# Submission

By


To

# Ministry of Consumer Affairs

On the

# Consumer Law Reform – A Discussion Paper

**30 July 2010**

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**CONSUMER LAW REFORM – A DISCUSSION PAPER**
**SUBMISSION BY BUSINESSNZ[1]**
**30 July 2010**

## 1. INTRODUCTION

1.1 BusinessNZ welcomes the opportunity to comment on the Ministry of Consumer Affairs *'Consumer Law Reform – A Discussion Paper*' (referred to as 'the paper'). The paper covers a large number of proposals to reform and rationalise New Zealand's consumer legislation. We do not intend to comment on every proposal. However, we are concerned about some of the more significant directions and recommendations that the paper outlines.

1.2 Given the increasing impact regulation is having on the economy, BusinessNZ welcomes alternative processes aimed at achieving desired outcomes without the need for further government intervention, whether at the day-to-day operational level, or involving enforcement procedures.

1.3 This submission is broken up into three broad parts. The first part provides BusinessNZ's views on the overarching review process that first has to be taken into account. The second part specifically outlines our view of three unfair practice provisions which we believe should not proceed, while the third part provides comments on other areas of the paper.

## 2. SUMMARY OF RECOMMENDATIONS

2.1 BusinessNZ **recommends** that:

a) **Overall, steps towards consumer law becoming more principles-based proceed (p.5);**

b) **Harmonisation of consumer law with Australia occurs only if there is a clear net economic benefit to New Zealand (p.6);**

c) **A prohibition on unconscionable conduct is not included in the Fair Trading Act (p.8);**

d) **The application of the broader concept of oppression from the Credit Contracts and Consumer Finance Act is not applied to the supply of goods and services generally (p.8);**

e) **Unfair contract term provisions are not included in the Fair Trading Act (p.10);**

f) **The Ministry looks to use the Productivity Commission as a possible avenue through which to undertake research relating to future consumer law reform (p.10);**

g) **No general prohibition is imposed on unsubstantiated claims under the Fair Trading Act (p.12);**

[1] Background information on BusinessNZ is attached in the appendix.

**h) The Ministry notes BusinessNZ views on changes to the Door-to-Door Sales Act as outlined on pages 12 and 13;**

**i) Sellers continue to be able to recover all their costs on the cancellation of a layby sale (p.13);**

**j) The liability cap of $1,500 in the Carriage of Goods Act 1979 is revised upwards to at least take into account the effects of inflation (p.14);**

**k) Any proposal for consumers to have rights under the Consumer Guarantees Act in relation to carrier services first involve a more formal analysis by the Ministry regarding the extent of the perceived problem and potential effects on the carriage industry (p.14);**

**l) No requirement is imposed on retailers to display the cost of an extended warranty in both advertising and on the item being sold does not proceed (p.15);**

**m) The Fair Trading Act should not be amended to ban recidivist offenders from supplying goods or services, but other existing mechanisms, such as increased fines or new mechanisms such as widespread public notifications, should be used instead (p.15); and**

**n) The Consumer Guarantees Act should not be amended so that both an electricity retailer and a lines company would be liable for quality guarantees (p.16).**

## 3. OVERARCHING REVIEW PROCESS

3.1 BusinessNZ is disappointed that the paper starts off on a wrong footing by not asking the fundamental question that should be required of any investigation into possible changes to regulatory practices, namely *"is there a problem?"*. In fact, we would even go further with this line of questioning, as it is crucial that policymakers take a step back and ask a series of related questions. These include – but are not limited to:

- Is there a problem *in New Zealand* with current consumer law (i.e. are there significant issues of "market failure" which need to be addressed)?
- If there is a problem, is the problem significant?
- What are the costs and benefits (including unintended costs) of any proposed changes outlined in the document?
- What are the potential options for improving outcomes which don't impose significant costs (e.g. by educating market participants)?

Unfortunately, the paper often fails to provide in-depth of coverage of these particular questions.

3.2 In addition to the bullet points above, there are three broad issues that need to be examined in detail, namely market failure, evidence of a sufficient problem, and the correct path of change (if any) to take.

*Market Failure – a possible case for government intervention?*

3.3 Before determining whether increased consumer law regulation and other interventions such as enforcement are justified as part of sound policy, it is first necessary to determine on what grounds government might decide to intervene.

3.4 Generally markets work best when left undisturbed by such government interventions as regulation/taxes/expenditures. However, in certain circumstances markets do not perform their functions efficiently so that government intervention *may* be justified. Therefore, the next issue to consider is does the evidence show there is a significant problem?

*Does the evidence show a significant problem?*

3.5 As will be pointed out in various parts of our submission, the paper regularly refers to the fact that any moves towards regulatory outcomes are hard to justify as there is a lack of evidence of significant problems unfolding. Therefore, it seems clear from the Ministry's own words that in many respects there is little justification for regulatory change, particularly around issues relating to enforcement.

3.6 Even if there are grounds for some significant changes to be made to consumer law in New Zealand, such changes need to be approached in a

systematic way. Namely, any moves towards widespread Government-led regulatory measures must start from the position of minimising distortion and unintended consequences arising from the intervention.

*The Correct Path of Action to Take*

3.7 Instead of viewing Government-led regulation as the first and only solution to any perceived problem, in BusinessNZ's 'Regulation Perspectives'[2], we stipulate nine actions that the government could adopt to improve the quality of regulation in New Zealand. Of these, the following six actions clearly relate to the issues raised in the paper:

a) *Define the Problem:* Require all proposals for regulation to include clear analysis of the problem to be addressed.
b) *Do a Cost Benefit Analysis:* Require all proposals for regulation to include a cost-benefit analysis by an independent agency with a service similar to that provided by a Productivity Commission.
c) *Travel up the Pyramid:* Consider non-regulatory options first, moving 'up the pyramid' to generic light-handed options, then more stringent options only if clearly warranted.
d) *Keep it Generic, Light-Handed:* Give preference to light-handed generic regulation.
e) *Regulate only when Required:* Introduce new regulations only when justified by clear cases of significant – not minor – market failure.
f) *Self-Regulation as a Goal, not a Pathway:* Self-regulation should not be introduced as a precursor to future government-imposed regulation; instead it should be allowed to stand on its merits.

We also take the view that the Government should always focus on the quality of regulation, not the number of regulations. While we approve of the Government's policy of less regulation in general, we are also mindful that improving regulation is not about balancing the number of regulations in existence. Simply put, a policy to improve regulation is not a simple numbers game, but rather looking at each piece of regulation on its own and making sure it goes through the adequate level of scrutiny as to whether it remains.

3.8 Of the six actions listed in 3.7 above, action (c) is a key step when regulatory decisions are made. BusinessNZ would strongly oppose any moves by the Government that automatically led outcomes to the 'tip' of the regulatory pyramid. Instead, if action is found to be needed, proper approaches should be taken from the base up.

*Principles Based Law*

3.9 Given our description above of best practise, BusinessNZ welcomes the general move outlined in the paper towards principles-based law. As it points out, *'the advantage of principles-based law is that its purpose and objectives are clear, and affected parties have the opportunity to determine how they will comply with the principles without necessarily having to follow detailed and intrusive rules. The intention is that principles-based law is outcomes*

[2] http://www.businessnz.org.nz/file/1053/Regulation%20Perspectives.pdf

*focussed and easier to comply with for businesses in particular'*. Given the age of many of the existing consumer laws, none can be considered principles based, so a step in that direction would modernise the laws in line with legislation in general.

***Recommendation: Overall, steps towards consumer law becoming more principles-based proceed.***

*Alignment with Australia*

3.10 The intention to align with Australia is strongly evident throughout the paper. For instance, the third main objective of the review as outlined in the paper is to '*achieve harmonisation with the Australian Consumer Law, as appropriate, in accordance with the government's agenda of a single economic market (SEM) with Australia'*. It is also interesting to note that on page 28 of the paper it is stated that *'one objective of the Fair Trading Act (FTA) noted in the Parliamentary debates preceding its passage was having laws in New Zealand comparable with those of our major trading partners, particularly Australia. The FTA's provisions, in accord with this objective, are very similar to equivalent provisions in Australia's Trade Practices Act 1974'*. Therefore, there is both an historical, as well as a forward looking reason why the government seeks alignment.

3.11 BusinessNZ appreciates that New Zealand does not live in isolation from other countries. International movements and trends need to be taken into account when domestic regulations/laws are examined, much like the private sector needs to observe and respond accordingly to consumer trends or product changes offshore.

3.12 However, this is not the first time we had noted our concerns about the way in which many of New Zealand's laws associated with this issue are to be aligned to similar arrangements in Australia. While we support moves that lead to closer economic relations between the two countries, we have always taken the view that harmonisation should only occur if there is a clear net economic benefit to New Zealand. In fact, we are increasingly of the view that the debate around trans-Tasman harmonisation has become far too simplistic over time, and as a consequence overlook some fundamental differences in terms of what should or should not be examined for harmonisation. While the objective statement in 3.10 above refers to the caveat of harmonisation where appropriate, the push by government towards harmonisation is often viewed as an overwhelming reason in itself for change. Therefore, subtle differences in the scale of importance for regulatory change are often overlooked.

3.13 For instance, there may be some harmonisation options where perfect alignment makes sense as it reduces transaction costs between the two countries. There may be other regulations that New Zealand should pick and choose from, given Australia has had them in existence for some years, providing New Zealand with the benefit of hindsight. Last, there are some regulations in Australia which for competitive purposes are clearly unpalatable for New Zealand, either because they would simply not fit with New Zealand's associated laws, or would place greater regulatory requirements on New

Zealand businesses. When going through the paper, the regulations of greatest concern to BusinessNZ are those which reduce our competitive ability and result in stunted growth. Based on the six actions described in 3.7, there appear to be proposals within the paper that do not seem to meet the criteria for good public policy.

***Recommendation: That harmonisation of consumer law with Australia occurs only if there is a clear net economic benefit to New Zealand.***

3.14 Regarding regulations (and in particular enforcement provisions) we believe would have a detrimental effect on New Zealand, BusinessNZ has strong concerns about the following which we wish to elaborate on:

- Unconscionable conduct;
- Prohibitions on unfair contract terms; and
- Unsubstantiated claims

3.15 We note that the Ministry has previously examined three proposals and has decided against them. BusinessNZ submitted on the Ministry's *'Review of the Redress and Enforcement Provisions of Consumer Protection Law – International Comparison Discussion Paper''* in 2006. Our overall response was that we found most proposals in the enforcement paper for changes to the FTA and Consumer Guarantees Act (CGA) simply not required. While reviewing any legislation is part and parcel of what a government should do to ensure efficiency and effectiveness, the government now needs to ask itself whether there is a legitimate and overwhelming reason for such changes to be undertaken.

3.16 We also pointed out in our 2006 submission that there is an "optimal" amount of consumer protection law, just like there is an optimal amount of waste or resources that should be spent on crime prevention etc. Activity that breaks consumer protection laws cannot be completely eliminated, not at least without great cost. It may be possible to be reduced, but beyond a certain point the marginal cost of taking action to minimise such behaviour becomes progressively higher, while the potential returns from taking action reduce. In this respect it pays for companies and individuals to invest in risk minimisation strategies up to the point at which the marginal cost equals the marginal benefits of taking action.

## 4. UNCONSCIONABLE CONDUCT

4.1 The paper examines the possibility of including a prohibition on 'unconscionable conduct' in the FTA. 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.

4.2 First, we wish to state that one of BusinessNZ's founding policies is the promotion of the integrity of business practices. Therefore, we oppose 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 FTA.

4.3 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 FTA. BusinessNZ has previously submitted to the Ministry on the issue of unconscionable conduct. 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.

4.4 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.

4.5 Also, while we appreciate the paper including a real life example (on page 58) of where the issue of unconscionable conduct might arise, we have to say that the example is an extreme one (a woman who felt she was in some way forced to sign a finance contract to purchase a car because she did not have enough cash to purchase a bus ticket), and again places doubts whether we would just be legislating for a very small minority. In addition, the paper points out that even in this case, there would still be significant uncertainty as to whether it would fall under unconscionable conduct.

4.6 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.

4.7 If we were to look at this issue from an opposite perspective, there is a justifiable argument that there needs to be a certain level of responsibility on the part of a business or consumer considered to be the victims of 'unconscionable conduct'. A deal that is deemed to be unfair by consumers or smaller organisations does not automatically mean that 'unconscionable conduct' has taken place. Factors often outlined by those in favour of introducing unconscionable conduct for the court to take into account may also be due to poor process by 'the victim'. For example, one factor could be whether the consumer or business was able to understand the relevant documents. If documents are signed that are not fully understood, a small business or consumer should have taken responsibility for getting outside help in order to understand what they were signing.

4.8 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 FTA.

***Recommendation: That a prohibition on unconscionable conduct is not included in the Fair Trading Act.***

*Alternative Option – Oppression*

4.9 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. Again BusinessNZ does 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. Without a clear indication of the problem at hand, BusinessNZ does not support its inclusion.

***Recommendation: That the application of the broader concept of oppression from the Credit Contracts and Consumer Finance Act is not applied to the supply of goods and services generally.***

## 5. UNFAIR CONTRACT TERMS

5.1 The paper states that an unfair contract term is a term that *'causes a party to a contract (usually the consumer) to be at a disadvantage while the term is not reasonably necessary for the protection of the interests of the other party (usually the business)'*. Typically, an unfair term is a pre-written term in a standard form contract.

5.2 As a possible solution, the paper seeks views on supporting the inclusion of unfair contract term provisions in the FTA, which the Ministry views as its preferred approach going forward.

5.3 First, it goes without saying that it should be the responsibility of any party who enters into a contract to find out the implications of what they are signing before doing so. If consumers or businesses are unsure or are not confident about signing something, there are numerous places to turn to for clarification.

5.4 There is also a clear failure to indicate the scale of the problem in New Zealand such as to justify prohibiting unfair terms in the FTA. Critical questions are not raised, for example, are there regular cases of New Zealand consumers not entering into contracts because of perceived unfair conditions? Also, what processes do these consumers go through to reach this point? The discussion paper lacks any description of the scale of the problem.

5.5 The key word at the heart of this issue is 'fair'. We believe this word can lead to misleading outcomes because the term can be used very loosely, and what is deemed to be fair or unfair can be very subjective. Fairness can often be used as a convenient label or as a more palatable alternative to self-interested

explanations for choices made. What is fair to one person may be perceived as totally unfair by another. There is always the prospect of other players competing in any field if a perceived gap or an opportunity arises that existing players have not identified or understood. For instance, if a business provides what a consumer deems to be unfair conditions in a contract. There is often the opportunity for another business to provide a more competitive offer. This underlines the importance of ensuring that there are no undue restrictions on new entrants to a market.

5.6 BusinessNZ would be extremely concerned if the introduction of the legislation prohibiting so called unfair terms in consumer contracts meant opportunities for transactions were stifled because of fears they could be deemed to have components that are unfair. Such outcomes would benefit no one in the long run.

5.7 While running the risk of sounding repetitive, BusinessNZ again struggles to understand why this has been included as a possible option going forward, when there seems to be another inadequate problem definition. In fact, the paper states that '*the extent of concerns with unfair contract terms in practice in New Zealand is not known'*.

5.8 Page 31 of the paper outlines work carried out by the Australian Productivity Commission (APC), which came to the conclusion there were sound economic and ethical reasons for legislation dealing with unfair contract terms that cause consumer detriment. However, there are two further statements that should encourage significant caution when looking to introduce such terms in New Zealand.

5.9 First, the paper outlines that *'the similarity between the Australian and New Zealand markets enables New Zealand policy makers to take advantage of the Australian Productivity Commission analysis without having to repeat an identical analysis'*. We disagree. If a trans-Tasman study had been undertaken, then we may have been more sympathetic towards that statement. But as we have mentioned above, Australia's evidence of findings and legislation should not automatically mean take-up in New Zealand without undergoing proper analysis here.

5.10 The other interesting point in the paper was that notionally unfair contract terms in Australia are often dormant and not used by suppliers. To that point, the APC pointed out that there is an argument that consumers generally have nothing to fear from what some consider being 'unfair' contract terms because suppliers will generally treat their customers fairly in competitive markets, irrespective of the standard terms to which consumers notionally agree. There is always the fact that consumers themselves may not be acting in good faith, hence the need for businesses to try and counter balance with their own contract terms.

5.11 Also, it is obvious that businesses that continually enact what some claim to be 'unfair' contract terms will most likely lose their competitive advantage as consumers will no longer be able to trust them. As is often the case, public notice of such conditions via the media often has far more powerful outcomes

than simply legislating across the board for the vast majority of contracts where no problems surface.

5.12 The last point we wish to comment on is that the APC weighed the uncertain evidence of consumer benefit against the likely costs of regulating unfair contract terms, and relying on the fact that businesses in Victoria, the U.K and Europe had identified no major problems or costs associated with the introduction of unfair contract term laws, believed such laws should proceed. However, the evidence (or lack of) in Australia and New Zealand seems to indicate no significant problem with the absence of legislation prohibiting unfair contract terms. Regarding costs, we again would want the matter analysed in a New Zealand context. It may be the case that costs are indeed low, but we should not take this for granted given regulatory structures offshore often differ markedly from their local counterparts.

5.13 Again, we do not oppose the possibility of including provisions for unfair contract terms if there are significant reasons for doing so. However, like unconscionable conduct, this does not appear to be the case. Overall, BusinessNZ would want to see evidence of a clear problem regarding unfair contracts in New Zealand before any consideration is given to the idea of introducing such terms in this country. Therefore, we favour the status quo option of not including regulation of unfair contract terms in the FTA.

***Recommendation: That unfair contract terms provisions are not included in the Fair Trading Act.***

5.14 At a wider level, the kind of work carried out by the APC in Australia - although not faultless – involved a better type of process that should be undertaken if significant changes are proposed to legislation in this country. While we would have difficulties reconciling the Australian findings with New Zealand's circumstances, nonetheless in Australia greater efforts were made to understand the issues, and to determine whether significant changes was needed.

5.15 We note that New Zealand is to have its own Productivity Commission (NZPC) from 1 April 2011. In future, we would welcome the Ministry looking to the NZPC as a possible means of conducting independent research in such areas.

***Recommendation: That the Ministry looks to use the Productivity Commission as a possible avenue through which to undertake research relating to future consumer law reform.***

## 6. CLAIMS WHICH CANNOT BE SUBSTANTIATED

6.1 As the paper points out, misleading or deceptive representations are currently prohibited under the FTA. However, there are no statutory powers in the FTA to allow the Commerce Commission to require, by way of issuing notices, substantiation of claims or representations from businesses. As a consequence, the task of establishing the misleading or deceptive nature of any representation is usually that of the Commission.

6.2 BusinessNZ agrees that bogus representations (by a minute number of businesses) should never be made and are clearly illegal. However, we also believe that consumers today are probably better placed than ever in the past to make a value judgment about the validity of a good or service. Any claim made about a product or service can now be readily verified if consumers are willing to initiate some background investigation themselves.

6.3 Indeed, most consumers are smart enough to make a judgment about whether a product or service does what it says it will. For many consumers, the catch phrase "if it's too good to be true, it probably is", is a tried and true motto to stand by. In many cases where there have been incorrect claims, the individual work of consumers is often in advance of what could be done through official channels. For instance, page 35 provides the example of the Commerce Commission successfully prosecuting GlaxoSmithKline for advertising their Ribena drink as containing Vitamin C when it did not. This case did not first arise because of an official investigation, but rather as the outcome of a high school science research project, which the media picked up on.

6.4 The paper notes that the outcome of the 2006 review showed that proposals to require suppliers to substantiate claims about their products or services are controversial, with suppliers having to prove they are innocent, which is a reverse onus, contrary to their rights under the New Zealand Bill of Rights Act 1990. In our submission, we also noted the costs associated with proving claims (especially who pays if a business is found to be innocent) and how such claims could revolve around frivolous issues as opposed to those involving significant health and safety concerns.

6.5 The current paper acknowledges that including substantiation provisions in the FTA along the lines of the Australian Consumer Law would again strike difficulties with the New Zealand Bill of Rights. Instead, the Ministry has sought feedback on the option of adding a general prohibition on suppliers not to make unsubstantiated claims under Part 1 of the FTA. This would mean unsubstantiated claims could be investigated and prosecuted in their own right instead of having a substantiation notice procedure used as an investigatory tool. In other words, consumers and other businesses would be able to take action on a claimed breach, not just the Commerce Commission. Therefore, as the paper points out, *'this would allow cases that would otherwise not meet the Commerce Commission's enforcement criteria to be taken'*.

6.6 BusinessNZ does not support this move. We have doubts as to whether a general prohibition would likely be used only as *"wake-up call"*, rather than a full-blown prosecution as the Ministry asserts.

6.7 Again, we come back to two issues. First, like the 2006 review there is no overwhelming evidence that substantial numbers of false product claims businesses are making. Apart from the GlaxoSmithKilne and Probitas examples provided in the paper, there is no attempt by the Ministry to provide figures on the proportion of successful prosecutions that the Commerce Commission has made.

6.8 Second, we still have significant concerns about the proposed transfer of costs associated with the claims process. Costs to the Commission were one of the primary reasons why substantiation notices were first proposed. The new proposal where unsubstantiated claims could be investigated and prosecuted in their own right would still impose compliance costs on businesses which will require supporting information for their products. As well, it would largely absolve the Commerce Commission from much responsibility and cost. There is no attempt at providing figures on what the average cost would be to business in terms of collating supporting information.

6.9 Last, as noted in page 40 of the current paper, opening the process out in such a manner would mean uncertainty as to what would be reasonable or best endeavours to substantiate a representation. This could have significant negative repercussions if the level of substantiation by a business falls short of what the Commerce Commission expects.

6.10 Overall, BusinessNZ believes the revised option outline in the 2010 paper is little different from that in the 2006 document. We believe our concerns remain as valid, and more importantly the solution fails to stand up against any measure of the problem.

***Recommendation: That no general prohibition is imposed on unsubstantiated claims under the Fair Trading Act.***

## 7. OTHER ISSUES

### Door to Door Sales and Other Direct Selling

7.1 While BusinessNZ does not have any strong views regarding reform of the Door to Door Sales Act 1967, we wish to note the following points in regard to the questions asked in the paper:

- BusinessNZ believes significant caution needs to take place regarding extending the boundaries of direct selling regulation. The paper discusses moves that would bring telemarketing or direct response advertising within the framework. We note that the Direct Selling Association defines direct selling as *'the sale of consumer products or services in a face to face manner away from a fixed retail location'*. Given this is an agreed definition world wide, extending the definition into areas outlined in the paper is a step in the wrong direction. Also, the paper fails to address exactly who might inadvertently be included if coverage is extended. For instance, the sales teams of our regional and industry associations may be included within the extended coverage, despite the proposed changes not specifically targeted at them.

- Given that the threshold amount for the direct selling law to apply has not changed in 35 years (currently, $20 for books and $40 for other goods), we have no objection to increasing the threshold. While we have no strong views as to what the revised threshold should be, we do note that the figure arrived at in 1967 equated to 100% of the average weekly wage. If we were to adjust that figure on an inflation calculation alone,

the present day value would be considerably more than the $100 mentioned in the paper. Alternatively, a present day average weekly wage would also be far higher. Therefore, BusinessNZ supports moves to increase the threshold considerably higher than the $100 mentioned.

- Regarding the cooling off period, we note the Direct Selling Association of New Zealand, which covers 90% of those in the direct selling industry, has a minimum 10 days cooling off period. Given our support for industry-led regulation, BusinessNZ would not object to the legislative cooling off period increasing to 10 days to match those of the Association.

- BusinessNZ strongly rejects prohibiting the supply of goods or services until the cooling off period has ceased. That simply puts those types of businesses at a major competitive disadvantage as a key benefit is swiftness of supply, particularly if the method of sale is literally door-to-door. Also, at a practical level

- BusinessNZ does not believe any regulations are required regarding the hours when direct marketers may call on customers. It is simply common sense for businesses not to call at ludicrous hours (i.e. 2am) to try and obtain a sale. Any attempts by businesses to call during inopportune hours will only harm their own prospects, without the need for regulation. Also, given the 24-hour nature of many businesses now, defining what are or are not suitable hours to call at the margins is difficult (i.e. ceasing calls at 6pm as opposed to 7pm).

***Recommendation: That the Ministry takes note of BusinessNZ's views on changes to the Door-to-Door Sales Act as outlined above.***

**Layby Sales Act 1971**

7.2 Regarding proposed changes to the Layby Sales Act 1971, BusinessNZ believes it is entirely appropriate that sellers can recover all their costs on the cancellation of a layby sale. There are many businesses who would be adversely affected if products they sold that were seasonal or only had a limited shelf life were not able to recover the real cost of the loss in value of such products. Therefore, we would not support moves that limit seller's costs to just transactional costs or fees that apply to that sale.

***Recommendation: That sellers continue to be able to recover all their costs on the cancellation of a layby sale.***

**Carriage of Goods Act 1979**

7.3 Regarding the Carriage of Goods Act 1979, BusinessNZ believes the only issue that needs to be examined is 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.

***Recommendation: That the liability cap of $1,500 in the Carriage of Goods Act 1979 is revised upwards to at least take into account inflationary effects.***

7.4 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'*. BusinessNZ agrees, 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.

7.5 While the paper outlines issues regarding consumer to consumer carriage of goods for a sold item via an auction website, there is again no attempt to provide information on the scale of the problem with what the Ministry believes is a significant change. In terms of the auction example, one could argue there are incentives for the seller to seek redress with the carrier. If we look at New Zealand's most popular online auction site – Trademe – buyers are able to provide feedback regarding the seller's attempt to help the buyer if issues arise. It is in the best interests of the seller to ensure they help the buyer where reasonably possible so as to keep a good feedback rating.

7.6 In short, this is a significant change with no attempt at providing evidence of the extent of the problem. Therefore, we believe that at the very least if there is strong support from other submitters for this proposal, the Ministry should undertake a more formal investigation, outlining all benefits and costs.

***Recommendation: That any proposal for consumers to have rights under the Consumer Guarantees Act in relation to carrier services first involve a more formal analysis by the Ministry regarding the extent of the perceived problem and potential effects on the carriage industry.***

**Extended Warranties**

7.7 While BusinessNZ has no strong views on the issue of extended warranties and whether specific regulation is required, we note one of the options the Ministry has asked for comments on involves 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'*. BusinessNZ disagrees. 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.

7.8 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.

***Recommendation: That no requirement is imposed on retailers to display the cost of an extended warranty in both advertising and on the item being sold.***

**Banning Orders**

7.9 The paper discusses the idea of issuing banning orders, whereby recidivist offenders would be banned from supplying goods or services either for a set period of time or indefinitely to prevent them from being able to continually mislead or deceive consumers. The paper also states that there are serious personal consequences to banning orders as they can seriously affect a person's future earning potential. BusinessNZ agrees. Issuing banning orders as a cause of action is at the extreme end of trying to solve the problem, and BusinessNZ does not support it.

7.10 One problem with not having banning orders which the Ministry states is that fines for breaches often represent a fraction of the profit earned from scams and have acted as no deterrent to subsequent trading activities. Instead, we believe a more useful approach rather than introducing banning orders would be a change to the fine system for repeat offenders. A system whereby the fine continues to double or triple for the same offence/same offender could act as an equivalent deterrent. For example, if a business is found to be guilty of an offence for the second time, the fine could double from an initial $60,000 to a maximum of $120,000. If this happens again, then the maximum figure is again doubled to $240,000 and so on.

7.11 Another alternative option (that could also apply to some of the other proposals mentioned above) is public shaming through newspaper notices or website notices. Currently, this occurs more informally through magazines such as those distributed by the Consumers Institute, or through television programmes such as 'Fair Go'. Very public notification that a business has been found guilty of an activity that contravenes legislation would often be a stronger deterrent than a fine. Repeat offenders might receive more headlines than normal to notify the public about their track record.

***Recommendation: That the Fair Trading Act should not be amended to ban recidivist offenders from supplying goods or services, but other existing mechanisms, such as increased fines or new mechanisms such as widespread public notifications, should be used instead.***

**Application to Electricity**

7.12 The Electricity Industry Bill is soon to be passed into law, having just had its second reading. Based on feedback received in the select committee process, the Bill now includes a new clause (clause 45(2)(ea)) that requires use of system agreements to include indemnities for retailers for liabilities under the CGA for breaches of acceptable quality caused by faults in the network over which the retailer has no control, because the lines business is a monopoly provider. The select committee considered this amendment necessary to ensure that retailers are not held responsible for issues they cannot control or influence. Therefore, this would appear to address the issues raised in the paper.

***Recommendation: That the Consumer Guarantees Act should not be amended so that both an electricity retailer and a lines company would be liable for quality guarantees.***

# APPENDIX

## 8. About BusinessNZ

8.1 Encompassing four regional business organisations (Employers' & Manufacturers' Association, Employers Chamber of Commerce Central, Canterbury Employers' Chamber of Commerce, and the Otago-Southland Employers' Association), its 54 member Major Companies Group comprising New Zealand's largest businesses, and its 76-member Affiliated Industries Group (AIG), which comprises most of New Zealand's national industry associations, BusinessNZ is New Zealand's largest business advocacy body. BusinessNZ is able to tap into the views of over 76,000 employers and businesses, ranging from the smallest to the largest and reflecting the make-up of the New Zealand economy.

8.2 In addition to advocacy on behalf of enterprise, BusinessNZ contributes to Governmental and tripartite working parties and international bodies including the ILO, the International Organisation of Employers and the Business and Industry Advisory Council to the OECD.

8.3 BusinessNZ's key goal is the implementation of policies that would see New Zealand retain a first world national income and regain a place in the top ten of the OECD (a high comparative OECD growth ranking is the most robust indicator of a country's ability to deliver quality health, education, superannuation and other social services). It is widely acknowledged that consistent, sustainable growth well in excess of 4% per capita per year would be required to achieve this goal in the medium term.