

REGULATION OF  
UNSOLICITED SERVICES

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OPTIONS FOR REFORM

March 2001

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# 1. INTRODUCTION

- 1.1 The inertia selling of services (also known as negative option selling) occurs when a seller supplies unordered services (for example, insurance) to a consumer and then bills the consumer. Often, the supply is accompanied by a form of notice instructing the consumer that if the offer is not rejected within a certain time, the seller will send an invoice or debit an existing account or line of credit. This is known as negative option selling, ie, instead of asking consumers to accept an offer of a service, it is assumed that they do accept it unless they say otherwise.
- 1.2 There have been a number of examples of inertia selling of services in New Zealand that have come to the Ministry's attention (see Appendix One for more detail). In 1988 a major retail store supplied unsolicited credit repayment insurance to customers with store credit cards. In 1991 three banks sent unsolicited credit cards to customers in an attempt to get cardholders to switch from one card to another. Some customers who did not reject the card and never used it were charged the annual card fee. In 2000 an electricity supply company informed its customers that it was introducing a new insurance scheme for call-outs to fix faults on the customer's property. The insurance was free for the first three months, but after that customers would be charged \$20 a year unless they opted out. Also in 2000, an insurance company used inertia selling to launch a Roadside Rescue package as an add-on to motor vehicle insurance.
- 1.3 This type of selling is not illegal in New Zealand, although it is prohibited in some comparable jurisdictions such as Canada (see Appendix Two). New Zealand's law treats the inertia selling of *services* differently from the inertia selling of *goods*.

Inertia selling is regulated only by the Unsolicited Goods and Services Act 1975. In relation to the inertia selling of both *goods* and *services*, the Act says that the person who delivers unsolicited goods or services can demand payment only if:

- the recipient uses or consumes the goods or services, or
- the supplier has reason to believe that there is a right to seek payment for the goods or services.

Specifically, in relation to unsolicited supplies of goods:

- the recipient may keep the goods if the sender does not collect them within three months of the date of delivery (or the recipient can write to the sender and ask for the goods to be collected. If the goods are not collected within 30 days of this notice being sent, the recipient can keep them.)
- the recipient does not have to pay for the goods unless they agree to purchase them, or deliberately throw them away or damage them.
- the sender cannot demand payment unless they have good reason to believe that they are entitled to it.

The above conditions provide a negative incentive to deter the inertia selling of goods.



However, the provisions described in the above paragraph do not apply to the inertia selling of *services*. The purpose of this paper is to address this issue.

- 1.4 The Ministry of Consumer Affairs considers inertia selling to be an unfair selling practice because it relies on inattention, inaction, or non-assertiveness on the part of consumers. Some consumers may not be able to assess whether an offer is value for money, or may be unwilling or unable to approach the provider to reject the offer. Consumers may inadvertently buy a service that they did not actively seek or do not want.
- 1.5 In this paper we propose three options for addressing the problems with inertia selling:
  1. For all services ordinarily used for personal, domestic, or household use to be 'prescribed by' (ie, specifically referred to in) the Unsolicited Goods and Services Act.
  2. For only certain services (for example, banking, credit, and insurance) to be 'prescribed by' (ie, specifically referred to in) the Unsolicited Goods and Services Act. This is the Ministry's preferred option.
  3. For guidelines to be prepared for sellers who choose to undertake inertia selling of services.



## 2. CALL FOR SUBMISSIONS

The Ministry encourages written submissions from interested parties on the content of this document. The purpose of the submissions will be to inform the government on any decisions it chooses to take with respect to inertia selling.

### 2.1 Questions for submitters

The Ministry of Consumer Affairs would like to receive comment on all aspects of this document. Specific questions on which comment is sought are:

*Question 1:*

What is your view of the suggestion that inertia selling techniques are inappropriate for banking, credit, and insurance services?

*Question 2:*

Are there any reasons why inertia selling of these services is appropriate?

*Question 3:*

Are any other services unsuited to inertia selling? If so, which services?

*Question 4:*

What is your view of the suggestion that all personal, domestic, or household services should be covered by the Unsolicited Goods and Services Act?

*Question 5:*

What is your view of the suggestion that only selected services should be covered by the Unsolicited Goods and Services Act?

*Question 6:*

What is your opinion of the proposed limitations to banking, credit, and insurance services:

- which have not previously been supplied by the supplier to the consumer under a contract that remains in existence, or
- which are different in nature from the services that are being supplied by the supplier to the consumer, and
- for which the consumer will incur an extra charge?

*Question 7:*

Can you identify any other advantages or disadvantages with Option Two?

*Question 8:*

Can you identify any other advantages or disadvantages with the option to prepare guidelines for sellers who choose to undertake inertia selling of services?

*Question 9:*

What is your opinion of the development of guidelines without any regulatory backing?

*Question 10:*

What is your view of the Ministry's preferred option? Do you have any further comments?



*Question 11:*

What is your view of the suggestion that the Unsolicited Goods and Services Act 1975 should not be exempt from the Electronic Transactions Act?

*Question 12:*

Are there other electronic commerce issues that need to be covered?



## 2.2 Final date for submissions, and contact details

The final date for receipt of submissions is **30 April 2001**.

Comments and submissions should be addressed to:

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Ministry of Consumer Affairs  
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### OFFICIAL INFORMATION ACT 1982

In providing your submission, please advise us if you have any objections to the release of your submission. If this is the case, please advise us of the parts of your submission that you would wish withheld, and the grounds for withholding. In preparing and releasing any summary, and in considering any formal Official Information Act requests that might be received, the Ministry will carefully review any representations that you make in this regard.

### PRIVACY ACT 1993

Any personal information that you supply to the Ministry in the course of making a submission will be used by the Ministry in conjunction with consideration of matters covered by this consultation paper only.

When preparing any summary of submissions for public circulation, it is the Ministry's usual practice to set out the names of parties making submissions. Your name will be included in any such summary unless you inform the Ministry that you do not wish your name to be included. In order to indicate your wishes, or to view personal information held about you in respect of the matters covered by this discussion paper, or to request correction of that information, please contact the Ministry of Consumer Affairs, ph (04) 474 2750.



## 3. THE PROBLEM OF INERTIA SELLING

### 3.1 Inertia selling

Inertia selling occurs when a seller supplies unordered services to a consumer and then bills the consumer for the supply. Often, the supply is accompanied by a form of notice instructing the consumer that if the offer is not rejected within a certain time, the seller will send an invoice or debit an existing account or line of credit. This is known as negative option selling. The practice is the reverse of how a usual contract would be formed. Instead of asking the consumer to accept an offer, the inertia seller presumes acceptance unless the consumer explicitly rejects it.

Many consumers presented with a demand for payment for unordered services are inclined to, and in fact do, pay rather than contest it. This may be because of gullibility, ignorance of the law, and being timid in the face of commercial pressure. Inertia selling is often seen as an unfair selling practice, because it relies on inattention, inaction, or non-assertiveness on the part of consumers. Consumers may inadvertently purchase a service that they have not actively sought and do not want.

Inertia selling undermines the central principles of contract formation, ie, the active participation of both parties leading to a mutually acceptable bargain – a ‘meeting of minds’. Silence, indifference, or inaction on the part of one party does not give effect to a contract as no genuine offer or acceptance has taken place. However, inertia selling techniques interpret inaction by consumers as acceptance.

### 3.2 Problems with inertia selling

The problems for consumers with inertia selling promotions are that:

- consumers must be aware of the offer and consciously turn it down or they may have to pay for the service
- consumers who do nothing in response to the offer are assumed by the seller to agree to acquire and pay for it
- although the cost of the service is usually small it is often difficult for consumers to assess whether it is value for money
- certain classes of consumer may receive only a limited benefit from the service
- the success of this type of selling may result in an increase in inertia selling by service providers such as telecommunications, banking and financial services, and subscription services.

### 3.3 Benefits of inertia selling

The benefits for consumers with some inertia selling promotions are:

- consumer choice is not necessarily diminished, because the customer can give notice at the beginning or cancel the service at any time
- possible efficiency gains for consumers and service providers (inertia selling may make the provision of a service more economically viable because it may attract more customers than other promotion techniques)



- where the product is insurance, there may be a reduction in losses incurred through misunderstandings and disputes resulting from uninsured events.

However, the Ministry believes that the benefits of the inertia selling of services do not outweigh the disadvantages for consumers.

### 3.4 Services not suited to inertia selling

The Ministry of Consumer Affairs has identified three types of financial service ordinarily acquired for personal, domestic, or household use, which may be particularly unsuited to inertia selling techniques. These are:

- banking
- credit
- insurance.

Reasons why these services are unsuited to inertia selling relate to the way these services are supplied, and billing arrangements, as discussed below.

Normally a consumer who requires banking, credit, or insurance services applies for them and the service provider accepts or rejects the offer on criteria such as risk. Usually suppliers of these services will require a consumer's written consent to acquire and pay for the service before they supply it. However, these services have also been offered through negative option selling in contexts where consumers would not expect it, and therefore are less likely to detect and respond to the offer.

The problem is compounded when inertia selling is used by suppliers of services such as electricity or telecommunications to offer additional services. These services have the potential to benefit consumers if sufficient numbers of consumers buy the services when they are offered. But it is difficult for consumers to assess the benefits and whether the service represents value for money. Often, sellers use negative option selling because they are not confident that other forms of promotion will attract sufficient customers to make the scheme viable. Sometimes other forms of promotion have already been tried and have failed, for example, in 2000 when insurance products were added on to electricity supply. The use of a negative option method may carry the suspicion that sellers calculate that consumers who will not opt in are unlikely to opt out either.

Consumers may be reluctant to reject the unsolicited service because they have an ongoing relationship with the supplier. A consumer who ignores the initial correspondence and is then billed for the service may feel coerced into paying for it in order not to jeopardise any future relationship with the supplier.

What is your view of the suggestion that inertia selling techniques are inappropriate for banking, credit, and insurance services?

Are there any reasons why inertia selling of these services is appropriate?

Are any other services unsuited to inertia selling? If so, which services?



### *3.4.1 Enhancements and variations to current services*

Suppliers often offer service enhancements to customers, who can access the enhancement by giving an oral instruction by telephone or simply by using the service, for example, telephone or Internet banking. Also, certain service variations may be granted unilaterally, such as the automatic raising of the customer's credit limit on a revolving credit facility, or the extension of insurance cover to adjust for price inflation, or the issue of a replacement credit card. Often, these changes are designed for the customer's benefit or convenience. It would be undesirable and inefficient for suppliers and consumers to have to execute written documents in every case for these to take effect.

The Ministry believes changes in the application of the law to inertia selling should not restrict these types of innovations. They should not impose restrictions which are inconvenient for consumers, unnecessarily inefficient or costly for business, or that may result in significant enforcement costs to the State.



## 4. OPTIONS FOR REFORM

The Ministry has identified three options for addressing the problems with inertia selling. These are:

1. For all services ordinarily used for personal, domestic, or household use to be 'prescribed by' (ie, specifically referred to in) the Unsolicited Goods and Services Act.
2. For only certain services (for example, banking, credit, and insurance) to be 'prescribed by' (ie, specifically referred to in) the Unsolicited Goods and Services Act. This is the Ministry's preferred option.
3. For guidelines to be prepared for sellers who choose to undertake inertia selling of services.

### 4.1 Option 1 – prescription of all personal, domestic, or household services

This option would use the Order in Council mechanism in the Unsolicited Goods and Services Act 1975 to prescribe all services that are ordinarily acquired for personal, domestic, or household use. Consumers would not have to pay for those services unless they had signed an order or a note of agreement to the charge. Providers would have to obtain written consent (to acquire and pay for services) from consumers before supplying any of the services covered, otherwise they could not be certain of receiving any payment.

The advantage of this option is that it would give absolute certainty about whether the consumer was legally obliged to accept and/or pay for a service.

However, this option has a number of disadvantages, including:

- an increased burden on suppliers to demonstrate that their services had in fact been solicited by consumers – providers would have to document the initiation of each contract
- significant increase in transaction costs for those transactions which do not currently require express written consent (for example, trade services supplied to households)
- reduced competition amongst suppliers – suppliers may decide to withdraw from the market providing services to domestic consumers
- likely increased costs to consumers as a result of reduced competition and the shifting of transaction costs.

#### 4.1.1 *Ministry's comment*

The potential scope of Option One is very wide, perhaps wider than is necessary to address the current problem. It would cover, for instance, not only banking, insurance, and credit services, but also all other conceivable services.

Suppliers of all services to domestic consumers might feel the need to gain the consumer's written consent to acquire and pay for the service before supplying it. This is likely to detrimentally affect the way in which suppliers deal with consumers who solicit services. For example, many tradespeople will currently do work in response to a telephone call from a consumer and leave an invoice with a reasonable expectation of being paid or of being able to enforce their right to be paid. Under Option One, the



right to be paid is not as clear, and suppliers might feel compelled to seek more tangible proof that the consumer has solicited the service before being prepared to do work and leave an invoice for work done. This could result in reduced convenience for consumers and increased costs for service providers in documenting consumers' willingness to pay.

What is your view of the suggestion that all personal, domestic, or household services should be covered by the Unsolicited Goods and Services Act?

## 4.2 Option 2 – prescription of selected services

Under this option certain selected services would become 'prescribed services', and be specified as being covered by the Unsolicited Goods and Services Act 1975. Suppliers would have to obtain express written consent from consumers to acquire and pay for services before supplying any of the services covered. This would apply only to those services where written consent to acquire and pay is ordinarily required by suppliers before the service is supplied, for example, banking, credit, and insurance services.

It is not desirable for this option to inhibit the provision of service enhancements, extensions, and innovations to existing customers. These are generally designed to benefit consumers, and suppliers need to be able to offer them in an efficient and cost-effective way. Accordingly, the Order in Council would be limited to banking, credit, and insurance services:

- which have not previously been supplied by the supplier to the consumer under an existing contract, or
- which are different in nature from the services that are already being supplied by the supplier to the consumer, and
- for which the consumer will incur an extra charge.

Advantages of this option include:

- it is limited to those services where the consumer's written consent to accept and pay for the service is ordinarily required by suppliers before the service is supplied
- certainty for suppliers – it is limited to certain, clearly defined services and will not affect the majority of service contracts between suppliers and domestic consumers
- the response directly addresses the problems – it would cover only those services where consumer resistance to inertia selling practices has been previously encountered
- it is unlikely to result in significant additional enforcement costs to the government as the Unsolicited Goods and Services Act is self-enforcing
- it is less likely to result in reduced competition amongst suppliers as it will not create the disincentives noted with Option One
- it will not result in increased transaction costs in the majority of service contracts.

Disadvantages of this option include:

- selective targeting of certain services may create a perception that the government regards inertia selling of other services as desirable or harmless, which could result in increased use of inertia selling techniques in other contexts.



#### 4.2.1 Ministry's comment

Option Two more directly addresses the problems with inertia selling than Option One, and is likely to create more certainty for consumers and suppliers as to when written consent is necessary. Greater certainty will reduce the likelihood and impact of some of the disadvantages noted with Option One. Specifically, Option Two is less likely to result in increased transaction costs, and is less likely to act as a disincentive to suppliers offering additional or enhanced services to consumers than Option One.

What is your view of the suggestion that only selected services should be covered by the Unsolicited Goods and Services Act?

What is your opinion of the proposed limitations to banking, credit, and insurance services:

- which have not previously been supplied by the supplier to the consumer under a contract that remains in existence, or
- which are different in nature from the services that are being supplied by the supplier to the consumer, and
- for which the consumer will incur an extra charge?

Can you identify any other advantages or disadvantages with Option Two?

### 4.3 Option 3 – guidelines for the industry

Option Three does not involve any regulatory action. Instead, the Ministry may choose to develop guidelines for industry, which could stand alone, and/or be incorporated into existing and future industry codes of practice.<sup>1</sup>

Advantages of this option include:

- it offers the opportunity to scope, analyse, and generate a set of principles and rules which could apply to inertia selling practices, giving an opportunity to fine tune and optimise best practice over time
- input and assistance from industry participants and consumer representatives could achieve widespread acceptance in the market and provide a firm analytical basis for any regulatory response considered desirable at a later date.

Disadvantages of this option include:

- a possible perception that little is being done to deter exploitation of consumers through industry use of inertia selling practices
- possible increased use of negative option selling techniques over time, given that some suppliers have continued to use them even in the face of public backlash
- without general acceptance of and adherence to guidelines, which is not certain, the problems caused for consumers would not necessarily be dealt with.

<sup>1</sup> We are aware of several Codes of Practice that either explicitly or impliedly discourage or prohibit inertia selling by members. The Code of Banking Practice commits member banks not to issue credit cards, PINs, or passwords (other than replacements) except on the customer's instruction. The Code of Practice for Direct Marketing in New Zealand prohibits the inertia selling of goods and services. Inertia selling would offend against the spirit of the Direct Selling Association's Code of Practice.



#### 4.3.1 *Ministry's comment*

Guidelines are a useful educational tool and, if developed with the support of industry, are likely to be adhered to by the majority of suppliers. However, without an enforcement mechanism, guidelines cannot be used to alter the behaviour of suppliers who are unwilling to change. Experience over the last decade suggests that, although there have been few incidents of inertia selling, their reach was widespread and the suppliers were not receptive to public opinion. This suggests that guidelines on their own would not alter the behaviour of those suppliers most likely to use inertia selling techniques.

Can you identify any other advantages or disadvantages with the option to prepare guidelines for sellers who choose to undertake inertia selling of services?

What is your opinion of the development of guidelines without any regulatory backing?

### 4.4 The Ministry's preferred option

The Ministry favours Option Two as the most appropriate regulatory response. This option addresses directly the concerns raised by the major incidents of inertia selling encountered to date in New Zealand – they involved contracts where prior written consent to be bound is normally required by business. Its scope is limited to situations where consumers would normally expect to give prior written consent and would therefore not expect inertia selling techniques to be used.

Option One would impose unacceptably high costs on all consumer transactions covering services.

The development of guidelines under Option Three might result in benefits for consumers without more heavy-handed intervention. It would be an ideal solution if there were any certainty that moral persuasion would continue to inhibit the use of negative option selling practices. However, experience suggests that this is not likely to be the case.

A predictable outcome of recent success in carrying out inertia selling schemes is that other suppliers may follow suit. This is a risk that only a regulatory response will address, and Option Two appears to be the most suitable regulatory option available.

What is your view of the Ministry's preferred option? Do you have any further comments?



## 5. ELECTRONIC COMMERCE ISSUES

During 2001, it is anticipated that the Electronic Transactions Bill 2000 will be enacted and passed into law. This Bill will give electronic documents the same legal status as manual documents so long as certain requirements are met. These requirements include:

- that the person the information is being given to, or whose signature is required, consents to the use of the electronic medium
- that the electronic form provides a reliable means of assuring the integrity of the information
- that the information is readily accessible and usable for reference
- that the electronic signature adequately identifies the signatory and adequately indicates the signatory's approval
- that the electronic signature is as reliable as is appropriate given the purpose for, and circumstances in, which the signature is required.

If either of Options One or Two in this paper is approved and an Order in Council is made declaring all, or any particular, services to be covered by the Unsolicited Goods and Services Act 1975, a decision will need to be made as to whether the Electronic Transactions Bill should apply to these. The following discussion deals with issues relating to that decision.

The Electronic Transactions Bill aims to facilitate electronic transactions that are functionally equivalent to paper-based transactions, but not at the expense of undermining important consumer protections. So the Act specifically exempts some consumer protections that will continue to require paper-based documentation. For example, pre-contractual disclosures under the Credit Contracts Act 1981 and pre-possession notices under the Credit (Repossession) Act 1997 will continue to be paper-based, though consumers will still be able to enter a contract electronically.

The Ministry does not see any need to exempt the Unsolicited Goods and Services Act 1975 from the Electronic Transactions Bill.

What is your view of the suggestion that the Unsolicited Goods and Services Act 1975 should not be exempt from the Electronic Transactions Bill?

Are there other electronic commerce issues that need to be considered?



## APPENDIX ONE – INERTIA SELLING INCIDENTS REPORTED TO THE MINISTRY OF CONSUMER AFFAIRS

Pre-1986 – Sending unsolicited electronic funds transfer (EFT) cards was common when EFTPOS was being introduced to New Zealand. The practice ended with the negotiation of a voluntary code of practice.

1988 – The Bank of New Zealand, the Rugby Foundation, and Farmers Retail Credit used inertia selling to offer credit repayment insurance to account holders using credit cards and store charge cards. The insurance covered the minimum monthly repayments where the cardholder suffered death, permanent disability, or 30 days off work due to accident, illness, or redundancy. Despite Ministry of Consumer Affairs and customer pressure, the schemes went ahead.

1991 – Three banks (the BNZ, followed by the ANZ and Westpac) alternately distributed unsolicited credit cards to customers in an attempt to get cardholders to switch from one card to another. Some customers who did not reject the card and never used it were charged the annual card fee. BNZ agreed to alter its practice in response to pressure. The other two banks went ahead, claiming the practice was not illegal and that the BNZ had gained a competitive advantage by being first off the blocks.

2000 – State Insurance launched a Roadside Rescue package as an add-on to motor vehicle insurance. In the same year the electricity lines company, Vector Limited, launched a call-out insurance package. Both schemes offered the customer a free introductory period of cover after which customers would be charged a premium if they did not cancel the insurance earlier. After pressure, and a change of control of the company, Vector cancelled the scheme. State Insurance's scheme went ahead.



## APPENDIX TWO - LEGISLATIVE BACKGROUND

New Zealand consumer laws do not prohibit the unsolicited supply of goods and services to domestic consumers or the practice of inertia selling. The common law rules of contract do not recognise silence or inertia as consent to the formation of a contract.

The Unsolicited Goods and Services Act 1975 applies to the supply of unsolicited goods, and invoices for unsolicited goods and services. It treats goods and services differently.

In relation to unsolicited supplies of *goods*:

- the recipient may keep the goods if the sender does not collect them within three months of the date of delivery (or the recipient can write to the sender and ask for the goods to be collected. If the goods are not collected within 30 days of this notice being received, the recipient can keep them.)
- the recipient does not have to pay for the goods unless they agree to purchase them, or deliberately throw them away or damage them.
- the sender cannot demand payment unless they have good reason to believe that they are entitled to it.

Under the Act sellers cannot send an invoice for any goods or services that have not been ordered or requested unless they have good reason to believe that they are entitled to payment. The Act provides a defence for carriers of goods, and for suppliers who send invoices by mistake.

However, offers for *services* can be constructed in such a way that sellers can claim reasonable cause to believe that customers who do not opt out have agreed to accept and pay for the service.

Services specifically are not covered by the Act unless an Order in Council declares them to be 'prescribed' services. Where this is the case:

- recipients of the service do not have to pay for the service unless they have signed (or authorised the signing of) an order form or an agreement setting out the price and particulars of the service to be provided
- it is an offence for a supplier to demand payment without reason to believe that the service was ordered or agreed to be paid for in writing and signed by the recipient.

The penalties for offences under the Act are a fine of up to \$500 for an individual and \$1,000 for a corporation.

### *Overseas legislation*

Several countries with legal systems similar to New Zealand's have laws that address issues with unsolicited goods and services. The New Zealand law is modelled on similar legislation in the United Kingdom. Australia and Canada have laws that go further and prescribe certain offences for inertia selling practices.



The Alberta (Canada) Fair Trading Act prohibits the use of negative option practices in connection with the supply of goods or services. It also prohibits the issue of unsolicited credit cards. Supplying goods or services under a negative option practice and sending an unsolicited credit card are offences and the maximum penalty upon conviction is a fine of up to (the greater of) \$100,000 or three times the amount received by the supplier. People who receive goods or services under a negative option practice are not liable to pay for them unless they agree in writing to pay. Similar laws apply in other Canadian jurisdictions including Ontario, British Columbia, and Saskatchewan.

The Australian Trade Practices Act prohibits a corporation from sending an invoice for goods or services without a reasonable belief that there is a right to payment on that invoice. It also prohibits the sending of unsolicited credit cards and debit cards and any article that can be used as a credit or debit card. Most Australian States and Territories have enacted similar prohibitions through their Fair Trading Acts, which apply to individuals as well as corporations. Fines are up to \$40,000 for an individual and up to \$200,000 for a corporation.