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CONSUMER LAW REFORM: KEY CHANGES TO THE FAIR TRADING ACT & CONSUMER GUARANTEES ACT

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INTRODUCTION

1. As some readers will be aware, 2013 saw the most significant reform to New Zealand's consumer laws in over 20 years. When the Fair Trading Act 1986 (**FTA**) came into effect in 1986, mobile phones were a rare sight, the internet's predecessors were only known to a select few computer scientists, and door-to-door encyclopaedia salesman were still a common sight. The commercial infrastructure used to conduct consumer transactions was vastly different to today. Consumers now purchase goods and services online using credit cards and are subject to practices including web marketing. Therefore, understandably, the reform is intended to modernise and better align New Zealand's consumer laws with its Australian counterparts (which were enacted in 2010) given the focus on a single economic market.

2. The vehicle used for this reform was the Consumer Law Reform Bill (the **Reform Bill** - an "omnibus bill"), which was introduced in April 2011 following an extensive consultation period.[1] The Reform Bill proposed to consolidate and amend a suite of consumer legislation.[2]

3. Following a long gestation, the Reform Bill was split into six separate bills in its final stages: the Fair Trading Amendment Act 2013 (**FTAA**), Consumer Guarantees Amendment Act 2013 (**CGAA**), Weights and Measures Amendment Act 2013, Secondhand Dealers and Pawnbrokers Amendment Act 2013, Carriage of Goods Amendment Act 2013, and Auctioneers Act 2013. The Amendment Acts have all passed into law, receiving Royal Assent on 17 December 2013.

[1] This included the Ministry of Consumer Affairs publishing a discussion paper in June 2010 on consumer law reform and holding stakeholder meetings.
[2] The Reform Bill **amended** the Fair Trading Act 1986, the Consumer Guarantees Act 1993, the Weights and Measures Act 1987, the Secondhand Dealers Act and Pawnbrokers Act 2004, the Sale of Goods Act 1908 and the Carriage of Goods Act 1979; and **repealed** the Door to Door Sales Act 1967, the Auctioneers Act 1928, the Layby Sales Act 1971 and the Unsolicited Goods and Service Act 1975.

4. For the purposes of this paper we will focus on the key changes to the FTA, in particular the new unfair contracts regime, and to a lesser extent the changes to the Consumer Guarantees Act 1993 (**CGA**), that practitioners should be aware for the purposes of their day-to-day commercial advisory and drafting work.

5. The key changes to the FTA that are outlined in this paper are:

- unfair contract terms
- uninvited direct sales (door-to-door and telemarketing sales)
- unsubstantiated representations
- compulsory interview powers
- management banning orders
- enforceable undertakings
- extended warranties
- increased penalties
- unsolicited goods
- contracting out
- internet sales
- layby sales
- auctions

6. The key changes to the CGA that are outlined in this paper are:

- contracting out
- guarantee as to delivery
- delivery of gas and electricity
- goods sold by auction or competitive tender
- "acceptable quality"

7. All sections referred to in this paper are in relation to the FTA unless otherwise stated.

KEY CHANGES TO THE FAIR TRADING ACT 1986

Purpose of the FTA

8. The FTA's purpose is to contribute to a trading environment in which the interests of consumers are protected, businesses compete effectively, and consumers and businesses participate confidently. To that end, the FTA prohibits certain unfair conduct in trade (and promotes fair conduct), provides for the disclosure of consumer information relating to the supply of goods and services, and promotes safety in respect of goods and services.

New unfair contract terms regime

9. Consistent with the FTA's purpose, the FTAA introduced new provisions prohibiting unfair contract terms (**UCT**). The UCT provisions will only apply to "standard form

consumer contracts" (**SFCC**). Some readers may view the introduction of UCTs as a major change and a departure from the doctrine of freedom of contract. UCT provisions were not included when the Reform Bill was first introduced and there was opposition partly due to unavoidable compliance costs. If UCTs had not been included this would have been a major inconsistency with the Australian Consumer Law and caused businesses operating on both sides of the Tasman additional inconvenience.

10. The new prohibition comes into effect on 17 March 2015 and does not apply to SFCCs entered into before 17 March 2015. **But** if the relevant SFCC is *varied or renewed* on or after 17 March 2015, the SFCC will be treated as a new contract for the purposes of the UCT regime.

11. Unlike the Australian regime, only the competition authority - here the Commerce Commission (**NZCC**) - may apply to the courts (the High Court or a District Court) for a declaration that a provision in a SFCC is "unfair". Third parties, however, may request the NZCC to seek such a declaration but that decision is at the NZCC's sole discretion. During the debate of the Reform Bill views were expressed that if remedies for UCTs were available to third parties some competitors may abuse the process by engaging in "tit-for-tat" allegations that each other's terms were unfair. Therefore it was viewed as more efficient to leave it to the NZCC's discretion whether or not there was a valid case to be tested in the courts. However there seems to be no evidence suggesting that third parties in Australia have abused the process and there seem to have been relatively few cases.

What is a consumer contract?

12. Consumer contracts are contracts for the supply of goods and services that are *ordinarily acquired for domestic, personal or household use* (ie consumer goods and services as opposed to commercial goods or services) but excludes contracts for the supply of goods and services acquired for resupply in trade, for the use in a production or manufacturing process or in the case of goods, repairing or treating, in trade, other goods or fixtures on land.

What is a SFCC?

13. Section 46J allows the court to determine that any consumer contract, in which the terms (other than exempted terms referred to in section 46K) have not been subject to effective negotiation between the parties, is a SFCC.

14. In making that determination the court must (without limitation) take into account the following:

- whether one of the parties has all or most of the bargaining power relating to the transaction (ie is there material imbalance in respect to bargaining power);
- whether the contract was prepared by one or more parties before any discussion relating to the transaction occurred with the other party or parties (ie the contract is pre-prepared);
- whether 1 or more of the parties was, in effect, required either to accept or reject the terms of the contract (other than terms referred to in section 46K) in the form in which they were presented (ie the contract is presented on a "take-it or leave-it" basis);
- the extent to which the parties had an effective opportunity to negotiate the terms (other than terms referred to in section 46K) of the contract (ie the contract was presented on a non-negotiable basis); and
- the extent to which the terms of the contract take into account the specific characteristics of any party to the contract (ie no consideration was given to the relevant party's circumstances).

15. Therefore terms of SFCCs have generally not been subject to effective negotiation, have been pre-prepared rather than having been the product of bespoke drafting for the purposes of the relevant transaction, and are generally presented by the supplier on a "take it or leave it" basis. Accordingly there is generally no opportunity for the consumer to review and/or negotiate to vary the terms of a SFCC.

16. Common examples of industries that use SFCCs cited by competition authorities (including the NZCC) include car parking, telecommunications, utilities, gym membership, daily deals, pay TV, residential construction, airfares, car rental contracts and retirement villages.[3]

17. If in proceedings, the NZCC alleges that a contract is a SFCC, the contract is presumed to be a SFCC unless the party relying on the term proves otherwise.

What is a UCT?

18. For a court to determine that a particular term is unfair the FTA requires that term to meet all three of the following requirements:

[3] See, Unfair Contract Terms Guidelines, NZCC, February 2015 (published 25 February 2015), paragraph 8.

- the term would cause a **significant imbalance** in the parties' rights and obligations arising under the contract;
- the term is **not reasonably necessary to protect the legitimate interests** of the party who would be advantaged by it; and
- the term would cause **detriment** (whether financial or otherwise) to a party if it were applied, enforced or relied on.[4]

19. The court, however, in making that determination will be able to consider any matter it thinks relevant, but must take into account:

- the **contract as a whole**; and
- the extent to which the term is **transparent**.

20. To the extent that a term of a SFCC:

- defines the **main subject-matter** of the contract; or
- sets the **up-front price** payable under the contract (to extent that the price term is transparent); or
- is required or **expressly permitted** by any enactment,

that term will **not** able to be declared unfair.[5]

21. The NZCC's Unfair Contract Terms Guidelines, February 2015 (published 25 February 2015) (**Guidelines**) state that:

- whether a term "creates a significant imbalance between the parties' rights and obligations will depend on the facts of each case";[6]
- the NZCC "expect[s] that the court is likely to make an overall assessment on the interests involved, rather that apply the test mechanically";[7] and
- the "significant imbalance" requirement is likely to be met where a term:
  - "gives rights to the business that it would not usually have or be able to obtain if the parties had equal bargaining power; or
  - protects the business in a way that puts the consumer at a significant disadvantage; or

[4] Section 46L.
[5] The NZCC's Unfair Contract Terms Guidelines, February 2015 note that "[s]uch terms are only exempt "to the extent that" they address exempt matters. If a term addresses multiple matters, part of the term may be exempt while the rest of the term is not", paragraph 84.
[6] Guidelines, paragraph 52.
[7] As above, paragraph 54.

- shifts risks to the consumer that the business is better placed to manage".[8]

22. In any proceedings a term in a SFCC is presumed **not** to be reasonably necessary to protect the legitimate interests of the party who would be advantaged by it unless that party proves otherwise. Note, however, there are certain terms in contracts of insurance that are presumed to be reasonably necessary to protect the legitimate interests of the insurer.[9]

23. According to the Guidelines, businesses would likely need to demonstrate that that there is a legitimate interest that needs protection and it "cannot reasonably be protected by fairer means".[10] The Guidelines suggest that businesses advantaged by a penalty term will need to provide sufficient evidence to a court to satisfy the court that a penalty is reasonably necessary to protect a legitimate interest by recovering the costs stemming from a breach of contract.[11]

24. In *Office of Fair Trading v Abbey National plc & ors* [2009] UKSC 6, the United Kingdom Supreme Court held that particular bank charges in the circumstances were a component of the price rather than a form of penalty. The Court noted that the Bank cross-subsidised services that were included in a banking package by imposing charges for other optional services and found that without such cross-subsidisation the Bank would not be in a position to profitably supply the banking package for a zero monthly fee.[12]

25. In respect to causing detriment to a consumer if the term were applied, enforced or relied on the Guidelines emphasis that the FTA does not limit the detriment to financial detriment and suggests other forms of detriment including delay or distress suffered stemming from the UCT.[13]

How is transparency likely to be viewed?

26. As noted above, when determining whether the three elements (ie significant imbalance, reasonably necessary and detriment) are met the court must, in addition to taking into account any matter it considers relevant, consider the contract as a whole and the extent to which the term is *transparent*. The Guidelines also note that "in determining whether a term is transparent, it is likely the courts will adopt an 'average reasonable consumer' standard." We would expect though that where the supply is aimed at a particular class

[8] As above, paragraph 55.2.
[9] Section 46L(4) & (5).
[10] Guidelines, paragraphs 59.
[11] As above, paragraphs 60 & 61.
[12] Lord Phillips, paragraph 88; Lord Mance concluded that "[t]he OFT's case that such charges are not "readily visible" or "recognisable" as the price is in my view untenable", paragraph 114.
[13] Guidelines, paragraphs 64.

of persons, for example retirement village arrangements, the court is likely to adopt an 'average reasonable consumer' in respect of the relevant class of persons.

27. Section 2(1) of the FTA defines transparent. Transparent "in relation to a term in a contract, means a term that:

- is expressed in reasonably plain language; and
- is legible; and
- is clearly presented; and
- is readily available to a party affected by the term".

28. The Guidelines cite *Chitty* for the purposes of providing the example, "that a seller who provides pre-contractual material making clear the otherwise surprising terms on which he deals, or whose staff follow a practice of advising customers of the terms in a clear and intelligible manner, may succeed in arguing that a term is fair."[14] This suggests from the NZCC's point of view that the transparency of a term may, at least in some circumstances, trump unfairness where the term would otherwise be viewed as unfair. However, the Guidelines further note that "[t]ransparency – or lack of transparency – will not in itself determine unfairness. But it is a key mandatory consideration, capable of influencing the court's view of whether or not a challenged term is unfair".[15]

29. In a recent Australian case Anforth member concluded in respect to transparency:

> *"I do not consider clauses 5.1b and 8 to be transparent for the following reasons:*
> *a. They are part of a 13 page agreement that is provided on-line;*
> *b. The structure of the agreement is confusing;*
> *c. The clauses appears inconsistent with clause 5.1(a) and 5.2(c)(iii).*"[16]

How is the contract as a whole likely to be viewed?

30. The court must also consider *the contract as a whole* when determining whether a term is unfair. Accordingly a court cannot consider a term in isolation – it must consider the whole contract and its operation. As the Guidelines note "[t]his means that a term that might appear unfair on its face may not be unfair when read in the context of the other terms of a contract. For example, a potentially unfair term may be counterbalanced by additional benefits such as a lower price. Similarly, an apparently fair term may be unfair when the other contract terms are taken into account."[17] Potentially unfair terms being counterbalanced by lower prices is likely to be relevant to industries that where

[14] *Chitty on Contracts* 31st edition, 2013, 15-084, at Draft Guidelines, paragraph 66.
[15] Guidelines, paragraph 71.
[16] *Malam v Graysonline, Rumbles Removals and Storage* (General) [2012] NSWCTTT 197 (18 May 2012), paragraph, 57.
[17] Guidelines, paragraph 73.

promotional pricing is common to attract volume/market share and suppliers are assuming additional risk that need protection.

Are particular terms deemed unfair?

31. Section 46M, without limiting the court's discretion in section 46L, provides the following non-exhaustive "grey list" of the kind of terms in a SFCC that may be UCTs:

- terms permitting, one party unilaterally to:
  - avoid or limit performance of the contract;
  - terminate the contract;
  - vary the terms of the contract;
  - renew or not renew the contract;
  - penalise a party for a breach or termination of the contract:
  - vary the upfront price (as defined in section 46K(2)) payable under the contract without the right of another party to terminate the contract;
  - vary the characteristics of the goods or services to be supplied, or the interest in land to be sold or granted, under the contract;
  - assign the contract to the detriment of another party without that party's consent; or
  - determine whether a contract has been breached or to interpret its meaning;
- terms that limit, or have the effect of limiting:
  - one party's vicarious liability for its agents;
  - one party's right to sue another party;
  - the evidence one party can present in proceedings relating to the contract:
- terms that impose, or has the effect of imposing, the evidential burden on one party in proceedings relating to the contract.

32. The NZCC states in the Guidelines that it "will pay particular attention to [SFCCs] that contain any of the types of listed terms".[18]

[18] As above, paragraph 78.

In what circumstances can a court declare a term unfair?

33. A court may declare a term a UCT if it is satisfied that the term is in a SFCC and:

- the declaration is not prohibited; and
- the term is unfair,

in accordance with section 46L.[19]

34. A declaration must identify the SFCC to which it applies by reference to at least one of the parties to the contract and may describe the context or conditions in which the term's inclusion in a SFCC means that the term is an UCT.[20]

What are the consequences of a term being declared unfair?

35. If a term in a SFCC is declared unfair by a court a party must not:

- apply, enforce or rely on that UCT; or
- include the UCT in a SFCC (unless the term is included in a way that complies with the terms (if any) of the decision of the court).

36. If a party continued to include the UCT (or include it in way that is viewed as contrary to the decision of the court), it may be convicted and fined under the FTA (new maximum penalties are discussed below), and ordered to pay damages or to refund money.

Are there any exceptions?

37. The new prohibition does not apply to:

- contracts of insurance (as defined in section 7 of the Insurance (Prudential Supervision) Act 2010); or
- any variation of a contract of insurance; or
- any new contract of insurance contract that has the effect of operating as a renewal of the contract, and any subsequent renewal,

if the relevant contract for insurance was entered into before 17 March 2015.

[19] Section 46I(2).
[20] Section 46I(3).

38. In respect to contracts of insurance entered into after 17 March 2015, section 46L(4) & (5) of the FTA sets out a list of terms that are deemed to be necessary to protect the legitimate interest of the insurer and are therefore cannot be declared UCTs.

REAL EXAMPLES

ACCC Report 2013

39. In March 2013 the ACCC published a report *Unfair contract terms – Industry review outcomes* (**ACCC Report**). The ACCC Report contained the results of an ACCC review of SFCCs focusing on the airline (including travel agents), telecommunications, fitness and vehicle rental industries, and online traders. The ACCC identified terms in SFCCs which it viewed as being UCTs and invited businesses to amend or remove such terms before the ACCC entered its enforcement phase. The ACCC Report notes that "….[p]articularly significant changes were achieved".[21]

40. Terms that the ACCC viewed as unfair included:

- Contract terms that allow the business to change the contract without consent from the consumer, without notice to the consumer or any adequate balancing provisions:

> *You must pay all subscription fees applicable to the plan for which you have registered. You understand that all fees and charges may be altered from time to time by us without notice, however, we will not increase the subscription fee for your plan until the end of the Minimum Contract Term.* [Telecommunications]

Amended to:

> *You must pay all subscription fees applicable to the plan for which you have registered. Failure to pay subscription or usage charges will result in the suspension or termination of your service.*

- Contract terms included in SFCCs of businesses trading online allowing the business to alter the terms and conditions during the life of the contract:

> *We may change or update this website and the terms and conditions at any time without providing you with prior notice.* [Online retail trader]

Amended to:

[21] Executive Summary.

> *We may change or update this website and the terms and conditions at any time by giving you notice as outlined below (by email, conventional mail or by posting it on the retailer's website).*

Or, as the ACCC preferred:

> *For future orders, these terms may be different and so we recommend you read these terms carefully each time you agree to them during the ordering process.*
>
> *We will not change any terms and conditions for an existing order that has been accepted by us; the terms and conditions that will apply to the order are the terms and conditions that applied at the time you placed the order.*

- Termination and 'locked in' contract issues:

> *Clause 8.5 You may not cancel, or otherwise terminate the Agreement or revoke any authority given under it after we certify that the Installation of the services has commenced.* [Solar panel installer]

One of the ACCC's concerns was that this term sought to 'lock in' the consumer once installation had commenced and implied that the consumers had no statutory rights to terminate.

Additional clause added:

> *Clause 13.8 For the avoidance of doubt, nothing in this Agreement affects your rights to terminate this Agreement in the event that you reject the goods under section 259 of the Australian Consumer Law.*

- Termination and terms that imply that a business may cancel an order after a consumer has paid for it:

> *... if your order is rejected or is not accepted, we will provide a full refund of any payment received.*

Additional balancing clause*:*

> *You may cancel an order (whether it is accepted by us or not) by contacting our Client Centre prior to the dispatch of that order. On cancelling the order, we will refund your payment.*

The ACCC will still be concerned if such terms are associated with bait advertising.

- Terms preventing consumers from relying on representations made by the business or its agents:

> *You acknowledge that you enter into this agreement entirely as a result of your own enquiries and that you do not rely on any statement, representation or promise by us or on our behalf not expressly set out in this agreement.* [Telecommunications]

The relevant business deleted this term from its SFCC in full.

Australian Cases

41. *ACCC and NRM Corporation P/L and NRM Trading P/L*[22]

The ACCC brought successful proceedings against both NRM Corporation Pty Ltd and NRM Trading Pty Ltd in respect of following UCT which the parties included in their SFCC:

> "*The customer must give 30 days written notice to terminate the contract. However, this makes the consumer liable to pay multiple fees, including an administration fee of 15%."*

The court agreed with the ACCC that the fees for termination caused a significant imbalance in the parties' contractual rights.

42. *Director of Consumer Affairs v AAPT Ltd* (Civil Claims) [2006] VCAT 1493 (August 2006)[23]

> "*Variations: We may vary any term of this Agreement at any time in writing. To the extent required by any applicable laws or determination made by the Australian Communications Authority (ACA), we will notify you of any variation*"

The Court declared this term unfair as "…it permits AAPT, but not the customer, to change the contract unilaterally…the term has the effect of permitting AAPT, but not the customer, to avoid or limit the performance of the contract".[24]

43. *Director of Consumer Affairs Victoria v Backloads.com Pty* (Civil Claims) [2009] VCAT 754

[22] This was the first court action taken by the ACCC under the unfair contract terms provisions of the *Australian Consumer Law (Schedule 2 of the Competition and Consumer Act 2010) - ACCC v Advanced Medical Institute & Ors*.
[23] Determined under Victoria's UCT regime.
[24] *Director of Consumer Affairs v AAPT Ltd* (Civil Claims) [2006] VCAT 1493 (August 2006), paragraph 50.

A supplier included a term in a clause that gave the supplier complete discretion over when the relevant goods would be delivered. This term was held to be unfair. (Note that there is the new delivery guarantee in the CGA which is discussed below.)

44. *Malam v Graysonline, Rumbles Removals and Storage* (General) [2012] NSWCTTT 197 (18 May 2012)

This was a successful case brought by the customer against an online auctioneer, graysonline.com. Graysonline included a term that was intended to exclude all liability for damage to any goods sold to the customer by graysonline.com, including in circumstances where the goods were damaged before being made available for collection. The customer demonstrated that the relevant term was unfair and was not reasonably necessary to protect the interests of graysonline.com. The term was ruled void. In this case the Consumer, Trader and Tenancy Tribunal of NSW clearly viewed that it was unreasonable to shift risk to the consumer for matters outside the control of the consumer but within the control of the supplier.[25]

Impacts on practitioners – what should you consider?

45. Practitioners drafting or reviewing terms that may be viewed as unfair should consider strategies and factors including the following:

- Is there scope to retain the term if transparency was increased by making the term more prominent (ie position, font etc) and educating staff to bring it to the attention of consumers before the agreement is entered into?
- Does the term still raise concerns when considered in the context of the contract as a whole?
- Is the term in respect to a "penalty" or is it a component of the up-front price?
- Could the term be made reciprocal so that the right applies to all parties?
- Could the term be amended to make it more reasonable and balanced as between the parties?
- Could the term be redrafted more narrowly so that it is better aligned with the business' legitimate interest that needs protecting?
- Does the clause require greater explanation of the term including why the term is included and the particular circumstances in which the term might apply?

[25] Paragraph 58.

- Always draft a provision with severability in mind.

*The following key changes to the FTA came into effect on **18 December 2013** (ie the day after Royal Assent)*

Compulsory interview powers

46. New section 47G(1) now provides the NZCC with powers similar to the powers it has under the Commerce Act 1986 to compulsorily require people to give oral evidence during some FTA investigations (whereas previously the NZCC could request voluntary interviews – but interviewees could refuse to be interviewed or answer certain questions). The new power provides a protection for the interviewee against self-incrimination (similar to section 98(c) of the Commerce Act).

47. The Commerce Select Committee considered this new power "…would make investigations more efficient, and save money and time".[26] There was a view that some parties under investigation had used stalling tactics and generally been uncooperative.

Enforceable undertakings

48. The NZCC may now accept enforceable undertakings if it believes there has been a breach of the FTA.[27] According to the Reform Bill's Explanatory Note these undertakings are "broadly based on similar provisions in the Securities Act 1978".[28]

49. Such undertakings may include agreements by a person or business to stop doing something, make compensation payments, publish corrective advertising or pay costs to the NZCC. If the party does not keep to their agreement the NZCC may apply to the Court to enforce the agreement.

50. Some parties were of the view that the purpose of this amendment was to plug a perceived gap where it was uncertain whether undertakings entered into between the NZCC and private parties were enforceable by the courts.

Management banning orders

51. A court can now also impose a management banning order which prohibits an individual from being involved in the management of a company.[29] A management banning order can be taken against an individual who: (1) has committed a criminal offence under the FTA on at least 2 separate occasions within a 10-year period, (2) is (or was at the

[26] Reform Bill's Commentary, page 10
[27] Sections 46A and 46B.
[28] Page 22.
[29] Sections 46D – 46G.

relevant time) a director/manager of an incorporated or unincorporated body that has committed a criminal offence under the FTA on at least 2 separate occasions within a 10-year period, or (3) has been prohibited by an overseas jurisdiction, in contravention of any law relating to unfair trading, from carrying on certain activities. A person who breaches a management banning order made against him or her commits an offence that is punishable by fine of up to $60,000.

52. A number of FTA cases have involved repeat offenders. The introduction of management banning orders will provide the courts with an additional remedy to help protect consumers from individuals/businesses whose modus operandi is to mislead and deceive at the expense of consumers and legitimate competition.

*The following key changes to the FTA came into effect on **17 June 2014** (ie six months after Royal Assent)*

Increased penalties

53. The maximum penalties for misleading and deceptive conduct, false representations, unfair practices and issues around product safety have increased to $200,000 for an individual (previously $60,000) and $600,000 for a body corporate (previously $200,000).

54. These are the first increases in maximum penalties since 2003. Effective penalties must be set at a level that deters potential offenders from concluding that the risk of prosecution is a cost of doing business. Accordingly the increases are timely and at the very least reflect the rate of inflation. However the maximum penalties are still below the maximum penalties for breaching the Australian Competition and Consumer Act 2010.

Unsubstantiated representations

55. The new regime introduced a prohibition against unsubstantiated representations.[30] Businesses that make claims about goods or services (whether express or implied) must have "reasonable grounds" for making those claims, at the time they are making the claim. Even if a business makes an unsubstantiated claim that later turns out to be true, this will still breach the new prohibition if a business did **not** have reasonable grounds for making that claim. The NZCC's fact sheet on unsubstantiated representations notes that "reasonable grounds" can come from information provided by reputable suppliers/manufacturers, information the business making the claim holds, or any other reasonable source (eg scientific or medical journals).

[30] Section 12B.

56. The new prohibition is effectively designed to stop businesses "jumping the gun", deliberately or otherwise, and making claims before those claims have been sufficiently validated. That validation may come in the form of rigorous and/or scientific testing carried out by a necessarily qualified and reputable party. Prohibiting businesses from making unsubstantiated representations promotes competitive markets. It prevents rogue businesses from gaining an unfair competitive advantage by making claims they do not have reasonable grounds to support, to the detriment of legitimate competitors.

57. Proceedings for unsubstantiated representations may be bought by the NZCC – no other parties may initiate proceedings for alleged breaches. It was considered that if other parties could bring proceedings the process may be open to abuse by competitors bringing proceedings against each other for the purposes of accessing confidential information during the discovery process.

58. If the NZCC issues proceedings the onus is on the defendant to prove on the balance of probabilities that they had "reasonable grounds" for making the claim (at the time the claim was made).

Contracting out

59. Previously the FTA did not expressly prevent parties from contracting out of it. Therefore some parties considered a degree of uncertainty existed as to whether or not businesses could contract out of the FTA, despite public policy arguments in support of "no contracting out" of such legislation. The new regime, however, expressly states that the general rule is that business cannot enforce any agreement (or part of an agreement) that attempts to release them from their obligations under the FTA.

60. But, the FTA also includes a new exception to that general rule where both parties to the agreement are "in trade" (ie the exception does not apply to agreements between a business and a party not "in trade"), the agreement is in writing, and the contracting out is "fair and reasonable" in the circumstances. The "fair and reasonable" limitation is aimed at protecting relatively "weaker" parties from losing their protections under the FTA. Note that only certain provisions of the FTA may be contracted out of: section 9 (misleading and deceptive conduct generally), section 12A (unsubstantiated representations), section 13 (false or misleading representations), and section 14(1) (false or misleading representations in connection with the sale or grant of land).

Extended warranties

61. The FTAA introduced a new regime for "extended warranties" which have been recently scrutinised by overseas competition authorities. Extended warranties are commonly supplied for household whiteware and brownware and other consumer electrical goods.

62. The FTA now specifies "cooling off" and extensive disclosure requirements for extended warranty agreements. Extended warranties must be in writing, use plain language, be legible and presented clearly.[31] Suppliers of extended warranties (**warrantors** – which includes the supplier and a third party if the consumer enters into the extended warranty with a person other than a supplier (eg an insurer or manufacturer)) must provide a summary of the consumer's rights under the CGA, a comparison of those rights with the (additional) benefits being offered under the extended warranty, a summary of the consumer's rights to cancel (and how to cancel) the extended warranty agreement under the FTA, and certain contact details about the warrantor.[32] This information must be disclosed on the front page of the extended warranty. The agreement must also be dated, and include all of its terms and conditions (including how long it lasts, when it expires, and the total price payable).

63. Consumers may cancel an extended warranty agreement within 5 working days from when they receive a copy of the agreement (or at any time if the warrantor has not met the specified disclosure obligations). A consumer may express their notice of cancellation in any way eg a warrantor cannot specify that cancellation must be in writing.[33]

Uninvited direct sales (door-to-door and telemarketing sales)

64. The FTAA repealed the Door to Door Sales Act 1967.[34] The FTA now sets out rules around what is termed "uninvited direct sales". An "uninvited direct sale" under the FTA is (generally) one where a business or their agent approaches a consumer uninvited at their home, workplace, or over the telephone, to try and sell goods or services, and an agreement is entered into for goods or services costing $100 or more (or a price that is uncertain at the time of supply).

65. Any uninvited direct sales must be in a clear written agreement, include details such as a description of the product, the supplier's contact details and the full purchase price. A copy of the agreement must be given to the consumer at the time the agreement is

[31] Section 36U(1).
[32] Section 36U(2).
[33] Section 36V.
[34] Section 41 of the FTAA.

entered into, or in the case of an agreement entered into over the telephone, within 5 working days after the date on which the agreement was entered into.

66. The supplier must also advise the buyer of their right to cancel the agreement (generally within 5 working days of receiving a copy of the agreement), before the agreement is entered into. A consumer may express their notice of cancellation in any way eg a supplier cannot specify that cancellation must be in writing.

Unsolicited goods

67. The FTAA repealed the Unsolicited Goods and Services Act 1975.[35] The FTA now includes unsolicited goods provisions. If a business supplies "unsolicited goods", it must explain to the recipient at the time it is delivering the goods that (1) the recipient is under no obligation to pay for the gods (unless they deliberately damage or lose them), (2) the recipient must make the goods available for collection by the supplier for a period of 10 working days after they receive them, and (3) if that collection period expires, the recipient may keep the goods as an unconditional gift without payment. The recipient may not keep the goods if they knew the goods weren't intended for them or they didn't provide the supplier a reasonable opportunity to collect the goods within the 10 day collection period. Similarly, anyone who receives unsolicited services (excluding reticulated gas and electricity) is under no obligation to pay for them, or for any loss or damage resulting for that unsolicited supply of services. It is illegal for a business to demand payment for unsolicited goods or services.

Internet sales

68. Businesses offering goods for sale over the internet must identify themselves as being "in trade" (as opposed to a private individual that is not operating in trade). Intermediaries in such transactions (eg auction websites) must take reasonable steps to ensure that sellers who are in trade identify themselves as such. This places a reasonable burden on intermediaries and would seem to be anecdotal evidence that some suppliers of used motor vehicles are not identifying themselves as "in trade".

Layby sales

69. The FTAA repealed the Layby Sales Act 1971.[36] Layby sales are now governed by the FTA. Businesses must provide customers with a clear written agreement, and are required to provide individuals with certain information, including details about their right

[35] As above.
[36] As above.

to cancel the layby sale. Businesses are entitled to charge a cancellation fee which must not be more than the "reasonable costs" incurred by the seller.

Auctions

70. The FTAA consolidates the laws relating to auctions, and clarifies how auctions must be run – including in relation to "vendor bidding". The new rules do not apply to transactions that are not conducted by an auctioneer (for example online trading platforms).

KEY CHANGES TO THE CONSUMER GUARANTEES ACT 1993

Purpose of the CGA

71. The CGA's purpose is the same as that of the FTA, namely to contribute to a trading environment in which the interests of consumers are protected, businesses compete effectively, and consumers and businesses participate confidently. To that end, the CGA provides that consumers have:

    a. certain guarantees when acquiring goods or services from a supplier (including that the goods are reasonably safe and fit for purpose and are otherwise of an acceptable quality and that the services are carried out with reasonable care and skill); and

    b. certain remedies against suppliers and manufacturers if goods or services fail to comply with a guarantee

*The following key changes to the CGA came into effect on **17 June 2014***

Contracting out

72. While the CGA previously allowed parties to contract out of the CGA (in situations where the consumer was purchasing goods or services for business purposes), the CGAA has added an additional requirement (consistent with the FTA) that it is "fair and reasonable" that the parties are bound by the "contracting out" provision. In determining whether the contracting out is "fair and reasonable", the Court must take into account the subject matter of the agreement, the value of the goods or services supplied, the respective bargaining powers of the parties (including their capacity to negotiate the terms of the agreement), and whether the parties had legal representation.

Guarantee as to delivery

73. The CGAA inserted a new guarantee as to delivery into the CGA. The new guarantee provides that where a supplier is responsible for delivering (or arranging for the delivery

of) goods to a consumer, there is an implied guarantee that the goods will be delivered at a time or within a period that has been agreed between the supplier and the consumer, or otherwise within a reasonable time (if no time period has been agreed).There is anecdotal evidence suggesting that some businesses are unaware of their new obligations and continue to attempt to shift the responsibility of delivering goods within the agreed time onto the supplier of the delivery services eg courier companies.

Delivery of gas and electricity

74. The CGAA introduced a tailored implied guarantee that gas or electricity supplied by an electricity retailer will be of acceptable quality. This means that the supply will be (1) as safe as a "reasonable consumer" would expect it to be, (2) as reliable as a "reasonable consumer" would expect supply in that place to be, and (3) of such a quality that it can be consistently used for things that a "reasonable consumer" would expect to use gas and electricity for.

75. When determining what a reasonable consumer would expect, it is assumed that the consumer has considered that the supply may be affected by emergencies outside of the control of the retailer, may be interrupted for safety, maintenance or other technical purposes, that there may be some fluctuations of supply within the tolerances permitted by regulations, that reliability may depend on the location being supplied, and that the reliability and quality of supply may be related to price. The CGA also specifies circumstances where the supply of gas or electricity will not fail to comply with the guarantee of acceptable quality, including if the gas or electricity has been used by the consumer in an unreasonable manner or to an unreasonable extent.

"Acceptable quality"

76. The CGAA also amended the definition of "acceptable quality" so that the nature of the supplier, and the context in which the supplier supplies the goods, can be taken into account by the Court. The explanatory paper noted that the amended definition should be flexible enough to take into consideration the concept of "acceptable quality" in the context of second-hand goods which are covered by the CGA when supplied in trade.

Goods sold by auction or competitive tender

77. Goods sold by auction or competitive tender are now subject to the CGA in the same way as other consumer transactions where they are purchased from a supplier in trade. Previously the implied guarantees were not available to consumers who acquired goods sold by auction or competitive tender (eg real estate and vehicles).