



SUBMISSION

Prepared by
New Zealand Retailers Association

For the
Ministry of Consumer Affairs

In Respect of
**Consumer Law Reform – A Discussion
Paper**

July 2010

Louise Evans
Government & Advisory Group Manager
New Zealand Retailers Association
Level 8, Willbank House
57 Willis Street, P O Box 12 086
Wellington

Ph: 04 472 3733
Fax: 04 472 1071
Email levans@retail.org.nz

Introduction

These submissions are presented by the New Zealand Retailers Association

The Association is the largest Association representing the retail industry in New Zealand.

Our members include the major supermarket and general merchandise chains, specialised chains, traditional department stores and thousands of owner operators spread throughout the country.

Our membership also includes a number of specialised trade groups representing manufacturers, distributors and retailers in the plumbing materials, metal fastener, pet, equestrian, jewellery, bicycle and sporting goods sectors.

Retail sales currently total some \$66b per annum and the industry employs approximately 325,000 people (20% of the workforce) in over 49,000 outlets spread throughout the country.

General Submission

The Association welcomes the release of this discussion document and has taken the opportunity to review its contents and to develop a comprehensive submission by 31 July.

The Association recognises that consumer laws are important instruments that have widespread implications amongst the business community within New Zealand.

We note the objectives of the review:

- To have in place principles-based consumer law that:
 - enables consumers to transact with confidence;
 - protects reputable suppliers and consumers from inappropriate market conduct;
 - is up to date and relevant now and into the future;
 - is easily accessible to those who are affected by it;
 - is in line with international best practice, as appropriate;
 - and
 - is effective and enforceable
- To achieve simplification and consolidation of the existing law; and
- To achieve harmonisation with the Australian Consumer Law, as appropriate, in accordance with the government's agenda of a single economic market with Australia (SEM).

On the final point, we acknowledge the government's SEM agenda, but caution that harmonisation with Australian Consumer Law must be determined by a clear net economic benefit.

We have, for some years, contended that consumer laws as a general principle need to be simplified, transparent and as far as possible included within omnibus legislation.

However, our principle submission is that the two main instruments of consumer law (the Fair Trading Act and Consumers Guarantees Act) are both well known and equally well understood by both retailers and consumers alike, and, as a consequence, we do not see the need for major changes in either of these policy instruments other than to bring them up to date to reflect changes in the economic environment of the 21st century.

Changes are nevertheless warranted in respect of some of the other lesser known consumer laws which are covered by the review.

Our views are incorporated within the submission in a structural order aligning to the 52 questions listed in the discussion document.

Detailed Submissions

1. Principles and Purpose Statement for Consumer Laws (Questions 1-3)

We can see merit in including brief general purpose statements within the Fair Trading Act, Consumer Guarantees Act and Weights and Measures Act along the lines of the drafts outlined in the discussion document.

We think a good faith clause is a reasonable addition to these statements.

2. Unfair Practices: Unfair Contract Terms (Questions 4-6)

(Question 4) We see no reason to include an unfair contract provision in the Fair Trading Act. Our preference is for the status quo.

The discussion paper itself notes that the extent of concerns with unfair contract terms in practice in New Zealand is not known. It assumes that the Australian analysis is also relevant in New Zealand and uses the promotion of SEM with Australia as a reason for inclusion of such a provision.

If a reference to trading in good faith is included in the Fair Trading Act purpose statement (as per the presented preferred option) this will be sufficient to deal with any contract terms which might be deemed to be unfair.

The discussion includes reference to standard contract terms which customers are “not intended to actually read” and to a belief that suppliers will generally treat their customers fairly in competitive markets despite any notional agreement to ‘unfair’ terms. Good faith goes both ways. A contract should be provided and read before the relationship commences. Customers need to take responsibility by knowing what they are signing for. To accept terms without reading – and therefore having no real intent of compliance -

may be just as unfair as the type of term exemplified in the Australian legislation.

(Question 5) Should the final decision be to include unfair contract terms provisions, then it should follow the Australian approach. There is no need for a second reference to good faith.

(Question 6) Again, we do not believe there is a need for an unfair contract provision but should one be included it should not provide examples. Examples frequently tend to be limiting rather than indicative. To refer to 'an imbalance created by a term which is not reasonably necessary to protect legitimate interests' is clear.

3. Unfair Practices: Unsubstantiated Claims (Questions 7-8)

(Question 7) We see no need for a general prohibition on unsubstantiated claims. The Act already prohibits false or misleading representations and works well without a general prohibition. Awareness of the Fair Trading Act is good and consumers who feel they have been misled will look to the trader for substantiation and may approach the Commerce Commission or seek their own redress. A general prohibition may lead to less information being available to consumers purely to reduce the potential cost of required substantiation.

4. Door to Door and Other Direct Selling (Questions 9-14)

We have had no recent experiences with the Door to Door Sales Act but recognise that new forms of activity such as telemarketing have developed since the legislation was last reviewed in the 1990's.

Our principle submission made at that time was that the 1967 Door to Door Sales Act should be repealed given that consumer rights were in our opinion adequately safeguarded through the Fair Trading Act 1986 and the Consumer Guarantees Act 1993

We are aware that self regulatory Codes continue to exist for certain types of direct selling through the Direct Selling Association of New Zealand and the Marketing Association of New Zealand and we believe it is appropriate for the review to consider whether such Codes provide adequate protection for consumers without the need for regulatory controls.

If the outcome of the review is in favour of continuing regulatory controls then we believe that they should be encapsulated within the Fair Trading Act.

If that is the case:

- we support that direct selling law should only apply to purchases above a specific threshold such as \$100 (Question 10);

- we consider any ongoing need for any cooling off period should be aligned with the other consumer legislation such as the Credit Contracts and Consumer Finance Act 2003 (Question 11);
- we do not support the proposals relating to prescriptive regulatory controls such as the prohibition of the supply of goods and services during a cooling off period (question 12) and specific regulation of hours when direct marketers may call upon consumers (question 13) .

5. Unsolicited Goods and Services (Questions 15-16)

We believe the need for regulation of unsolicited goods and services remains and that It would be appropriate to incorporate the current Unsolicited Goods and Services Act into an enhanced Fair Trading Act.

6. Unconscionable Conduct (Questions 17-19)

As a member of Business New Zealand's affiliated industries group, the Association has reviewed their submissions and are in agreement with their views in regards to Unconscionable Conduct and reiterate their concerns. The paper examines the possibility of including a prohibition on 'unconscionable conduct' in the Fair Trading Act. As the name suggests, the word 'unconscionable' includes the element of a party acting without a conscience, and it has the flavour of being immoral, unethical or unfair.

The Association are opposed to any conduct that is clearly deemed to be 'unconscionable' or 'unreasonable', which we would view to mean actions deemed to be clearly illegal or dangerous. However, in light of what the Ministry have outlined in their paper, we believe there is no justification for referring unconscionable conduct in the Fair Trading Act.

Because the term 'unconscionable' can be very emotive and open to wide interpretation, we view such behaviour as being any action deemed to be clearly illegal, that is, an action that breaks current legislation such as described under the Fair Trading Act. We believe analysing the facts of a case to ascertain whether the behaviour of one party should be deemed to be unfair or unreasonable is an extremely subjective process.

The paper itself outlines two statements in relation to unconscionability that we believe send strong warnings that its introduction should not proceed. First, page 54 states that *'in practice the legal test for unconscionability is difficult to meet. Essentially, a stronger party needs to be found to have taken advantage of weaker party, to an extent which is "against good conscience"*. The second notable statement is on pages 55 and 56, namely *'the previous Principal Referee of the Disputes Tribunal noted that in 5,000 cases, only two consumers were successful in establishing unconscionable conduct in the Disputes Tribunal'*. In other words, this represents a success rate of only 0.04%, hardly indicative of a significant problem.

The small percentage of successful cases and the extreme example provided in the paper fail to indicate any significant problem that currently exists in New

Zealand regarding ‘unconscionable conduct’. Although it may be somewhat difficult to openly provide an example of ‘unconscionable conduct’, looking to rectify a problem without providing evidence of the severity of the problem makes supporting what is proposed difficult. This perhaps indicates that the issue in New Zealand is not as severe when compared with other countries.

Overall, the term ‘unconscionable conduct’ is an extremely emotive one. Because of the lack of evidence of clear cases of unconscionable conduct, along with the general uncertainty of the term’s meaning, we find no significant merit in allowing for the inclusion of unconscionable conduct in the Fair Trading Act.

The paper also asks whether as an alternative to introducing the concept of unconscionability the broader concept of ‘oppression’ in the Credit Contracts and Consumer Finance Act might be applied to the supply of goods and services generally. We do not support this move. The inclusion of ‘oppression’ leads to the same problems as unconscionability, and also lowers the threshold for triggering such a claim. The Association does not support its inclusion.

Our preference, as mentioned at the outset of our submission, is that a good faith clause is a reasonable addition to the principal and purpose statements within the FTA.

7. Product Safety (Questions 20-24)

The Association considers that the existing provisions contained within the Fair Trading Act 1986 are adequate to deal with consumer product safety in New Zealand. (Question 20)

We believe that our members are very conscious of the need to supply merchandise that is safe in the hands of both adults and children and most of the major traders have developed their own compliance programmes to ensure that they work within the parameters of the current law.

There have in fact been few prosecutions brought by the Commerce Commission against retailers for breaches of either the Fair Trading Act, or the product safety or consumer information standards issued pursuant to the major Act. This, in our view, reflects a good understanding of the statutory responsibilities relating to product safety generally, and the six product safety standards specifically, amongst the retail industry in New Zealand.

Furthermore the requirement for the Minister of Consumer Affairs to consult interested parties prior to the promulgation of any new product safety standards is we believe a strength of the current law and we would wish that this be maintained.

As far as the specific suggestions outlined in the discussion document are concerned:

- we question the necessity of New Zealand adopting a “reasonably foreseeable” test for product safety in New Zealand (Question 21)
- we accept that it is reasonable for the regulator to initiate a product recall itself where a supplier fails to undertake a compulsory recall (Question 22)
- we accept that it is a reasonable requirement for mandatory notification to the regulator of voluntary recalls and incidents where products are associated with serious injury or death (Question 23);
- we support the inclusion of provisions within the Fair Trading Act for the Minister to issue product safety policy statements (Question 24).

We would additionally suggest that the product recall procedures proposed under our major consumer laws should be aligned with those procedures set out in the our food legislation, particularly with the new Food Bill which currently before Parliament.

We see this as being particularly important given the considerable cross over of food and general merchandise sales by supermarkets, general merchandise chain stores and traditional department stores.

8. Consumer Information (Questions 25-27)

There are few product safety standards promulgated in New Zealand that have implications for retail and those that have been enacted that primarily relate to origin, fibre content and care labelling for textiles, apparel and footwear are well understood by both retailers and consumers. We consequently see no real need for additional provisions (Question 25),

However, we can see some merit in adding testing requirements to the consumer making powers in particular instances such as was the case with water efficiency.

We also see a possible need to align the wider consumer information regulatory powers outlined in the Fair Trading Act with the similar powers covered by the Gas and Electricity legislation which is administered by the Ministry for Economic Development

9. Lay-by sales (Questions 28-31)

In reviewing the questions posed in the discussion paper on the Lay-by Sales Act, we will first look at the extent to which Lay-by is used (source: MoCA National Consumer Survey 2009).

Total Sample	100%	n=1000
	%	n=
% Using Lay-by in the past 2 years	16.9	169
% Experiencing a problem	2.3	23
% Experiencing no problems	14.6	146

% Did nothing	0.4	17	4
% Returned to seller	1.9	83	19
% Instances seller co-operated	1.5	79	15
% Instances seller didn't co-operate	0.4	21	4

The discussion paper states that 'as noted, the National Consumer Survey 2009 found that lay-by sales are still a fairly popular form of transaction'. As a starting point we would suggest that 16.9% of people using lay-by once or more in the last 2 years would hardly rate as 'a fairly popular form of transaction'. When considering that close to 100% of people would engage in a transaction of some sort every day, the number of lay-by transactions as a proportion of all retail transactions would be very small. Over two years most consumers would undertake well in excess of 1000 transactions, so half a dozen lay-by transactions each is very small in a relative sense (anecdotally the view is that half a dozen lay-by transactions per customer over two years would be on the high side).

As a proportion of all transactions lay-by is quite small. When we look more closely at the lay-by transactions themselves, they are largely without issue. From 1000 interviews, 169 consumers had made a purchase on lay-by. Of these 169 consumers, 23 had a problem. Of these 23, 4 did nothing and 19 went back to the seller. In 15 out of the 19 cases, the seller fixed the problem. From 169 consumers only 4 were left dissatisfied.

(Question 28) On the basis of the above analysis, we would contend that issues around lay-by are not significant and this would lead us to a principles based solution rather than a prescriptive approach. There is little point in developing detailed regulations.

(Question 29) There is however an issue around the definition of a lay-by. The discussion paper argues that if a deposit is paid and then the transaction is completed with one further payment that this would be a lay-by transaction.

This is very much a Ministry view which has never been verified through the courts. We have always argued strongly that these transactions should not be considered a lay-by.

Consider two examples: -

- i) A consumer orders a wedding dress which is designed specifically for her and for her proportions. A deposit is paid and then unfortunately the wedding is called off. It would be most unfair on the retailer for the consumer to be able to consider this a lay-by and walk away from the transaction.
- ii) A consumer visits an art exhibition and sees a painting they like and pays a deposit with the balance due at the end of the exhibition. The painting has a "red dot" put alongside it to indicate it is sold. The consumer has a change of mind and asks for the deposit back under the Lay-by Sales Act. The selling opportunity is gone (ie. The

exhibition is over) and the potential market have been told (via the red dot) that the painting is sold. What recourse does the gallery have?

We strongly support the removal of those transactions from the coverage of the Lay-by Sales Act – ie. a deposit with the balance due later is not a lay-by.

(Question 30) The question of how much should be repaid for a cancelled lay-by depends on individual circumstances.

For example, an item of fashion clothing might be put on lay-by at the start of the season but by the time it is cancelled the season is largely over and the retailer's chance of selling the item to another customer is remote. The only option might be to discount the item in the end of season sale. In this case the loss of value might be claimed.

However, if the lay-by fell over after a couple of weeks, the retailer would have the opportunity to put the goods back into stock and sell to someone else.

It is our view that it is impossible to apply a hard and fast rule. Every circumstance will be different. However, very few issues with lay-by sales went unresolved (see MoCA research summary). Therefore, we would suggest that we use a principles based approach around what is fair. If agreement can't be reached there is always the small claims court, but as the numbers indicate, this would be very much an unusual circumstance.

(Question 31) As the Fair Trading Act requires fairness on the part of both parties to the transaction we would have no issue with lay-by sales being covered as a part of a new Fair Trading Act.

We strongly suggest that the principles need to be spelt out and what constitutes a lay-by sale needs to be clearly defined.

10. Weights and Measures (Questions 32 and 33)

We are supportive of the Weights and Measures Act being retained in its own right rather than being moved to the Fair Trading Act (Question 32).

As a general principle we consider it is the primary responsibility of the brand owner or supplier to quantify the specific correct weight of a particular product and do not see this as an individual retailers' responsibility unless the retailer is specifically involved in the supply of its own house brands.

We have met recently with the Ministry of Consumer Affairs to discuss this issue in more detail and we understand that the discussion paper prepared by Progressive Enterprises Ltd which was tabled at that meeting will be considered in the context of the current review.

Consequently, we have no other suggestions to make to improve the current Weights and Measures Act (Question 33)

11. Carriage of Goods Law and Consumers (Question 34)

The Association would support a review of the current level of the liability cap, which was last set at \$1,500 in 1986. While we have no strong views as to what the current liability cap should be, we would not object to at least inflation-adjusting the cap, as well as looking to adjust through regulations, in line with inflation.

The Ministry has also asked whether it is appropriate for consumers to have rights under the Consumer Guarantees Act in relation to carrier services. As the paper states *'covering carriers providing services to consumers under the Consumer Guarantees Act would be a significant change to longstanding practices in the carrier industry, because it would potentially rebalance the risk of goods being lost or damaged in transit in favour of consumers'*. We agree, especially when the definition of who is a consumer under the Consumer Guarantees Act would be crucial to the carrier industry if the definition were extended to include small business. However, there is no evidence or substantiation within the document that there is indeed a problem or a need for such a significant change.

12. Consumer Guarantees Act (Questions 35-49)

Auctions

The rapid growth in auctions from the traditional style (in person) to an online environment certainly drives the necessity for a review of the definition of auction in the Auctioneers Act, and to the exemptions of auctions within the Consumer Guarantees Act.

The discussion paper proposes a possible modern definition for a traditional auction where goods purchased at such an auction would continue to be exempted from the statutory guarantees under the CGA. It also proposes that where such an auction is conducted online that a disclosure statement could be provided, requiring a participant to acknowledge the terms of the auction in that the CGA does not apply.

However, it proposes that *'Trade Me style auctions, where there is only a computer program conducting the auction rather than a real time auction being conducted by an auctioneer (who is a natural person), would not be covered by the definition, so consumers buying from traders using this selling mode would have the benefit of the statutory guarantees under the Consumer Guarantees Act (assuming the seller is a trader, and the property being purchased is for personal use).'*

We believe there is merit in this approach being further scoped, however we note that the definition of a trader in this instance should in the case of the sale of second-hand goods be in alignment with the definition of a trader under the Second Hand Dealers Act, the consequence of which would see many online sellers captured as traders and subject to complying with the CGA.

We also support the proposal of a tie-in to require auctions exempted from the Consumer Guarantees Act to be conducted by a licensed auctioneer or member of an approved auctioneers body with provision for exemptions for fundraising auctions of the sort conducted by charities and communities of low value and donated items.

Extended Warranties

The Association is of the view that specific regulation of extended warranties is not required.

As noted in the discussion document extended warranties are a prolonged warranty offered to consumers to protect their purchase of a consumer good. It normally relates to the reliability of a good used under conditions of ordinary consumer use.

The document however seems to make an assumption that in the main, extended warranties do not provide any greater protection than what is provided for under the Consumer Guarantees Act, and that the consumer generally may be no better off by purchasing an extended warranty.

The document refers to a mystery shop report that found *'retailers providing a strong emphasis on selling extended warranties with a confusing or misleading sales patter and a distinct lack of knowledge of the Consumer Guarantees Act and its proper application to retail situations'*. We do not condone such behaviour, and have met with the Ministry to look at industry led measures such as education for frontline sales staff on the CGA, and consideration of developing materials such as structured sales scripts and point of sale consumer information on the CGA obligations to remedy this.

However, we note the current private member's Consumer Guarantees Amendment Bill before the house which seeks to have the CGA provide for consumers to be informed about whether an extended warranty they are considering purchasing provides any benefit, right or convenience that is greater than the rights under the Act.

We are opposed to the introduction of such requirements. The provision of such information is not as straightforward as it may seem. Every single product to which an extended warranty is available for purchase will have differing levels of benefits greater than those provided for under the Act. These will also be further complicated by a manufacturer or supplier's definition of 'ordinary consumer use' which may be quite different to what the consumer would deem to be ordinary use.

The Bill also provides for a cooling off period once an extended warranty has been purchased. This will allow consumers to reconsider whether to continue with the extended warranty and if they decide not to do so within the cooling off period they will be entitled to a full refund. We do not oppose

We note the Ministry seeks comments on the proposal requiring retailers to display the cost of an extended warranty in both advertising and on the item being sold. The information would also need to be included on any associated website. The Ministry states that the benefit of such an approach is that *'a consumer is provided information about the extended warranty before they become emotionally committed to the purchase of the good'*. We do not support such a proposal. There is no argument here for any type of unlevel playing field against the consumer. Instead, there is a responsibility on a consumer to understand the full costs associated with buying a product. The additional cost of an extended warranty is in many respects no different from a delivery charge for a large item. If one is to favour compulsory disclosure, then there could equally be a case for the charge for delivery also to be displayed before a consumer becomes 'emotionally' committed.

Again, there needs to be a certain level of responsibility on the consumer to simply ask a retailer about the cost of an extended warranty before a purchase takes place in order to appreciate the total cost if they wish to sign for one. Also, there is usually ample opportunity for consumers to enquire as to what the extended contract they are being offered would and would not cover.

Bonds to assess faulty goods

The paper questions whether it is reasonable for the retailer to ask a consumer to pay a bond before the retailer will agree to repair replace or refund when a fault develops in a product. This matter is usually associated with electronic goods such as phones or TV's etc.

The issues are:

1. Is the fault clearly and obviously within the CGA guarantee?
2. If not, and there is reasonable doubt, should a bond be payable?
3. If yes, is the bond a reasonable amount for the work in assessing the matter?
4. Should the consumer be made aware of the possibility that a bond may be charged in some circumstances.

There is a good argument to suggest that an obvious fault that clearly should be fixed under the CGA should not incur a bond payment. In other words a bond should only be charged if there is a reasonable possibility that the cause was misuse or neglect or the problem has occurred outside the reasonable life of the product.

There is some merit in having a term included in the sale agreement that provides for the payment of the reasonable costs of dismantling the goods to assess the fault, if there is reasonable doubt that the fault is covered by the CGA, and that cost will be refunded if the fault is found to be genuine.

An excessive charge for an assessment may deter both the genuine and false claimants from making a claim; however a consumer has the right to take the goods to another retailer and claim the cost of any assessment and repair, or

even to take the matter to the Disputes Tribunal. This may be enough to deter any potentially excessive bond charges.

Supplier is unresponsive

Should the definition of “refusing to provide a remedy” be defined more clearly to include “refusal by word or conduct”?

In our experience this is not a matter that commonly arises. There is very little leeway in the CGA for a supplier to unreasonably delay offering a solution and the threat of the Disputes Tribunal is ever present. It may be that the consumer is not aware of the Disputes Tribunal or even their rights under the CGA but this does not make the existing definition wrong, only that perhaps some consumer needs educating.

Rejection of goods and collateral credit agreements.

Should the equivalent provision from the Motor Vehicle Sales Act, (section 89(2)) be added to the CGA?

It seems reasonable that where a hire purchase agreement has been entered into and the goods have been rejected, the hire purchase obligations should pass to the vendor. What is the situation however if the purchaser has already paid a considerable amount of the H P payments, and the interest that would apply, but receives only a refund of the purchase price. In this situation the purchaser is out of pocket.

Application to Electricity

(Question 48) We believe it is reasonable for both an electricity retailer and a lines company to be liable for the quality guarantees set out in the Act. This highlights the imbalance of liability within the current CGA and the long outdated Sale of Goods Act. As with electricity retailers, retailers of goods are liable to remedy faults over which they have no control. Retailers are frequently ‘left out in the cold’ by a supplier or manufacturer who fails to share the cost of a defective item. The retailer has a clear obligation to the consumer but the supplier to retailer obligation is muddy at best, and is able to be contracted out of.

13. Enforcement (Questions 49-50)

(Question 49) We consider it is reasonable to include provisions for court enforceable undertakings in the Fair Trading Act providing the same principles apply, that is, the enforceable settlement agreement is made when a person in trade voluntarily admits they have breached the Fair Trading Act. This would give the ‘honest mistake’ traders the surety that disreputable traders will not enter settlements and then disregard them purely to delay the formal process. If a trader is willing to volunteer a breach it is reasonable to expect them to stand by that admission.

(Question 50) We are neither convinced nor fundamentally opposed to provisions for banning recidivist traders. Further consultation may be

appropriate as this appears to be a late add-on. Perhaps an alternative is a provision that the maximum penalties apply for a repeat breaches.

14. Consolidation of Consumer Law (Questions 51-52)

On balance we consider that:

- a single enhanced Fair Trading Act should be retained to incorporate the smaller statutes covered in the discussion paper
- but that a standalone Consumer Guarantees Act as well as the current Weights and Measures Act should also be retained.

We feel that the current Fair Trading Act and Consumers Guarantees Act are well known to both individual businesses and consumers and that case law has been established around these statutes.

Consequently we are of the view that that major changes are unwarranted at this time except as outlined in our submission.

Appearance

We would like to meet with the Ministry to speak to our submission

New Zealand Retailers Association
July 2010