



## **Consolidated Response to the Ministry of Consumer Affairs**

### **Consumer Law Reform Additional Discussion Papers**

#### **1. Unfair Contract Terms**

##### **Summary View**

The New Zealand Retailers Association remains opposed to the approach being proposed by the Ministry which is to include Unfair Contract Terms provisions within the Fair Trading Act.

The paper provides extensive and substantive Australian research and analysis of the policy development to provide greater justification for an alignment between Australian and New Zealand consumer law in regards to Unfair Contract Terms. This analysis is insightful.

It notes that the fact that Australia and New Zealand consumers purchase a similar range of goods and services from similar (and, in many cases, the same) suppliers is deemed a compelling argument for the adoption of similar Australian Law provisions into the Fair Trading Act.

However, the Ministry notes that the evidence is strong that Australian suppliers have been taking advantage of unfair contract terms at the expense of consumers and economic efficiency generally, but the Ministry also concedes that the evidence is largely anecdotal. On that basis alone we still question the reasonableness to place a high level of potential compliance burden on business through the adoption of similar provisions in New Zealand based simply on anecdotal evidence.

We agree that it is useful for New Zealand to utilise the learnings from the Australian policy development and law introduction and operation, however we strongly recommend further New Zealand evidence be gathered and analysed to appropriately substantiate the necessity for introducing Unfair Contract Terms provisions. Particularly analysing the terms deemed to be unfair in existing standard form contracts and the level to which those terms have been breached/acted on.

We are of the view that businesses in preparing contracts must consider the risk that they are taking in respect of the contract arrangement and make appropriate and necessary inclusions that mitigate that risk or assign the risk where it appropriately sits. However, in doing so we agree that it is clearly not reasonable to overtly sway the balance of fairness and make contract terms unjustifiably unfair. The test of justification also needs to be rigorously analysed and a balance of fairness applied.

We believe that under various existing pieces of New Zealand legislation, there are adequate protections and remedies available to consumers in regards to unfair contracts.

While we are opposed to the introduction of Unfair Contract Terms provisions in the Fair Trading Act, if it were to be adopted along the lines of what the Ministry proposes (similar to Australian Law) it notes that one of the implementation issues to be resolved is whether the right to challenge unfair contract terms in standard form contracts should be available for small businesses as well as consumers. We are of the view that, as in Australia, this should be limited to consumers.

## **2. Referencing Good Faith in a Fair Trading Act Purpose Clause**

### **Summary View**

The New Zealand Retailers Association is supportive of the recommendation and supporting analysis taken by the Ministry that any purpose clause for the Fair Trading Act does not include a reference to good faith.

In our original submission on the Consumer Law Review, the Association felt that the inclusion of a good faith clause within the general purpose statements was a reasonable addition. This was with the view that the a purpose clause is an aid to interpretation and a statement of the principles underpinning the Fair Trading Act, and not that it's inclusion would create any new or separate obligation or right (a concern raised by some business submitters).

However, in reviewing the Ministry's subsequent discussion paper, we concur with the concern that reference to good faith in the purpose clause from a consumer law perspective is not in fact an accurate statement of the principles of the Fair Trading Act. Most of the offences in the Fair Trading Act are strict liability offences, so the Fair Trading Act requires more of traders than good faith.

Accordingly we agree that the reference to good faith in the purpose clause would therefore be inaccurate and should not be included.

## **3. Unconscionability**

### **Summary View**

The New Zealand Retailers Association is opposed to the recommendations of the Ministry in its discussion paper –

- that the analysis within the discussion paper supports unconscionable conduct provisions based on the Trade Practices Act be added to the Fair Trading Act; and
- that the provisions should include protections for small business which are subject to unconscionable conduct.

The additional discussion paper has provided further information on the application of the unconscionable conduct provisions in the Australian Trade Practices Act 1974, with the object of informing the decision of whether or not equivalent provisions should be added to the Fair Trading Act in New Zealand.

The paper has also noted (but failed to fully address) some of the logical arguments received from business and legal submitters, who were among the **majority** of submitters on the Consumer Law Reform discussion paper who opposed the introduction of Australian-based unconscionable conduct provisions in the Fair Trading Act.

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, we remain steadfast to our views (as outlined in our previous submission) not to support unconscionability and one of the key reasons previously outlined relates to evidence showing there is a substantial problem to warrant government intervention, ie. a significant degree of market failure needs to be found.

The paper states that *“the examples of the cases where the ACCC has taken enforcement action in Australia show that there is a degree of market failure, and that competition has not been sufficient to regulate supplier behaviour in every instance”*.

The paper then goes on in an attempt to draw a connection between the cases in Australia and needing similar enforcement provisions here. The Association would be very concerned if the government took the view that any level of market failure warrants government intervention by citing a degree of market failure. There will undoubtedly always be instances where transactions of any kind lead to some imperfect outcomes. However, to legislate for any and all cases often creates distortions and in the long run high levels of government failure. .

Finally, in putting aside the very small number of successful claims outlined in the paper, we are concerned at how the Ministry can justify the perceived degree of market failure in Australia as a proxy for market failure in New Zealand.

Similarly to the majority of submitters in this and previous calls for submissions on the matter, we remain opposed to the introduction of unconscionable conduct provisions.

## **4. Layby Sales**

### **Summary View**

Overall the New Zealand Retailers Association is supportive of the approach being proposed by the Ministry.

We believe the recommendations made with respect to layby sales will clarify a number of grey areas in current legislation and by incorporating this into the Fair Trading Act will remove the necessity for separate legislation.

In the notes below are our responses to the various recommendations made in the Ministry's latest paper. Where we are in agreement we haven't gone into detailed discussion.

#### **1 Incorporation in FTA**

We support layby sales being included under the Fair Trading Act, retaining the existing relevant rights and obligations, and the Layby Sales Act being removed from the legislative catalogue.

#### **2 Principles Based Approach**

In general we support a principles based approach but given the nature of the layby transaction there will be some necessity for some prescriptions and some specified rules. These will be covered later.

#### **3 Definition of a Layby Sale**

We agree with the definition proposed that a layby sale be defined as:

- i) A sale comprising three or more part-payments where title to the goods does not move from the seller to the buyer until the final payment is made.
- ii) In this case the first payment is considered to be that, the first payment, – it is not a deposit.
- iii) A two payment process could be considered to be a layby but only with the express agreement of both parties. This recognises the intent of the parties.

However, we would strongly contend that the following should be included for the sake of clarity. "As the term "layby" suggests the goods being purchased in this manner have to be in stock and then set aside for the sale to be considered a layby." -Layby rules will then clearly not apply to contracted or commissioned goods where the customer might choose to pay incrementally, e.g. a commissioned wedding dress.

#### **4 Value Cap**

We agree that it is appropriate to align a value cap with the Disputes Tribunal limit, i.e. \$15,000, as per clause 19 of your discussion document.

#### **5 Passing of Risk**

As long as it is made clear to the consumer that they have no ownership rights to the product until all payments have been made then the risks are minimal.

Thus, the retailer would retain ownership until the final payment is made but the consumer would have the right to pull out of the deal at any stage before that, with a refund of all payments less selling costs and loss in value.

We believe that risks as described are fairly shared.

The legislation wording needs to make it very clear that the risk only passes when the final payment is made and delivery completed or goods uplifted. Section 6, or similar provisions, should be retained.

## **6 Statements**

We support the proposal for removal of Section 7, which currently provides for written statements upon payment of 25c and penalty for non compliance, to instead be replaced by a principles-based statement within the termination provisions.

## **7 Buyer Cancellation – selling costs**

As set out in our original submission the calculation of selling costs is not something where “one size fits all”. Each situation must be judged on its own merits.

For example, if the layby on a fashion item fell over after a couple of weeks the goods could go back into stock and be sold at the original prices. However, should the time period be much longer (e.g. 3 months, or more) the season might be over and all the retailer can do is include the goods in his/her end of season sale at a discounted price. This loss of margin should be included in his “selling costs”.

As indicated it is difficult to apply a hard and fast rule. One possibility might be to stipulate that the difference between the original selling price and the achieved selling price could be included as part of the selling costs.

However, it should also be recognised that from the Ministry’s own survey the incidence of significant issues with laybys were few and far between and we probably don’t need a volume of regulations. A principles-based approach with recourse to the Disputes Tribunal would seem an appropriate mechanism.

The qualification of the proposed ‘termination charge’, i.e. ‘not more than the reasonable costs incurred...such as storage and administration costs and the loss of value’ is appropriate.

## **8 Layby Sales Agreement**

As we understand it the majority of retailers already have a layby sales agreement. In fact we made a basic agreement available to our members (a copy is attached to this submission). We don’t believe this would be a significant imposition as long as it is kept simple.

Under the current Act a record of payments has to be kept and available should the customer request a statement, so an agreement would not need to add more to this existing level of compliance. The key – keep it simple.

## **9 Cancellation by the Seller**

We would support the sentiments expressed in clause 34 of the discussion paper.

## **10 Insolvencies**

We would support the retention of the current rule around insolvencies (clause 43).

## **11 Hamper Companies**

We don’t believe that these transactions should be treated as a layby. The fundamental difference is that you can add to or change your order right up until the date of delivery (Chrisco). The goods are not put aside for the customer at the point of the first payment. – This is not a layby.

These transactions should be covered in the same way as a Christmas Club.

## **12 Enforcement**

The Commerce Commission would be the logical enforcement agency as we are very much of the view that the layby regulations should be part of the Fair Trading Act.

However, having said that we need to be mindful that the Ministry's own research indicated very low levels of problems with layby. In fact out of 1,000 respondents 169 had used layby in the previous two years and only four of these had unresolved problems.

Let's be careful that we don't try and crack a walnut with a sledgehammer.

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