

## Changes in Consumer law – what's in store?

The Consumer Law Reform Bill (Bill), currently with the Commerce Select Committee, is set to modernise consumer law in New Zealand and align it with Australian consumer law. In this article MDS Law Associate, Nichola Hiatt reviews the changes being proposed.

The Bill introduces significant consumer law reforms.

The Bill amends and repeals various consumer-based legislation, as summarised below:

Amends	Repeals
<ul style="list-style-type: none"><li>o Fair Trading Act 1986 (FTA)</li><li>o Consumer Guarantees Act 1993 (CGA)</li><li>o Weight and Measures Act 1987 (WMA)</li><li>o Carriage of Goods Act 1979</li><li>o Sale of Goods Act 1908 (SGA)</li><li>o Second Hand Dealers and Pawnbrokers Act 2004</li></ul>	<ul style="list-style-type: none"><li>o Auctioneers Act 1928</li><li>o Door to Door Sales Act 1967</li><li>o Lay-by Sales Act 1971</li><li>o Unsolicited Goods and Services Act 1975</li></ul>

Relevant provisions in the legislation that is to be repealed have been incorporated into the amended FTA and the new Auctioneers Act.

The FTA, CGA and WMA are to be amended to each include a standardised purpose clause that in general terms recognises the interaction of both businesses and consumers in consumer law. The purpose clause is as follows:

*"To contribute to a trading environment in which -*

- (a) trading is fair;*
- (b) there is effective competition; and*
- (c) consumers and businesses participate confidently."*

The Bill states that the inclusion of the purpose clause reflects the underlying policy of consumer law, that consumers individually and the economy as a whole benefit from consumers making effective purchasing choices from a range of competing offers.

We have outlined in this article some of the more significant changes to the legislation as proposed by the Bill. This is not a complete outline of all the changes proposed by the Bill.

### Fair Trading Act

- Contracting Out

The Bill introduces the ability for businesses, in business to business agreements, to contract out of certain sections of the FTA. These sections include: section 9 (misleading and deceptive conduct generally), section 13 (false or misleading representations) and section 14 (false representation and other misleading conduct in relation to land).

To rely on this new contracting out provision, both parties involved must be in trade, the agreement between them must be in writing and it must be "*fair and reasonable*" to do so.

The ability to contract out of these FTA provisions will provide businesses with greater certainty and the ability to rely on the standard "entire agreement" and "no reliance" provisions generally included in business to business agreements.

- Unsubstantiated Representations

The Bill introduces a new offence relating to "*unsubstantiated representations*". This offence provides that a person must not "*in trade*" make an "*unsubstantiated representation*" in connection with goods, services or interests in a land.

The term "*unsubstantiated representation*" is defined as being "*a representation made by a person who does not, at the time of making the representation, have reasonable grounds for the representation ...*" It is irrelevant whether or not the representation, when made, is in fact false or misleading.

The concept of "*reasonable grounds*" appears to be flexible. The Bill provides that when deciding whether a person had reasonable grounds, the Court must have regard to all of the circumstances. The Bill goes on to provide some guidelines as to what these circumstances may include, these include: the level of research undertaken and the nature of the representation. It is important to note that, this provision is in addition to the existing prohibitions relating to false or misleading representations.

The inclusion of this new offence is significant for businesses. It extends consumer rights and, as a consequence, exposes businesses to greater [risk] in respect of their trade. It will be important for businesses to develop specific processes and guidelines that deal with potential issues. These processes and guidelines should include an outline of what evidence should be prepared and retained in relation to the goods, services or interests in land offered by the business.

It is important to note that the Commerce Commission is the only party that can commence proceedings against a person who has made an "*unsubstantiated representation*".

- Enforcement

The Bill extends the jurisdiction of the Disputes Tribunal. The Disputes Tribunal provides a forum for civil disputes between people under the value of \$15,000.00. Lawyers and judges are not involved. The Disputes Tribunal offers an inexpensive and quick way to resolve issues.

The Bill provides that the Disputes Tribunal can hear and determine applications in relation to the "*misleading and deceptive conduct*" provisions under the FTA. Consumers that are in dispute with a business will now have greater recourse to action.

The Bill also expands the Commerce Commission's powers to enforce the FTA.

- Laybys

The Bill makes provision for layby sales in the FTA (as noted the Layby Sales Act 1991 is repealed). In light of this, the opportunity to refine the definition of layby sales has been taken. A layby sale is the sale and purchase of goods where the consumer does not take possession of the goods until full payment has been made, the price is not more than \$15,000.00 and the price is paid in three or more instalments (or two if the agreement states it is a layby sale agreement).

The Bill enables a consumer, in a layby sale agreement, to cancel the layby at any time before taking possession of the goods. Previously a layby could only be cancelled at the time of final payment. Any cancellation charge is strictly restricted to the supplier's reasonable costs arising directly from the lay-by sale agreement.

Businesses that use laybys will need to establish processes and formal written disclosures that deal with the changes.

- Uninvited Direct Sales (Door to Door Sales)

The Bill sets out the rules for uninvited direct sales. The definition of an "*uninvited direct sale*" is now very wide: an agreement for supplies in trade (goods or services) to a consumer of more than \$100.00 as a result of negotiations at a place other than the supplier's usual place of business or trade or by telephone, and where the consumer did not invite the supplier to come to that place or make the telephone call. The new rules will apply to cash and credit card payments (previously only limited to credit).

The new disclosure requirements place a duty on the supplier to ensure that the agreement is in clear language and given to the consumer at the time the agreement is entered into or, if over the telephone, within five working days after that time.

The agreement entered into must include a summary of the consumer's right to cancel the agreement. Clear notice must also be given of the consumer's right to cancel the agreement within five working days and the process by which cancellation may be made.

It will be important for businesses to review the current business practice to ensure that they do not inadvertently fall within the category of an uninvited direct sale. If the business is in the business of direct sales, it will need to ensure that the processes and disclosures are sufficient to deal with the changes.

- **Extended Warranties**

The Bill includes detailed provisions for extended warranty agreements. The term "*extended warranty*" is essentially an agreement between a supplier and a consumer in which the supplier agrees, for additional consideration paid by the consumer, to repair, replace or remedy defective goods or services. It also includes agreements that provide for benefits that are the same as those under the CGA, for a longer period than those available under that Act or provide insurance cover in relation to the goods or services. The provisions extend to the related manufacturers.

The disclosure requirements set out in the Bill include a summary of the consumer's rights, in particular the right to cancel the extended warranty within five working days, and the existing rights under the CGA.

## **Consumer Guarantees Act**

- **Gas and Electricity**

The Bill amends the CGA with respect to its application to the supply of gas and electricity. This supply will now be treated separately for the purposes of determining acceptable quality under the CGA.

- **Auctions/Tenders**

The Bill removes the exemption from the guarantees provided under the CGA with respect to auctions and competitive tenders, with the exception of second-hand goods sold by a trader to a consumer at an auction.

The Bill will therefore ensure that all goods sold by traders through an internet auction are covered by the CGA. This change will not catch ordinary people selling old fridges on TradeMe, as private sales are not covered.

### **Carriage of Goods Act**

The Bill amends both the CGA and CofGA to provide that "*carriers*" under the CofGA will now also be subject to the guarantees set out in the CGA. Consumers will have the benefit of the guarantees provided by the CGA when using carrier services. Further, the liability of the carrier has been increased from \$1,500.00 to \$2,000.00.

Businesses that involve a "*carrier*" service will be significantly affected by this amendment. The guarantees provided to the consumer, pursuant to the CGA, are strong and wide-ranging, and include a guarantee to provide services with reasonable care and skill and within a reasonable time. For completeness, these guarantees will not apply to carrier services to businesses.

Logistics companies have expressed concern over this amendment. They claim that carriers cannot guarantee a freight service in the way a manufacturer of a product can. We expect there to be a number of submissions relating to this amendment.

### **Timeline**

Submissions on the Bill are currently being heard by the Commerce Select Committee. It is expected that the Committee will report back in August.

To date, no formal indication has been given on when the Government expects the Bill to be executed.

### **Further Information**

Please contact us if you would like to register for further information in relation to the Bill.

You can also access further information in relation to the Bill at:

