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Submission to the Ministry of Consumer Affairs on Consumer Law Reform

The National Council of Women of New Zealand (NCWNZ) is an umbrella organisation representing 46 nationally organised societies. NCWNZ has 26 branches throughout the country attended by representatives of those societies and some 150 other societies. The Council's function is to serve women, families and the community through research, study, discussion and action.

This submission has been prepared by the Consumer Affairs Standing Committee following circulation of the questions to NCWNZ membership. The collated responses are from 6 Branches, 2 Nationally Organised Societies and many individual members and interested groups. NCWNZ welcomes the opportunity to consider the Consumer Law Reform document and comment on the proposed review. Consumer legislation is an important contributor to consumer confidence and successful consumer participation in the market place. It is timely for the consumer laws to be reviewed and updated and to include modern purpose statements signifying their intent or underlying principles.

Responses to Questions or Sections

Principles and Purpose Statement for Consumer Laws

Q1. Clear statements of purpose are important and should be included in Consumer Law. If the Fair Trading Act and Consumer Guarantees Act are combined they should be headed by a meaningful purpose statement.

Responders were not sure whether there would be a purpose statement for each Act if combined or combined into one purpose statement for both which is appropriately worded. Some were in favour of 3 separate purpose statements.

Most responses preferred that the Weights and Measures Act should remain separate. Their considerations were that "a significant part of administering and enforcing this Act involves complying with international standards. This enables consumers and businesses worldwide to have greater confidence that the products they are purchasing meet the same measurement standards, whether they are locally produced, exported or imported. Alignment with international convention makes it easier for New Zealand to work with other jurisdictions on weights and measures matters." It was felt that this may be difficult to achieve if combined into one law.

Q2. It was considered there should be more references to cover online trading in the law which may require new principles and objectives to protect buyer and seller. How is TradeMe regulated was a question. Basically, the law needs to cover the methods that are currently being used and be flexible to cope with changes in trading and the way it is transacted.

Q3. "Good faith" should be included (or remain) in any purpose statement in the Fair Trading Act to protect buyers and encourage openness and honesty between consumers and suppliers. It would require accurate definition to avoid "loose" interpretation and any ambiguity, especially in a court of law if challenged. Any matters involving dispute should be addressed fairly and quickly and at minimal cost.

Unfair Practices: Unfair Contract-Terms

Q4. A few responses supported including unfair contract terms provisions in the Fair Trading Act along the lines of the Australian Consumer Law. As Australia is currently undertaking a major reform of its consumer laws it is difficult to make a decision at this point in time and will depend on changes that may eventuate from the review. By including unfair contract terms in the Fair Trading Act it would mean it was in accord with international consumer law.

Q5. Most responses supported the approach used in the Australian Consumer Law. "Good faith", it was considered, would be breached in an unfair contract terms provision. This would, if included, protect consumers from unfair contract terms.

Q6. Yes, it was considered that providing examples of unfair contract terms would be appropriate for New Zealand law. Consumers are definitely at a disadvantage due to lack of adequate and accurate information about products and services they buy. Standard form contracts should be knowingly agreed upon and understood by the consumer.

Unfair Practices: Unsubstantiated Claims

Q7. Yes, so that enforcement can be applied. Consumers need to be confident that products purchased are true to claim and must be able to trust information presented by suppliers. A prohibition on unsubstantiated claims would improve the ability to clarify and take enforcement if necessary.

Q8. Yes, it was considered by most responders that general prohibition of unsubstantiated claims should be enforceable by the Commerce Commission and both civil and criminal prohibition would be appropriate to enable action to be taken. The inability to provide supporting evidence for a claim would be a strict liability offense.

Door to Door and other Direct Selling

Q9. Responses considered direct selling, whether it be door to door, telemarketing, seminar presentation etc, should be strictly regulated to protect the buyer. All sellers should provide photographic ID as a minimum requirement or provide a viable checking system in other sales approaches. Concern was expressed that exploitation of vulnerable persons, e.g. the elderly and those with English as a second language, should not occur in door to door selling. Consumers need protection from smart operators.

The current law seems to be robust at the moment, but the consumer and public in general need to be educated on their rights under consumer law. Many are unaware of the provisions of

the law and regular education campaigns and information provisions on consumer law were considered to be essential on an ongoing basis.

Q10. Some members considered that direct selling law should apply to purchase of any amount as sellers may encourage consumers to purchase low cost items initially and follow with further pressure to purchase more expensive goods and/or services additionally. Other responses considered \$100 would be acceptable as the threshold amount.

Q11. Support was expressed for a cooling off period of 10 days.

Q12. The buyer should have a time-frame to consider the commitment independently and seek advice from family and friends. Many sellers apply subtle pressure and 'pushy' sales techniques and the buyer feels powerless to say 'no'. The supply of goods and services should be prohibited during the cooling off period, however a free trial offered over that time could be permitted. However, some goods may not be easily supplied because of size or high value of product.

Q13. Responses indicated strong support for a regulation of hours when direct marketers may call to be included in the law. It was suggested Monday to Saturday in daylight hours (e.g. 8.30am to 5.30pm) be an option for consideration. An alternative approach is for the direct seller to make an appointment with the consumer and call at an agreed time. Safety issues for the consumer are of concern if selling is after dark.

Q14. Responses are in favour of including regulation of direct selling in the Fair Trading Act. They considered this to be a timely move as it appears to be a 'loosely' regulated area of selling at present.

Regulations are needed to ensure that any charges are reasonable, that sellers are identified and bona-fide, and the services offered is a satisfactory contractual agreement. The Act should apply to all direct selling, other than at the usual place of business of the supplier, irrespective of when the consumer pays for the goods or service. There also should be regulation to prevent misleading advertising or promotional activity.

There is justification, it was agreed, for continuing to regulate door to door or unsolicited selling to consumers.

Unsolicited Goods and Services

It was agreed by responders that there is a need for some form of regulation regarding unsolicited goods and services and the proposed Australian Consumer Law was considered to be the best option for a modern approach to regulation. This will give consumers the ability to transact with confidence, provide protection and easy access to those affected by receiving unsolicited goods or services. The law will also be enforceable. As part of the Fair Trading Act, continued regulation will meet these objectives and simplify and consolidate the existing law.

Unconscionable Conduct

Responses favoured an improvement to the present standard. Concerns were expressed that any action should be available to both businesses and consumers, as not all consumers act unconscionably. One response questioned whether 'good faith' was the opposite of 'unconscionable conduct'.

It was generally agreed that including unconscionable conduct in the Fair Trading Act would benefit small businesses, who can be as vulnerable as other consumers. Any complaints should be pursued by the Commerce Commission after a decision making process and provision enforced in court.

Product Safety

Q20. A few responses expressed concern that the provisions in the Consumer Guarantees Act were not sufficient to cover any product safety situations as evidenced, for example, by the toys provided with children's happy meals which contained heavy metals as well as a large range of cheap products available from \$2 and \$3 dollar stores.

Q21. It was agreed it would be appropriate for the Ministry to issue product safety and policy statements. Provisions should always include the country of origin of all products/ingredients. Most responses agreed that New Zealand should adopt a "reasonably foreseeable" test of product safety regulation along the lines being considered by Australian Consumer Law.

Q22. Product recalls should be the regulators responsibility where a supplier fails to undertake a compulsory recall.

There should be collaboration with New Zealand Food Safety Authority, Food Standards Australia New Zealand, and other appropriate agencies who are also dealing with product safety, to develop legislation that is consistent across the board when developing standards and introducing new and updated laws.

Q23. All notification, it was considered must be mandatory to the regulator of voluntary recalls and incidents where products are associated with serious injury. Also these incidents should be notified to and covered by ACC and OSH.

Q24. It was agreed that the Fair Trading Act should include provisions for the Minister to issue government product policy statements to endorse the safety of all products, particularly those imported items that presently are not regulated or checked.

Consumer Information

Q25. Concern was expressed by members that the consumer information regulations provided are not sufficient. It was agreed that there should be increased education about the Fair Trading Act, Consumer Guarantees Act and other Acts to be included in the law reform, starting at secondary school and taught as a curriculum component or subject.

Q26. Testing requirements should be included and added to the consumer information regulation, e.g. absence or presence of genetic modification or engineering, safety of children's furniture etc. Standards New Zealand and the Fair Trading Act should be consistent with any testing requirements for the consumer.

Q27. Disclosure requirements should be included in the Fair Trading Act. Consumers need to know what proportion of any donation goes to administration and or commission to third party collectors.

NCWNZ, in a submission written in December 2009 on the Fair Trading (Soliciting on Behalf of Charities) Amendment Bill, endorsed disclosure requirements on all donations of any amount that goes to administration and or commission.

Layby Sales

Q28, 29, 31. A principles based approach regulating layby sales would be acceptable if the regulations protect both buyer and seller. The existing Layby Sales Act 1971 has a clear set of principles which could be moved easily and satisfactorily into the Fair Trading Act, be covered also by the Consumer Guarantees Act and be consistent with consumer law reform proposals. The definition of a layby sale may need amendment. Responders were not sure if this was necessary.

Detailed provisions regulating layby sales are necessary so consumers can transact with confidence and reputable suppliers are protected from inappropriate market conduct.

Risks should be reduced and clarified and the goods remain with the seller until the buyer has possession of the goods.

A statement must be provided should the consumer have money refunded when a layby is cancelled. It was considered essential that any terms and conditions must be clearly stated in any layby documentation, at the time of purchase, allowing consumers to make an informed choice. The trader should not expect to receive any installments as a “windfall” as a contractual agreement should clearly state the time for repayment and at what stage a trader may reclaim some “costs” for storage of any item. Buyer rights in the event of insolvency of the seller need to be clearly stated in the regulations.

Weights and Measures

Q32. The majority of NCWNZ responders considered that the Weights and Measures Act should remain standalone, as a significant part of administering and enforcing this Act involves complying with international standards. It is considered to be a world leading Act and includes a consumer protection and assurance component by regulating against traders selling goods less than their stated weight, measure or number and is not over prescriptive.

Q33. A few responses did indicate support for moving the Weights and measures Act to the Fair Trading Act to keep all Acts under one law. It was considered the Act may need improvement in some areas. No details or supporting explanations were offered.

Carriage of Goods Law and Consumers

Q34. Yes, it was considered appropriate for consumers to have rights in relation to carrier services. Insurance held by the trader/supplier should cover delivery services and any remedy for non-delivered or damaged goods would require sender to take action under the contract. It would be an advantage to have a full review undertaken of the Carriage of Goods Act to clarify the need for further or increased protection for all parties involved not only for consumer rights. The definition of Consumer under the Consumer Guarantees Act should be reviewed and clarified and should include small businesses if extended. As well as covering carriers providing services to consumers under the Consumer Guarantees Act, clarification would rebalance the risk of goods being lost or damaged in transit in favour of consumers.

Regulation of Auctioneers and Auctions

Q35. Responses indicated that voluntary regulation was not working at present and all auctioneers should be registered as well as real estate agents. Many members considered they had insufficient knowledge to comment, however, stated that the practice of using false bidding in an auction to raise the price seemed morally suspect.

Q38. Purchasers from TradeMe style auctions should have the benefit of guarantees under the Consumer Guarantees Act and the regulations should be changed or updated to include this protection. A code of conduct should be established to avoid any unfair practice in auctions.

Q39. A new definition of “Auction” may be a solution so that any auctions must be conducted by a licensed or approved auctioneer and online auctions must also meet certain requirements. The Act should be flexible and any legal rules which apply to auctions under the Sale of Goods Act should definitely be updated and included in the reform.

Consumer Guarantees

Q40. Most responses agreed that extended warranties are not necessary and often benefit the seller of the goods and or service financially. All goods sold should be covered by the Consumer Guarantees Act, so specific regulation of extended warranties may not be necessary to protect the purchase of a consumer good.

Q41. All information on extended warranties should be disclosed to the consumer at point of sale and pressure exerted to sign up by invoking fear should major costly problems arise at some point after the purchase.

Q42. A ‘cooling off’ period for cancellation should not be required if sufficient information and explanation is given to the consumer who may then make an independent and free choice.

Q43. An ‘opt in’ period could be considered as an alternative option, possibly for 7 days following purchase agreements. Many consumers have English as their second language and may need assistance and interpreters to make an informed decision.

Q44. Any law regulating extended warranties should be enforced by the Commerce Commission.

Consumer education is of paramount importance and the Ministry of Consumer Affairs should publish, display, and offer pamphlets and advice sheets and increased information written in plain English which could be widely available. Protection is provided under the Consumer Guarantees Act but education regarding consumer rights is often unavailable.

Q45. A bond for assessment of a faulty good should not be required if under guarantee which would obviate the need for disclosure in writing before the goods are purchased.

Q46. Responses agreed that it is appropriate that ‘refusing’ to remedy a failure under the Consumer Guarantees Act also includes ‘refusal by words or conduct’. Consumers can be given the impression that the supplier or manufacturer is not prepared to do anything when there are problems with goods and services and have difficulty finding a remedy or receiving assistance.

It was agreed a solution could be to define 'refuses' to mean actual refusal, as well as refusal by other conduct which does not explicitly convey a refusal.

Q48. There was agreement from responders that consideration be given to amending the Consumer Guarantees Act to reflect that consumers should only need to deal with their electricity retailer when they have supply issues, but that both an electricity retailer and a lines company would be liable for the quality guarantees set out in the Act. The consumer contact point is the electricity retailer and this should be the point of redress initially and not another entity. If it is decided to amend the Consumer Guarantees Act to provide that both an electricity retailer and a lines company would be liable for the quality guarantee, the Electricity Industry Code should also be changed to indemnify retailers for network fault. This would result in no change for the consumer who would still deal with the retailer under the Consumer Guarantees Act.

Enforcement

Q49. It was agreed that provisions for court enforceable undertakings should be included in the Fair Trading Act.

Q50. It was also agreed that recidivist traders should be banned from certain activities by the inclusion of enforceable undertakings in the Fair Trading Act.

Some responses recommended that action should be expedited as quickly as possible. Currently, under the Commerce Act, enforcement can take a considerable time.

Consolidation of Consumer Law

Q51. As has been stated in answer to question 32, member's viewpoints supported a single, enhanced Fair Trading Act that also incorporates the Consumer Guarantees Act. However it was considered that the Weights and Measures Act should stand alone as a separate Act, as it is a very important law for defining customer outcomes, but is 'specialist business legislation' as stated.

The viewpoint supported by the majority of NCWNZ members would more comfortably align with Option 3 as a possible outcome. A few responses support Option 1, as summarized in section 14 under 'What the Review Might Deliver'. As appropriate, Australian Consumer Law would be realised if Option 3 was adopted.

Conclusion

NCWNZ thanks the Ministry of Consumer Affairs for the opportunity to comment on this important review of Consumer Law which will promote better outcomes for consumers. NCWNZ looks forward to being kept informed on the progress of this Bill.

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