

CONSUMER LAW REFORM

SUBMISSION BY

WAITAKERE COMMUNITY LAW SERVICE

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Part 1 – Introduction

1. Waitakere Community Law Service (“WCLS”) is a community law centre which was established to enhance the lives of people most in need and whose lives are impacted by unresolved legal issues. WCLS has a strategic mandate to monitor the effect of legislation on our communities and to anticipate the effect of proposed legislative changes. While it is rational for legislation to target common breakdowns in the legal system, WCLs is particularly concerned about the effect of legislation on our constituency – vulnerable people at the fringes. The focus of this submission is on enhancing protections for those people.
2. Waitakere Community Law Service (“WCLS”) agrees that the outcomes sought from consumer law is confident consumers, such that:
 - a. when a consumer purchases a product or service, his/her reasonable expectations are met; and
 - b. consumers know there is access to redress if their reasonable expectations are not met; and
 - c. consumers and suppliers have confidence in market rules
3. WCLS believes an additional outcome of consumer law should be that:

Consumers are protected from the uneven playing field that is inherent in consumer transactions.
4. The economic principle underpinning consumer law is that of a fair bargain. Parties should be able to enter into fair bargains. Their bargaining positions should be fair, at arms length, and rational. However, two factors need to be acknowledged and mitigated:
 - a. Firstly, consumers are not always wholly rational agents fully able to make rational decisions about their purchases. They are people, with emotions and psychological traits, not wholly rational decision making agents.

- b. Secondly, some businesses are willing to take advantage of the uneven playing field - the psychological and social factors. In many cases this undermines the reality of a fair bargain.

Part 2

Commentary and Proposals In Review Document

Move To Principles Based Law

5. Waitakere Community Law Service (“WCLS”) supports the move to principles based law.
6. WCLS notes the observation that principle based law can be less prescriptive; and therefore users may be less clear about where they stand. WCLS agrees that knowing where you stand is an important principle for both consumers and businesses.
7. WCLS believes the current consumer law is clear (for the most part). There will be relatively few consumer transaction where there is doubt about the legal rights of the parties.
8. Where there are doubts about legal rights it is important for the protection of consumers that the Courts determine rights on the basis of principle, rather than the presence or existence of narrow, prescriptive rules. Our view is that consumers will more likely find remedies in principled based laws than in prescriptive codes.
9. WCLS supports the inclusion of principles along the lines proposed in the discussion paper, as follows:

Fair Trading Act – *“To promote consumer well being by fostering effective competition and enabling the confident participation of consumers in markets in which both consumers and suppliers trade fairly and in good faith.”*

- Consumer Guarantees Act – *“To promote consumer well being in markets by:*
 - a) *defining rights that give consumers confidence that their reasonable*

expectations about a good or service provided by a supplier or manufacturer will be met, including expectations about the good or service's performance, quality, purpose, or safety.

b) defining rights for consumers to seek redress from a supplier or manufacturer where those reasonable expectations have not been met."

Weights and Measures Act – "To promote consumer and business confidence and effective market competition through ensuring goods are exchanged using accurate measurement, and regulating measuring instruments in use for trade."

Part 2A - Fair Trading Act – Proposed Enhancements

Unfair Contract Terms

10. WCLS supports including in the FTA a prohibition on unfair contract terms.
11. WCLS notes the observation that these standard terms are often not relied on. Presumably, this is because the vast majority of consumer transaction run smoothly. The problem for the consumer arises when the transaction does not run smoothly and the supplier relies on an unfair term to defeat a claim. WCLS supports prohibiting unfair terms and shifting the burden to the supplier of proving the term is 'reasonably necessary' to protect its legitimate interests.
12. WCLS also supports including in the FTA a non-exhaustive list of scenarios that would appear to breach that provision, along the lines of the Australian standards. That is, terms that:
 - a. permit one party to avoid or limit performance of the contract
 - b. permit one party to terminate the contract
 - c. penalise one party for a breach or termination of the contract
 - d. permit one party to vary the terms of the contract
 - e. permit one party to renew or not renew the contract
 - f. permit one party to vary the upfront price payable under the contract without the right of another party to terminate the contract

- g. permit one party to unilaterally vary the characteristics of the goods or services to be supplied, or the interest in land to be sold or granted, under the contract
- h. permit one party unilaterally to determine whether the contract has been breached or to interpret its meaning
- i. limit one party's vicarious liability for its agents
- j. permit one party to assign the contract to the detriment of another party without the other party's consent
- k. limit one party's right to sue another party
- l. limit the evidence one party can adduce in proceedings related to the contract
- m. impose the evidential burden on one party in proceedings relating to the contract, and
- n. are of a kind prescribed by the regulations.

Unsubstantiated Claims About Products and Services

13. WCLS supports the prohibition of unsubstantiated claims.
14. A key protection under the Consumer Guarantees Act ("CGA") is that goods and services do what they say they will do. Prohibiting unsubstantiated claims is a natural extension and strengthening of this principle.
15. We also agree with the observation in the discussion paper that:

A fundamental premise of good consumer decision making is that honest business should only make supported and justified claims about their products and services. This enhances the confidence consumers have in the market.
16. Finally, we agree that prohibiting unsubstantiated claims will afford affords protection to vulnerable consumers, such as people with terminal illnesses seeking miracle cures. WCLS supports this principle.
17. WCLS believes there is considerable merit in providing the Commerce Commission with substantiation notice powers. Extending Commerce Commission powers in this regard would considerably enhance consumer protection. Suppliers should, as a matter of principle and good business practice, be able to substantiate their claims. Compliance for good busi-

nesses should be a routine exercise. Fly-Buy night rip-off merchants should not be able to take advantage of deficiencies in Commerce Commission enforcement powers.

18. WCLS notes the observation that substantiation notice powers amounts to requiring persons to prove their own innocence, and is therefore a breach of Bill of Rights Act protections. WCLS does believe these concerns can be addressed within a substantiation notice framework. That is, enhancing commerce commission powers to permit serving substantiation notices can be consistent with Bill of Rights Act.
19. Firstly, failure to *respond* to a notice could be a strict liability offence without running into any Bill of Rights issues. The penalty in this case would be for failure to comply with a regularity requirement only.
20. Secondly, failure to *substantiate* a claim could exist solely within a civil framework. Some form of public notification of non-substantiation or other civil sanction could be used to enforce the notice.
21. Thirdly, the fact a person cannot prove that their claim is substantiated, to a civil standard, need not in itself give rise to criminal liability. The Commerce Commission could still be required to effectively prosecute a supplier through the Courts. This prosecution would be to a standard beyond reasonable doubt.
22. If the review or minister is not inclined to support a substantiation notice regime WCLS supports the alternative proposal in the discussion paper, namely: Prohibition of unsubstantiated claims under the FTA.
23. WCLS strongly supports the proposal that unsubstantiated claim could then be investigated and prosecuted as a separate offense.

Door to Door Sales

24. WCLS supports extending the protections within the Door to Door Sales Act to ensure:
 - a. All forms of direct marketing are captured by the protections; and
 - b. The protections are extended to all forms of sales, whether credit sales, cash, credit card, exchange, or other purchase methods.
25. Direct marketing always contains an inherent power imbalance compared to store based transacting methods. The key cause of this power imbalance

ance is identified by analysing the consumer's behaviour, not the suppliers. In traditional store based transacting the consumer is the active agent who, to a large degree, initiates the interaction with the supplier. In store based transacting the consumer chooses to go to a commercial space. An element of consumer choice and agency seems to be a critical difference in the selling methods.

26. Direct marketing necessarily has a different power structure to store based transacting. The supplier invades the non-commercial space of the would-be consumer. This puts the consumer at a disadvantage relative to transacting scenarios where they hold greater agency.
27. The next question is how does direct marketing function differently from mere advertising. Again, much of the difference relates to the level of agency the parties have in the process. The difference in this case becomes evident by analysing the behaviour of the supplier. Firstly, the supplier (or its agent) makes direct contact: face to face, over the phone, or through a recorded message. Secondly, the contact is often by a real person. People to people engagement is inherently different from a psychological perspective than mere advertising:
 - a. Many people find their agency reduced, they find it hard to reject the person who has made contact;
 - b. The person who has made contact is an active agent themselves, capable of (indeed trained to) manipulate the person who has been contacted into engagement.
28. Consumer law should protect not just consumers (i.e. people wanting to purchase something) but should also protect people who are not, at a given time, seeking to consume.
29. WCLS believes the following regulation is appropriate:
 - a. All direct selling techniques should be regulated for the reasons stated above, based on some definition that is based on the agency of the consumer and the power imbalance inherent in the selling techniques. The definition should be broad enough to capture direct sellers who operate on street fronts, such as charities who contract to third parties and who in turn use direct selling techniques on the street side.

- b. Regulation of direct selling techniques should extend to all price ranges, because one of the harms being regulated is the power imbalance and the invasion of privacy itself. All direct selling should be subject to regulation of the hours it is permitted; furthermore, regulation of how the approach from the supplier actually occurs: would customers be asked whether they want to discuss the possibility of purchasing a product, have their right to reject the invitation explained, and be given a reasonable opportunity to decline the invitation.
- c. WCLS would accept a cap (of say \$100) in relation to cancellation or cooling-off rights, PROVIDED regulations described in 29(b) above are enacted and were complied with by the supplier. In the event that the controls are not enacted, or a supplier called outside regulated hours or did not comply with requirements to provide a chance to rebuff the supplier's advance, any purchase should be subject to a cooling-off period.
- d. WCLS supports extending the cooling off right to at least 10 days, and to all purchase methods, whether cash or otherwise.
- e. WCLS supports regulating the hours that a supplier can call in. WCLS believes normal trading hours 9am-5pm is an appropriate time range. Mon-Fri, possibly Saturday (but certainly not Sunday) are appropriate days. WCLS believes direct selling in the evenings and night time is not appropriate: the evening is not a traditional trading time, many people are dealing with families in the evening, and many people feel insecure in the evenings, many people value their quiet enjoyment of their evenings.

Unsolicited Goods

- 30. WCLS supports closing the gap that permits suppliers to rely on Goods and Services Act 1975 to demand payment of unsolicited goods. It is correct in principle that:
 - a. consumers and businesses should not have to accept, take responsibility for and pay for goods or services that they have not sought; and

- b. consumers and businesses should not be subjected to demands for payment for goods and services that they have not sought.
31. WCLS prefers the UK approach, whereby unsolicited goods and services are treated as unconditional gifts. Consumers should have no liability for unsolicited goods. Any supplier's rights or claims to the property must be exercised quickly, but certainly without leading to consumer liability. All risk should be with the supplier.
 32. The Australian approach, that a person in trade or commerce can assert a right to payment on the basis of a reasonable belief exposes vulnerable people to manipulation. Research referred to in the discussion paper demonstrates only a modest understanding of consumer rights. A law that makes liability contestable in relation to unsolicited goods and services exposes vulnerable consumers to manipulation.

Unconscionability and Oppression

33. WCLS supports including safeguards against unconscionable conduct and oppressive bargains. It is likely that the Courts, unless guided otherwise by the legislation, will interpret unconscionability and oppression along similar lines to current case law. To that extent, there may well be few cases in the consumer context.
34. Having said that, it is important that vulnerable consumers have adequate remedies available. Some consumer contracts or supplier activity are against good conscience. The catchall, equitable remedy of good conscience has a place to play in consumer law.

Product Safety

35. The general approach to product safety law through the Consumer Guarantees Act and the Fair Trading Act allows for consumers to take self-enforcement action and for public enforcement and monitoring. This two pronged approach would appear to be very effective. The following possible changes are considered in the review:

Test For Product Ban/Recall

36. WCLS supports amending weakening the test for product bans and recalls, such that items can be banned or recalled where it is “reasonably foreseeable” that they will or may cause injury.
37. WCLS supports the regulator being able to initiate a product recall itself where a supplier fails to undertake a compulsory recall.
38. WCLS support mandatory notification to the regulator of voluntary recalls and incidents where products are associated with serious injury or death.
39. WCLS supports the Fair Trading Act including provisions for the Minister to issue Government product safety policy statements.

Information Standards

40. WCLS feels comfortable with the current level of regulation, subject to the other comments in this submission.
41. WCLS supports adding testing requirements to the consumer information regulation-making powers. The power to require certain tests to be conducted prior to a good or service coming to market is an appropriate additional safeguard. This can help to facilitate greater awareness of the attributes of a product or service, and greater confidence in the product or service (particularly technically complex items). The power to require testing could also provide a useful supplement to supplier substantiation of claim requirements and safety standards.
42. WCLS supports including specific disclosure requirements in the Fair Trading Act concerning third party collectors fundraising for charities. Consumers often want to give to charities. It is important they are able to make an informed choice about how they donate. This is particularly so where charities use direct selling techniques. Charities using direct selling techniques place are in a position to take advantage of an imbalance of power. Where the actually ‘seller’ has a commercial interest in the transaction this should be disclosed.

Layby Sale

43. WCLS is reasonably comfortable with the way the current Layby Sales Act is operating. WCLS agrees with the need for continued regulation of this area.
44. In relation to costs on cancellation, WCLS believes sellers should only be able to recover specific costs associated with the layby transaction. The cost of depreciation and other risks should remain with the seller. Sellers are best placed to assess whether they can carry that risk when deciding whether to offer layby facilities.
45. Furthermore, Sellers are also best placed to prove their costs. Purchasers are at an evidential disadvantage in relation to disproving all costs claims by sellers. Many purchasers will not feel willing or able to mount a case, or will certainly not be able to gather evidence to disprove a claim for all costs. The amount sellers can recover in relation to costs should be modest. If they are not regulated to a modest level unscrupulous sellers will take advantage of vulnerable consumers.
46. WCLS supports moving Layby Sales Act into the FTA.

Part 2B – Changes to Other Consumer Legislation (Not FTA or CGA)

Weights and Measures

47. WCLS supports requiring equipment to be regularly checked for accuracy. An approach along the lines of the Australian one is supported.

Carriage of Goods

48. WCLS supports amending the CGA and Carriage of Goods Act so that consumers to have rights under the Consumer Guarantees Act in relation to carrier services.
49. A consumer is a beneficiary of a contract of carriage, even if it is not a contract party. In this regard, they are analogous to a beneficiary under a trust. Alternatively, in theory if not in law, the consumer is analogous to a principal and the vendor an agent. It simply makes sense to allow the per-

son who enjoys the benefit of a contract of carriage to be able to sue in the event the service was not delivered to an adequate standard.

Part 2C – Proposed changed to Consumer Guarantees Act

Online Auctions and CGA

50. WCLS supports bringing Trade Me style auctions, conducted in the course of trade, under the protection of the CGA, for the following reasons:
- a. To eliminate the inconsistency of protections between consumer who purchase by way of the Buy Now/Confirm Purchase and consumers who purchase through auction.
 - b. To capture traders who are simply using Trade Me style auctions as an additional channel to market.
 - c. Because traders do appear to use Trade Me style auctions as negotiable sale or discounted prices rather than a true auction (as such, CGA protections should apply)
 - d. Because Trade Me style auctions typically do not provide for pre-inspection of the goods prior to sale.
51. WCLS supports a new definition of auction (such that auctions must be conducted by a licensed or approved auctioneer and that online auctions must meet certain requirements).

Extended Warranties

52. WCLS strongly supports the introduction of specific regulations in relation to extended guarantees. The current lack of regulation amounts to a disgraceful tort: consumers are paying millions of dollars per year unnecessarily.
53. WCLS strongly supports the introduction of cooling off periods in relation to extended warranties. WCLS also supports option to post-purchase extended warranties to eliminate the risk that special offers can attached to warranty sales.
54. WCLS also supports greater disclosure to consumers. At the very least extended warranty terms and costs should be displayed on the sale ticket so that consumers can compare offers with competitors.

Bonds to Assess Faulty Goods

55. WCLS supports regulations in relation to assessment bonds on faulty goods. WCLS acknowledges that a balance needs to be struck between the effective exercise of CGA rights and the risk to suppliers of fraudulent claims.
56. To the extent that bonds act as a barrier to the exercise of CGA rights, those practices should be outlawed.
57. WCLS supports as a minimum measure the capping the bond at the reasonable costs of the supplier of checking the item.
58. Another approach in the area may be to prohibit bonds but to strengthen supplier's rights to liens or streamline recovery mechanisms in relation to fraudulent or unfounded claims.

Unresponsive Suppliers

59. WCLS supports extending the definition of refusing to remedy a defect, such that refusal can be "by words or conduct". Part of this matrix could be to require a supplier to either remedy a defect or provide reasons why not within a specified time period of receiving a written request to remedy.

Rejection of Goods and Collateral Credit Agreements

60. The review states:

A consumer who has purchased goods on credit may have the right to cancel the purchase under the Consumer Guarantees Act, but the consumer will remain liable to pay the price of the goods under the credit agreement.
61. It is not clear that this is in fact the law. The CCCFA amended the CGA, such that a supplier of goods includes the lender where the lenders advanced some of the purchase price and took security over the goods.
62. WCLS supports clarifying this area of law. Specific rights to a refund of the collateral credit agreement should be made provided for in the CGA and made more explicit than they are.

63. Furthermore, WCLS support vesting the obligations for credit contract in suppliers upon application to the tribunal

CGA Applying to Electricity Companies

64. WCLS supports extending CGA protection to include both electricity retailers and lines companies.

Part 3 – Other Matters

Enforcement

65. WCLS supports the introduction of Court enforceable undertakings to facilitate speedy yet effective settlement of breaches of the FTA.
66. WCLS supports the introduction of banning order provisions in relation to recidivist offenders under the FTA.



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