

REGULATORY IMPACT STATEMENT CONSUMER LAW REFORM: DECEMBER 2010

AGENCY DISCLOSURE STATEMENT

This Regulatory Impact Statement has been prepared by the Ministry of Consumer Affairs (MCA).

It provides an analysis of options to address problems that have been identified with consumer laws not adequately meeting the objectives of consumers who are able to transact with confidence and businesses which are able to compete on a level playing field. Some of the laws do not adequately address modern sales processes including the use of the internet, telephone and credit cards. Some of the laws do not clearly state the requirements of businesses and consumers, creating uncertainty and associated compliance costs. None of the consumer laws have prohibitions on unfair contract terms, unconscionability and making claims that cannot be substantiated which are unfair practices that are internationally recognised as causing detriment to consumers. Consumer law also is not harmonised with the new Australian Consumer Law. This does not accord with the Single Economic Market agenda and means New Zealand businesses and consumers are not benefitting from the deeper linkages with Australia that reduce discrimination and costs arising from different, conflicting or duplicate regulatory requirements.

There are 7 consumer laws and 2 business laws that apply to consumer transactions. The analysis of the problems with these laws has been undertaken using the framework of the OECD's Consumer Policy Toolkit. The analysis has found consumer and business detriment caused by out of date laws that are prescriptive and complex, that do not include protections against unfair contract terms, unconscionable conduct and making claims that cannot be substantiated and which, if updated, could better deliver on the objectives that consumers should be confident when they purchase goods and services, that consumers and suppliers should have confidence in market rules and consumers should have access to redress if their reasonable expectations are not met.

Whilst there is good recognition and good understanding of the Consumer Guarantees Act and the Fair Trading Act, consumers and businesses do not know of their obligations and rights with respect to other consumer laws such as the Door to Door Sales Act, the Auctioneers Act and the Unsolicited Goods and Services Act.

As New Zealand has a very similar marketplace to Australia, studies undertaken by the Australian Productivity Commission, the Australian Treasury and the Australian Competition and Consumer Commission have been used to support the analysis rather than undertake duplicate work.

MCA recommends the outcome of the Consumer Law Reform is that the Fair Trading Act should be expanded to include regulatory provisions related to direct selling, sale by auction, layby sales and unsolicited goods and services. The laws covering these matters would be repealed. This will reduce compliance costs to businesses and consumers with respect to identifying the applicable legislation. Reforming the provisions in a modern, principles-based approach will also reduce the complexity and business and consumer costs associated with complexity. MCA recommends that additional provisions are added to Part 1 of the Fair Trading Act related to unfair contract terms, unconscionable conduct and making unsubstantiated claims. These provisions will improve market competition and with respect to unconscionability enhance the common-law principle. There may be business compliance costs initially to check standard form contracts and to adjust to ensuring standard form contracts do not have unfair terms. For businesses that have made

claims without adequate information to substantiate the claims there will be an initial compliance cost to obtain this information.

MCA recommends changing licensing of auctioneers and conduct at auctions requirements. This will have initial compliance costs for auctioneers to adjust to the new requirements. MCA also recommends laws on unsolicited direct selling apply to all sales by this method valued at \$100 or more, as compared to credit sales valued at \$40 or more. This will have compliance cost for businesses using this sales method.

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STATUS QUO

There are 7 pieces of consumer law that set out rules concerning transactions between businesses and consumers and also businesses to businesses:

- Fair Trading Act 1986
- Consumer Guarantees Act 1993
- Weights and Measures Act 1987
- Auctioneers Act 1928
- Door to Door Sales Act 1967
- Layby Sales Act 1971
- Unsolicited Goods and Services Act 1975.

The Fair Trading Act and Consumer Guarantees Act are principles-based law and overall these laws and the Weights and Measures Act are very sound business and consumer law.

The Fair Trading Act promotes fair market conduct and consumer protection and complements the Commerce Act. It prohibits certain unfair practices, notably misleading and deceptive conduct and misrepresentations.

The Consumer Guarantees Act (CGA) provides that consumers have the right when obtaining goods from a person in trade that they must have clear title, meet acceptable quality including that the goods are safe, be fit for particular purpose and correspond with description.

The Weights and Measures Act provides the means by which consumers and businesses are assured of the correct quantity of goods sold by weight, measure or number.

The Auctioneers Act requires auctioneers to be licensed in order to protect consumers and vendors from financial loss caused by unreliable or incompetent auctioneers.

The Door to Door Sales Act regulates sales agreements initiated by the seller for the sale of goods and services on credit entered into at places other than appropriate trade premises.

The Layby Sales Act sets out the requirements for suppliers and rights of consumers regarding goods put on layby.

The Unsolicited Goods and Services Act sets out rules for those who send and receive (consumers and businesses) unsolicited goods or invoices for unordered goods or services.

The Sale of Goods Act 1908 and the Carriage of Goods Act 1979 which are business conduct laws, also affect consumer transactions. The Sale of Goods Act applies to consumer to consumer transactions and auctions. The Layby Sales Act is a subsidiary law to the Sale of Goods Act.

PROBLEM DEFINITION

To achieve the objectives of consumers who are able to transact with confidence, businesses which can compete on a level playing field, and consumer laws that can assist in facilitating mutually beneficial trade, consumer laws need to be up to date and applicable to the full range of modern transactions and need to be clear and easy to apply. Consumer law that is out of date, uncertain or complex is a cost to consumers and businesses. The impact is a loss in consumer confidence and a drag on the innovative potential of business.

Several areas where the Fair Trading Act and Consumer Guarantees Act are not meeting their objectives or could meet their objectives in a different way with more positive outcomes have been identified:

- Although the Fair Trading Act promotes fair market conduct and consumer protection, it does not prohibit unconscionable conduct or unfair contract terms. These are both unfair practices that impose a cost on individual consumers who are affected by their application, do not promote good market conduct and affect competition between businesses. The Fair Trading Act also does not prohibit making unsubstantiated claims. An unsubstantiated claim may be a misrepresentation but this is usually very difficult to prove. Many consumer goods are credence goods, including health products, processed food and petrol, and consumers need to be able to trust the information provided on these products.
- The Consumer Guarantees Act is not clear in its application to internet auctions and its relationship to the Carriage of Goods Act. Problems have been identified with its application to electricity, with respect to extended warranties and with respect to collateral credit.

The Fair Trading Act is very similar to and was modelled on the Australian Trade Practices Act 1974. This law will be amended on 1 January 2011 to the Competition and Consumer Act and will include the new Australian Consumer Law (ACL). There are advantages to New Zealand maintaining consumer law that, as appropriate, is complementary with Australian consumer law as, in accordance with the Single Economic Market (SEM) agenda, this promotes a trans-Tasman economy or market based on the objective that deeper economic linkages provide bigger markets in which to buy and sell goods and services, allows access to a larger and more varied pool of capital and labour and opens our economy to new ideas and technology. There is an impediment to trade when there are behind the border impediments to trade which can result from conflicting or duplicate regulatory arrangements. Complementary law also means New Zealand jurisprudence can refer to Australian jurisprudence which has greater depth because of the larger number of cases it considers. Australia and New Zealand Prime Ministers in August 2009 reaffirmed the objective to advance a single economic market including in the area of consumer law.

The Auctioneers Act, Door to Door Sales Act, Layby Sales Act and Unsolicited Goods and Services Act are old laws that are prescriptive and are not able to address the range of modern consumer transactions. It is questionable why these laws need to continue as stand alone laws and if the laws were more principles based this would mean their purpose and objectives were clearer and affected parties would be able to comply with the principles rather than follow detailed and intrusive rules. The licensing provisions of the Auctioneers Act do not accord with the Occupational Regulation framework, are inefficient and there is no publicly accessible, central register of auctioneers. There would be benefits to consumers and auctioneers from a more transparent and efficient licensing or registration.

The Carriage of Goods Act 1979 and the Sale of Goods Act 1908 have been examined with respect to their relationship with the Consumer Guarantees Act and relevance to layby sales and auctions conduct.

OBJECTIVES

The objectives of the Consumer Law Reform review are:

- to have in place principles-based consumer law that:
 - enables consumers to transact with confidence,
 - protects reputable suppliers and consumers from inappropriate market conduct,
 - is up to date and relevant now and into the future,

- is easily accessible to those who are affected by it,
 - is in line with international best practice, as appropriate, and
 - is effective and enforceable;
- to achieve simplification and consolidation of the existing law; and
 - 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.

Consumers should be confident when they purchase goods and services. Their reasonable expectations should be met when they transact, they should have access to redress if reasonable expectations are not met and consumers and suppliers should have confidence in market rules.

Consumer laws should facilitate mutually beneficial trade on equitable terms in that trade partners should have trust that our laws deliver safe products and products that are consistent with any measure, quality or other claims made.

REGULATORY IMPACT ANALYSIS

An analysis of consumer and business detriment as a result of consumer laws not meeting the above objectives has been undertaken using the OECD Consumer Policy Toolkit Framework¹. The Framework includes assessments of the detriment and whether the detriment warrants a policy action, identification of the range of policy actions/options and evaluation of these options. This analysis is set out below including an assessment of the costs and benefits of the options. Specific analysis has been undertaken of:

- Unfair contract terms in standard form contracts
- Unconscionability
- Making claims that cannot be substantiated
- Layby Sales
- Unsolicited Direct Sales
- Unsolicited goods and services
- Consumer Guarantees Act statutory guarantees
- Auction conduct and licensing.

More detailed analysis is set out in Additional Papers that are available on www.consumeraffairs.govt.nz.

¹Consumer Policy Toolkit, OECD, 2010

Unfair contract terms in standard form contracts

<p>The consumer problem and its source/ What is the problem?</p>	<p>Standard form contracts are a valuable and efficient tool for businesses and consumers. Their benefit is that an individual contract does not have to be negotiated for every consumer and consumers know that the contract terms are generally acceptable. A problem occurs when a term is unfair. Unfair terms are terms that allocate risks to consumers rather than suppliers, who are usually better placed to manage those risks. Alongside this, the consumer's rights are usually limited in ways that are unbalanced.</p> <p>The legal remedies and protections available to consumers against terms in contracts they are deemed to have agreed to are very limited.</p> <p>Standard form contracts mean that the freedom to contract becomes artificial as consumers do not have the opportunity to read, understand or negotiate the terms. They are usually drafted by professionals and therefore the supplier has the advantage of advice on the contract that outweighs that available to the consumer.</p> <p>Contracts may also be long and not written in Plain English, meaning that people do not read or cannot understand the contract terms.</p> <p>Standard form contracts are "take it or leave it". Whilst this does not amount to duress, the consumer is under some pressure if the alternative is to forgo the product.</p> <p>Unfair contract terms provisions are internationally included as part of unfair practices provisions in consumer law. Australia, the UK and Europe have unfair terms provisions. New Zealand consumers are disadvantaged from not having access to such provisions.</p>
<p>Measure of Consumer Detriment / Magnitude of Problem</p>	<p>As unfair terms are not illegal in NZ, there are not recorded examples. However, there are many anecdotal examples. The MCA review of the Credit Contracts and Consumer Finance Act 2003 notes possible unfair practices related to contract terms.</p> <p>Given the New Zealand market is substantially similar to that in Australia, the analyses of whether unfair contract terms are a problem in Australia undertaken by the Australian Productivity Commission and others have been used to indicate the measure of detriment. The Productivity Commission concluded that there was persuasive evidence of the prevalence of unfair terms in Australia, although there is limited information on the extent of detriment associated with them as data is inherently hard to collect. That is, since they were not prohibited, many people did not complain and the data was not collected. This is a similar situation in New Zealand.</p> <p>The Productivity Commission summarises the problem or</p> <p>The Australian reports that we have used are:</p> <ol style="list-style-type: none"> (1) <i>Unfair Contract Terms Working Party Discussion Paper</i>, Standing Committee of Officials of Consumer Affairs (SCOCA) (January 2004) (2) <i>Unfair Terms in Consumer Contracts</i>, Standing Committee on Law and Justice, NSW Legislative Council, Report 32 (November 2006) (3) <i>Unfair contract terms in Victoria: Research into their extent</i>,

	<p><i>nature, cost and implications</i>, Consumer Affairs Australia, Research Paper No. 12 (October 2007)</p> <p>(4) <i>Review of Australia's Consumer Policy Framework</i>, Australian Productivity Commission (30 April 2008)</p> <p>(5) <i>An Australian Consumer Law Fair Markets – Confident Consumers</i>, SCOCA (February 2009)</p>
<p><i>The nature of the detriment</i></p>	<p>Personal detriment is the inherent unfairness of such terms. People feel that their trust is abused.</p> <p>Structural or economic detriment occurs when the shifting of risk on to the consumer is not economically efficient, either between competing suppliers or between consumers and suppliers. Ideally, if consumers could trade off the shift in risk for a reduction in price, the detriment could be mitigated. However, it is unusual for the consumer to be aware of the unfair term and therefore unlikely to be able to make such a trade off. If a price trade off is available, the consumer may not be aware of that situation, and find that they have onerous contract terms for a cheap product. This is economically and personally detrimental.</p> <p>Research in 2007 included the findings that consumers do not necessarily make the link between signing up for a product or service and consciously entering into a contract². The common complaints were about contracts with unclear service fees or additional fees, changes to contract terms, excessive penalties or changes to the goods or services provided. Consumers believed contracts were legally binding and that they were compelled to abide by the terms and conditions, regardless of whether they were fair or reasonable. This means that consumers can feel locked into unsuitable contracts.</p> <p>In the research, consumers reported that they had experienced emotional detriment (feeling annoyed, disappointed, frustrated), economic detriment (feeling ripped off and cheated), and social detriments (losing confidence in suppliers and their own judgement). The research showed that consumers are incurring both financial and emotional costs after encountering unfair contract terms. This research also shows that consumers do not lodge complaints, or if they do, they lodge them with the supplier. This is usually because they do not know how to deal with unfair contract terms, both before the contract is signed and once they encounter a problem. There is also evidence of a flow-on effect – consumers who come across unfair contract terms become suspicious of written agreements and drop out of the market.</p>
<p><i>What is the scale of consumer detriment?</i></p>	<p>The SCOCA Discussion Paper concludes that consumers bear additional costs and risks and have no practical redress, while there is no cost or disadvantage to businesses. For example, contracts by suppliers never provide for any penalty against the supplier for a breach of contract by the supplier, but they often include significant penalty fees and charges for breaches by consumers. The use of standard form contracts means that many consumers are affected at a time. Suppliers often use similar contracts.</p> <p>The NSW Commissioner of Fair Trading advised the Standing Committee on Law and Justice of the NSW Legislative Council during their inquiry into unfair contract terms (Nov 2006) that the</p>

² *Unfair contract terms in Victoria: Research into their extent, nature, cost and implications*, Consumer Affairs Victoria, Research Paper No. 12 (October 2007)

	<p>incidence of unfair contract terms is probably increasing. He stated that the use of standard form contracts for everyday items has increased as most of those products and services have only become common items within the last 20 years, e.g. mobile phones, internet contracts, pay TV.</p>
<p>Measure of Business Detriment</p>	<p>(1) Market conduct cost</p> <p>Businesses are affected if they are put at a marketing disadvantage by competitor businesses whose standard form contracts have unfair terms. For example, a term making it difficult for a consumer to cancel a contract can lead to that consumer being unable to switch products or services. There is anecdotal evidence of this occurring in the electricity and gas sectors.</p> <p>(2) Market participation cost</p> <p>Small businesses are similar to consumers with respect to only having the option of standard form contracts which may have unfair terms.</p> <p>(3) Ability to participate in international trade</p> <p>When New Zealand laws are not consistent with international best practice this does not give New Zealand firms exposure to operating in deeper and more complex markets, which could manifest itself in an inability to compete and operate in international markets.</p>
<p>The likely consequences of taking no policy action /Cost of Status Quo</p>	<p>Cost to Consumers</p> <p>There is quantitative evidence from Victoria and various other countries that suggests somewhere between 5 and 15% of consumers might be detrimentally affected by unfair terms. The Productivity Commission noted, however, the evidence about the overall extent of detriment suffered by consumers is limited. Given these difficulties, an equally relevant question is whether the incidence of detriment is low enough not to be relevant for policy action. It concluded it is not clear, however, whether trying to gather more information would result in any more evidence³.</p> <p>If no policy action is taken the consumer detriment noted above will not be addressed.</p> <p>Australia, UK and Europe have in place protections against unfair contract terms. If New Zealand does not have unfair contract terms provisions, this will mean consumers and small businesses will have a lesser level of protection. In particular, this does not accord with the SEM principle of reducing discrimination and costs trans-Tasman arising from different, conflicting or duplicate regulatory requirements, including consumer laws.</p> <p>The possible tools available to consider potential poor business practices which could be used by industry dispute resolution schemes are reduced.</p> <p>Cost to Businesses</p> <p>If no policy action is taken the business detriment noted above will not be addressed.</p>

³ Review of Australia's Consumer Policy Framework, Australian Productivity Commission (30 April 2008)

	<p>The Small Business Advisory Group (SBAG) notes that unfair contract terms provisions would contribute to developing stronger and more efficient markets by encouraging improved competition through better information and transparency around allocation of risk in standard form contracts. If no policy action is taken this outcome would not be achieved.</p> <p>The possible tools available to consider potential poor business practices which could be used by industry dispute resolution schemes are reduced.</p> <p>Costs to Government</p> <p>The possible tools available to consider potential poor business practices which could be used by the Commerce Commission are reduced. This is particularly relevant to oversight of market conduct in the credit industry.</p>
POLICY OPTIONS	
<i>(1) No change</i>	<p>The Ministry does not favour this option.</p> <p>The costs to consumers, businesses and government are outlined above.</p> <p>The status quo would mean that business uncertainty and costs noted below would not occur. Many submitters on the Consumer Law Reform, particularly from business representatives, support the status quo.</p>
<i>(2) Add provisions to the Fair Trading Act the same as in the Australian Consumer Law (including transitional provisions providing that law applies only to new contracts or those amended or renewed).</i>	<p>The benefits are:</p> <p>Consumers: Addresses detriment and costs of status quo noted above. There would be additional protections against unfair practices and it would extend the areas the Disputes Tribunal and industry disputes resolution schemes can consider when dealing with disputes.</p> <p>Government: Increases the possible tools available to consider potential poor business practices which could be used by the Commerce Commission. Alignment of Australian and New Zealand consumer law, meeting the SEM Agenda.</p> <p>The costs are:</p> <p>Businesses argue there will be compliance costs related to checking existing standard form contracts and the ongoing need to ensure there are not unfair terms in the new standard form contracts. Given many businesses operate in Australia and New Zealand, the standard form contracts used in Australia could be used, with minimal compliance costs. Businesses also argue there is an uncertainty and transaction cost from consumers being able to challenge that a term is unfair. MCA considers transitional provisions will help to address part of this concern. Business representatives consider that New Zealand should observe how the unfair contract terms provisions in Australia are applied before any similar provisions are introduced in New Zealand.</p> <p>Small businesses note that the Australian provisions do not cover small businesses and therefore the reach is not sufficient to address costs they could incur from unfair contract terms in standard form contracts.</p> <p>Consumer costs could increase if businesses increase prices to address their perceived increase in costs related to uncertainty. However, the Productivity Commission noted in its report that in</p>

	<p>those countries and jurisdictions that have introduced new regulations on unfair contract terms there is no evidence of significant costs or other burdens for business (and therefore consumers).</p> <p>Government: The Commerce Commission would have increased costs related to enforcement of the new provisions and providing guidance.</p>
<p><i>(3) Add provisions to the Fair Trading Act on unfair contract terms</i></p> <ul style="list-style-type: none"> • <i>similar to the Australian Consumer Law provisions, but</i> • <i>also provision for the Commerce Commission to obtain from the Court a ban on the use of specified unfair terms by particular suppliers, and</i> • <i>provide for the provisions to cover small businesses.</i> <p><i>(Includes transitional provisions providing that law applies only to new contracts or those amended or renewed.)</i></p>	<p>The Ministry favours this option.</p> <p>The benefits are</p> <p>Consumers and small businesses: Addresses detriment and costs of status quo noted above. There would be additional protections against unfair practices and it would extend the areas the Disputes Tribunal and industry disputes resolution schemes can consider when dealing with disputes.</p> <p>Businesses: Would contribute to developing stronger and more efficient markets by encouraging improved competition through better information and transparency around allocation of risk in standard form contracts.</p> <p>Would provide for the Commerce Commission to look at sector standard form contracts rather than taking action against a representative company. This reduces costs to businesses.</p> <p>Government: Increases the possible tools available to consider potential poor business practices which could be used by the Commerce Commission. Harmonisation of Australian and New Zealand consumer law, meeting the SEM Agenda.</p> <p>The costs for businesses are the same as above in option (2) (except those for small businesses and there is overall reduced uncertainty cost). The costs for Government are as above in option (2).</p>
<p><i>(4) Add provisions to the Fair Trading Act on unfair contract terms</i></p> <ul style="list-style-type: none"> • <i>similar to the Australian Consumer Law provisions, but</i> • <i>with enforcement of these provisions and the remedy that the courts may strike out an unfair term in a standard form contract only through the Commerce Commission, and</i> • <i>provision for the Commerce Commission to obtain from the Court a ban on the use of specified unfair terms by particular suppliers.</i> • <i>(Includes transitional provisions providing that law applies only to new contracts or those amended or renewed.)</i> 	<p>This option provides for some but not the full range of consumer benefits as consumers could not individually pursue action and the industry dispute resolution schemes would not be able to consider unfair contract terms.</p> <p>It addresses the uncertainty costs raised by business in that only the Commerce Commission could take court action with respect to an alleged unfair contract term. The other costs are as above in option (2).</p>

Unconscionability

<p>The consumer problem and its source / What is the problem?</p>	<p>Unconscionability is a long-standing doctrine established by the courts in their equitable jurisdiction to provide a just outcome where other legal concepts such as duress, fraud or mistake do not provide adequate relief. In practice, the legal test for unconscionability is difficult to meet, as the stronger party needs to be found to have taken advantage of the weaker to an extent which is “against good conscience”.</p> <p>One of the features of the doctrine is that it only applies as a defence in court where the stronger party is seeking to enforce a contract. Unconscionability is “remedial”, but there is no positive legal obligation under the case law on anyone not to act unconscionably. The threshold tests for disadvantage or disability are difficult to meet in relatively low-value consumer cases.</p> <p>Unconscionability cases that come before the courts usually involve high-value transactions, such as \$12.5 million contracts to buy land entered into by a property developer with terminal cancer. Low value transactions are rarely litigated and unconscionability is a case law concept.</p> <p>Another problem is that the doctrine is limited to the formation of contracts only, not to the conduct or decisions that a stronger party may make during the course of the contract.</p> <p>Unconscionability provisions that extend the common law concept are an established part of the Australian consumer protection framework.</p>
<p>Measure of Consumer and Business Detriment / Magnitude of Problem</p>	<p>Measuring the detriment for unconscionable conduct is extremely difficult as the nature of the vulnerable person means they are not likely to complain. Also the threshold for “disadvantage” or “disability” is very subjective.</p> <p>Reports or complaints usually go directly to the supplier or industry involved and usually from a third party. For example, a rest home resident whose family will discover the disadvantage and complain to the rest home or the Ministry of Health, or a small business who would approach their own lawyer.</p>
<p><i>The nature of the detriment</i></p>	<p>The detriment for consumers can be both personal and economic. The personal detriment can be significant in terms of confidence in the market. Consumers can also withdraw economically and socially after a distressing experience.</p> <p>Economically, the detriment is usually through paying more for a good or service than is reasonable, paying for an unnecessary good or service, and becoming financially at risk of loss of assets.</p> <p>For small businesses, the detriment is economic. The goods or services they provide can be diminished or withdrawn if a stronger party (for example, their supplier or franchiser) changes their contract unilaterally. This can lead to the small business becoming uneconomic and ceasing to trade.</p>
<p><i>What is the scale of consumer and business detriment? Who is experiencing detriment?</i></p>	<p>Few consumers would be at risk from having their disability or special disadvantage exploited. However, the depth of the detriment can be extreme. Depending on the nature of the conduct, the detriment can have flow-on effects to other people, i.e. members of the family.</p> <p>Evidence from the Fair Trade Coalition indicates that there are business sectors which are at risk of being affected by unconscionable conduct by their suppliers, such as service</p>

	stations, horticultural contract growers, franchisees. These types of businesses are common in New Zealand.
The likely consequences of taking no policy action /Cost of Status Quo	<p>Cost to Consumers</p> <p>If no policy action is taken the detriment noted above will not be addressed.</p> <p>The MCA Additional Paper on Unconscionability summarises cases taken by the Australian Consumer and Competition Commission (ACCC) on unconscionability. In New Zealand, these cases could not be taken because our law does not include the depth of unconscionability provisions as in Australia. As well, the ACCC is able to take representative cases which the Commerce Commission cannot do because there are no unconscionability enforcement powers in the Fair Trading Act. Representative cases can be very expensive but provide case law that can be used by the Disputes Tribunals and industry dispute resolution schemes.</p> <p>Not having unconscionability provisions similar to Australia means New Zealand consumers and small businesses have a lesser level of protection. It also does not accord with the SEM principle of reducing discrimination and costs trans-Tasman arising from different, conflicting or duplicate regulatory requirements, including consumer laws.</p> <p>Cost to Businesses</p> <p>If no policy action is taken the business detriment noted above will not be addressed.</p> <p>The Fair Trade Coalition considers there is already business detriment that cannot be addressed because of the limitations of the law. Cases will only be able to be taken by individual businesses at considerable expense.</p> <p>Costs to Government</p> <p>The possible tools available to consider potential poor business practices which could be used by the Commerce Commission are reduced.</p>
POLICY OPTIONS	
<i>(1) No change</i>	<p>The Ministry does not favour this option.</p> <p>The costs to consumers, businesses and government are outlined above.</p> <p>Various submitters opposed unconscionability provisions being added to the Fair Trading Act. Reasons given included that unconscionability is an emotive and uncertain term, existing case law includes the equitable remedy of unconscionability and provides sufficient protection for vulnerable consumers, adding unconscionable conduct provisions to the Act would compromise freedom of contract and there is no evidence of a problem. Businesses opposing unconscionability provisions include Fonterra, Business NZ, the Franchise Association of NZ, Telecom, NZ Retailers Association, NZ Business Roundtable and New Zealand Chambers of Commerce.</p>
<i>(2) Add provisions to the Fair Trading Act the same as in the Australian Consumer Law</i>	<p>The Ministry favours this option.</p> <p>The benefits are</p> <p>Consumers and small businesses: Addresses detriment and costs of status quo noted above through additional protections</p>

	<p>against unconscionability. There would be particular benefits in relation to the Commerce Commission being able to take representative cases. Fair Trading Act provisions aligned with the Australian Consumer Law will enable the courts to consider the Australian jurisprudence. This provides depth of application and also helps to reduce some aspects of uncertainty.</p> <p>Businesses: Would contribute to developing stronger and more efficient markets by encouraging good market conduct.</p> <p>Government: Increases the possible tools available to consider potential poor business practices which could be used by the Commerce Commission. Harmonisation of Australian and New Zealand consumer law, meeting the SEM Agenda.</p> <p>The costs are:</p> <p>Businesses: argue that any law change has a compliance cost related to increased uncertainty about how the law will be monitored and applied.</p> <p>Government: The Commerce Commission would have increased costs related to enforcement of the new provisions and providing guidance.</p>
<p><i>(3) Add oppressive conduct provisions to the Fair Trading Act consistent with the Credit Contracts and Consumer Finance Act</i></p>	<p>The benefits are:</p> <p>Consumers and small businesses: Addresses detriment noted above through additional protections against oppression. Unconscionable conduct comes within the definition of oppression.</p> <p>Government: Increases the possible tools available to consider potential poor business practices which could be used by the Commerce Commission. The Commerce Commission notes there would be benefits in alignment with the Credit Contracts and Consumer Finance Act.</p> <p>The costs are as above for business. Consumers and small businesses would not be able to benefit from jurisprudence in Australia.</p> <p>Government: The Commerce Commission would have increased costs related to enforcement of the new provisions and providing guidance. Does not align or harmonise with Australia and thus does not meet the SEM agenda.</p>

Making Unsubstantiated Claims

<p>What is the problem?</p>	<p>Purchasing decisions by consumers have an important role in the development of dynamic and competitive markets, and consumers and businesses need to be able to trust the information they are given to make the best decisions. Suppliers making misleading, false or unsubstantiated claims compromise the effective operation of markets.</p> <p>Consumer laws should facilitate mutually beneficial trade on equitable terms in that trade partners should have trust that our laws deliver products that are consistent with any measure, quality or other claims made.</p> <p>Substantiation refers to the requirement for verification, confirmation, corroboration, evidence or proof that a representation made by a trader is true.</p> <p>The Fair Trading Act prohibits misleading or deceptive conduct in</p>
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	<p>trade and false or misleading representations in connection with the supply of goods and services in trade. The misleading or deceptive conduct and false or misleading representation provisions in the Fair Trading Act do not effectively address situations where it is not possible or practical for consumers, competing suppliers or the Commerce Commission to know whether a claim is deceptive, misleading or false.</p>
<p>Measure of Consumer Detriment / Magnitude of Problem</p>	<p>Measuring the detriment from unsubstantiated claims is difficult because it is not possible to know how many claims currently made by suppliers of goods and services are unsubstantiated. Any claims made by a supplier might be unsubstantiated, or might be a misrepresentation. It is very difficult for consumers, competing suppliers or the Commerce Commission to know whether claims in relation to credence goods (for example, goods where there are claims about environmental friendliness, ethical business practices, miracle cures, health benefits, competitive pricing and business opportunities) are unsubstantiated, or misrepresentations, without carrying out their own testing or investigation, which is often time consuming and expensive because the testing or investigation is invariably technical.</p>
<p><i>The nature of the detriment</i></p>	<p>Consumers: The market detriment is that consumers are buying credence goods and services – and may be paying a premium because of the claims being made by the supplier – and the supplier has no legal obligation to verify or substantiate the claims being made. The supplier may not even know whether the claim is supported by any evidence.</p> <p>Businesses: Trade could be affected over time if there is not confidence that New Zealand laws support claims that are made on products. This could manifest itself in trade restrictions or increased risk aversion requiring a greater depth of substantiation with trading partners.</p> <p>More ethical suppliers which have incurred the expense of ensuring their claims are properly substantiated, or which are not prepared to make unsubstantiated claims, are disadvantaged by unfair competition from less honest traders.</p> <p>Not dealing with unsubstantiated claims in the Fair Trading Act is also an inconsistency between New Zealand law and the Australian Consumer Law.</p>

<p><i>What is the scale of the consumer detriment? Who is experiencing the consumer detriment? Are there substantial costs to the economy?</i></p>	<p>It is not certain how many suppliers make unsubstantiated claims when they market their goods and services. Presumably it is relatively rare for suppliers to make outright misrepresentations because that is an offence under the FTA. However the risk of being held to account for a misrepresentation is relatively low and suppliers may currently make unsubstantiated claims with virtual impunity in practice.</p> <p>The detriment will primarily be incurred by consumers buying credence goods,. There is an impression that many of these claims are new, and that they are increasing over time.</p> <p>Competing traders are also disadvantaged by unsubstantiated claims made by less scrupulous or careful suppliers.</p> <p>Essentially substantiation is about honesty and fair market conduct; traders should not make claims about their goods and services without being able to demonstrate a reasonable basis for making the claim, especially where the claims are "credence" claims where it is too difficult for a consumer to determine whether a product is true to its claims and where the purchaser pays a premium because of the claim being made, e.g. health, scientific, environmental or ethical claims. Consumers effectively have to take these claims on trust, and honest traders face unfair competition from unscrupulous traders.</p>
<p>The likely consequences of taking no policy action /Cost of Status Quo</p>	<p>The benefits are:</p> <p>Suppliers will not be required to incur the cost of substantiating their claims about their goods and services, and those costs will not be passed on to consumers.</p> <p>The costs are:</p> <p>Consumers: Consumers may be paying for goods and services where it is not certain whether the claims made are valid. Consumers must take the claims on trust, or incur the cost (directly or indirectly through the Commerce Commission) of proving any claims are false or misrepresentations.</p> <p>Business: Competing businesses may lose sales to products where the claims made are unsubstantiated and may be false. Businesses which do substantiate their claims may suffer a cost disadvantage compared to suppliers which have not substantiated their claims.</p> <p>Businesses will also be detrimentally affected when confidence in the integrity of the market as a whole is diminished.</p> <p>There would be no cost to suppliers making unsubstantiated claims.</p> <p>Government: Enforcement action by the Commerce Commission in respect of misrepresentations would be more expensive than enforcement action in respect of unsubstantiated claims, because the Commerce Commission needs to prove that a representation is actually false or misleading, rather than simply being unsubstantiated. The Commerce Commission needs to have reasonable grounds to suspect that an offence has been committed to use its information gathering powers under the Fair Trading Act, which is a more difficult threshold to reach in relation to misrepresentations than substantiation.</p>

POLICY OPTIONS	
<i>(1) No change and continued reliance on the investigatory and enforcement provisions of the FTA.</i>	<p>The Ministry does not favour this option.</p> <p>The costs and benefits are as stated above.</p>
<i>(2) Follow Australia: Add provision for Substantiation Notices the same as in the ACL.</i>	<p>The Australian approach has been to focus on the information imbalance between suppliers and consumers, and to empower the regulator to require traders to share the knowledge they have about the claims they make if they are served with a Substantiation Notice. The ability to issue Substantiation Notices is effectively an additional investigatory tool for the regulator. The Commerce Commission's existing investigatory powers are limited to situations where it reasonably suspects an offence has been committed.</p> <p>Making an unsubstantiated claim is not an offence in Australia (so the conventional investigatory powers do not apply), but the information provided (or not) under a Substantiation Notice would be assessed by the regulator to decide whether a case against the supplier who made the claim is warranted, on the basis that the lack of substantiation amounts to making a false or misleading representation.</p> <p>The benefits are:</p> <p>Consumers/Businesses: Additional enforcement powers for the Commerce Commission would improve market conduct to the extent that suppliers manage the risk of being required to substantiate their claims. This would provide a level of protection to consumers and competing businesses which does not currently exist.</p> <p>Government: There would be SEM alignment benefits from this option, and the Commerce Commission would have an additional enforcement tool which would be cheaper to use than having to prove actual misrepresentations.</p> <p>The costs are:</p> <p>Consumers/Businesses: This option is in fact a limited procedural response to the problem of unsubstantiated claims, which does not go to the heart of the problem and may have a limited effect on market conduct. Suppliers could choose to take the risk of not substantiating their claims, and would only be caught out if the Commerce Commission chose to issue a Substantiation Notice.</p> <p>Businesses that choose not to take that risk would incur the cost of substantiating their claims, and that cost may be passed on to consumers.</p>
<i>(3) Add a general prohibition on unsubstantiated claims enforceable by the Commerce Commission.</i>	<p>Making an unsubstantiated claim could be an offence, and the defence available to the trader would be that there was prior substantiation for the claim on which it was reasonable for the trader to rely. A representation which is subsequently substantiated would still have been unsubstantiated when it was made, so it would still be an offence. A representation which could not subsequently be substantiated would remain an unsubstantiated claim, and it would also probably be false and misleading, which would be an offence under the Fair Trading Act.</p> <p>The benefits are:</p> <p>Consumers/Businesses: A general prohibition would prohibit</p>

	<p>suppliers from making claims without having reasonable grounds to justify or substantiate those claims; enhance consumers' confidence in making purchasing decisions; improve market conduct; and protect and differentiate those businesses which do substantiate their claims from those which do not.</p> <p>Government: A general prohibition would reduce costs of enforcement for the Commerce Commission and provide harmonisation benefits from SEM. Also aligns New Zealand with international consumer law best practice. Unsubstantiated claims can be used as a trade barrier (e.g. food miles, environmental impact claims). Having law that aligns internationally could assist in putting New Zealand's case in international fora.</p> <p>The costs are:</p> <p>Businesses may have costs in having to substantiate claims when previously they did not do so, and those costs may be passed on to consumers.</p> <p>Having the general prohibition only enforceable by the Commerce Commission (rather than consumers and businesses) will limit costs to businesses.</p>
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Layby Sales

<p>The consumer problem and its source / What is the problem?</p>	<p>Layby sales are still a popular form of purchasing goods but evidence indicates that businesses are not applying the provisions of the Layby Sales Act. Consumers have lost money and goods through this and do not have the knowledge to challenge if there is a problem.</p> <p>The law is self-enforcing meaning that consumers have to go back to the retailer. While this appears to be often successful, there are cases of disagreement and/or widespread misinterpretation of the law which cannot be escalated easily.</p> <p>The Commerce Commission receives complaints on layby sales but does not have powers to consider them unless it can establish a breach of the Fair Trading Act (misrepresentation or misleading or deceptive conduct).</p> <p>Lack of clarity of the definitions in the Act leads to retailers not applying the 'rules' uniformly or fairly. There is uncertainty for retailers about whether a deposit is a layby.</p>
<p>Measure of Consumer and Business Detriment / Magnitude of Problem</p>	<p>The National Consumer Awareness Survey 2009 indicated that layby sales are still a popular way to purchase goods: 17% of consumers use layby to purchase certain goods, and women use layby more than men (22% vs 12%). Young people under 30 are the group most likely to use layby. The survey also indicated that 8% of consumers using layby had a problem with their transaction. The problems were mainly resolved (82%) by approaching the retailer.</p> <p>Submitters to the Consumer Law Reform discussion paper suggested there were more problems than the survey showed. This was followed up by MCA with the Commerce Commission, Consumer NZ and the Citizens Advice Bureaux. They provided information on layby sales' problems indicating these were principally due to ignorance of, and a lack of clarity in, the law.</p> <p>The information received from the Citizens Advice Bureaux showed that their most serious layby complaints were to do with</p>

	<p>high-value goods over \$1000 and that resolution of these problems was not easy.</p> <p>The evidence from the consumer organisations indicates that the same small set of problems is occurring over again in different parts of the country. This indicates that individual consumer action may resolve their own isolated cases, but the lesson is not passed on to other retailers. These problems include a lack of a written contract, retailers changing the payback period, incorrect information on the law being given to the consumer and excessive selling costs being applied when a layby is cancelled.</p>
<i>The nature of the detriment</i>	The detriment is principally economic, as consumers are likely to lose money or be unable to complete their transaction and lose their good. Their confidence in this form of payment could affect future purchasing.
The likely consequences of taking no policy action /Cost of Status Quo	<p>Costs to Consumers</p> <p>The self-enforcing nature of the current Act is working well in most cases, but the evidence shows that the same problems are widespread over the country and that single action by a consumer does not filter through to other retailers. A central agency to undertake some enforcement action or education would be a significant improvement to ensuring consistency of the law.</p> <p>Cost to Businesses</p> <p>Retailers have asked for clarification of certain definitions to improve the understanding of layby sales transactions and the rights and obligations, e.g. so that all parties know what an instalment is, and what a termination cost/selling cost is. This would reduce the scope for potential problems to arise.</p> <p>Retaining the specific nature of the Act will continue the complexity and confusion that retailers are experiencing. Retailers react by not following the Act because they are unclear of the requirements.</p> <p>Cost to Government</p> <p>Not taking advantage of the opportunity the Consumer Law Reform presents to address the problems with the uncertainty about the existing law. The need for specific law is not apparent and principles-based layby sales protections in the Fair Trading Act would be in line with modern law.</p>
POLICY OPTIONS	
<i>(1) No change</i>	The Ministry does not favour this option. The costs to consumers and businesses are as above. This would not address the problems of uncertainty with the current law.
<i>(2) Include Layby Sales provisions in the Fair Trading Act, have provisions similar to Australian Consumer Law (ACL) but with current protections in NZ law continuing.</i>	<p>This is the Ministry's preferred option.</p> <p>The benefits are:</p> <p>Consumers and retailers: Addresses detriment noted above. Clearer legislation will reduce uncertainty.</p> <p>Government: Alignment of Australian and New Zealand consumer law, meeting the SEM Agenda. Increased scope of Commerce Commission allowing for improved enforcement of market conduct.</p> <p>The costs are:</p> <p>Retailers will have specific requirement to provide written</p>

	contracts (which some currently do not have). The NZ Retailers Association, however, has not raised this as an issue.
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Unsolicited Direct Selling

<p>The consumer problem and its source/ What is the problem?</p>	<p>Unsolicited direct selling situations can lead to poor purchasing decisions because:</p> <ul style="list-style-type: none"> • Traders use pressure sales techniques; • Consumers are likely to feel vulnerable because they are unprepared for the sale and a stranger is in their house or workplace uninvited. <p>The current legislation is the Door to Door Sales Act (DDSA).</p> <p>The DDSA does not apply to cash or credit card sales. It is also unclear as to what is meant by appropriate trade premises and whether the DDSA applies to some of the sales techniques (e.g. telemarketing) that have been developed since its enactment.</p> <p>While the DDSA provides basic protection provisions, it is open to interpretation and thus manipulation by traders who wish to avoid coverage. It is the Act's coverage (or lack of) that results in many consumers not receiving protection.</p> <p>The DDSA is self-enforcing and therefore relies on consumers enforcing their rights, which is often difficult when the law is ambiguous and there is a power imbalance between consumer and trader.</p>
<p>Measure of Consumer and Business Detriment / Magnitude of Problem</p>	<p>Consumer personal detriments include:</p> <ul style="list-style-type: none"> • Consumers may not make an optimal purchase because of limited information and choice, and pressure exerted by the vendor; • Consumers are unable to return goods which they do not really want; • Consumers are unable to contact the trader to cancel the purchase; • Consumers are burdened with payment for the goods; • Consumers have their personal space invaded – this can be particularly distressing for more vulnerable consumers, for example, the elderly (many door to door sellers target the vulnerable); • Consumers are inconvenienced by traders visiting or calling at, for example, dinner times. <p>The National Consumer Survey found that 26% of New Zealanders purchased via door to door selling, telemarketing or other direct selling and 16% of these people experienced a problem.</p> <p>The Commerce Commission reports that it receives a disproportionate number of complaints regarding door to door selling and telemarketing when compared with complaints regarding sales at either physical retail stores or online. In particular, in recent years, telemarketing calls from telecommunications or electricity companies have resulted in a significant number of complaints to the Commission.</p> <p>Consumer advocacy agencies report that they receive numerous complaints about door to door sellers and telemarketers. Media also from time to time report issues about this topic; for example,</p>

	<p>in early 2010 with regard to door to door selling of KiwiSaver.</p> <p>Structural detriment arises from the DDSA's ambiguity around its application. Detriment includes:</p> <ul style="list-style-type: none"> • Added compliance costs to interpret the law; • Added costs to implement workarounds for what might otherwise be legitimate business; • Loss of business opportunities (and thus consumer choice) because of conservative interpretation.
<p>The likely consequences of taking no policy action /Cost of Status Quo</p>	<p>Cost to consumers:</p> <p>A significant group of consumers do not have protection or redress because the DDSA does not cover those who pay by cash or credit card, and traders may take advantage of the Act's ambiguity to circumvent being covered.</p> <p>Door to door sellers often target the vulnerable, who are often not in a position financially to have the burden of the unwanted costs.</p> <p>Cost to businesses:</p> <p>Legislation that is ambiguous often adds compliance costs for interpretation and costs to implement workarounds for what might otherwise be legitimate business. Conservative interpretation may result in loss of business opportunities (and thus consumer choice) because of conservative interpretation. For example a software company did not offer discounted software to the employees of their business customers because it interpreted that any approach to employees would be a door to door sale.</p> <p>Ambiguity can lead to significant court costs. For example, interpretation around whether the DDSA applied to telemarketing was a central issue in <i>Commerce Commission v Telecom Mobile Ltd</i> which went to the Court of Appeal.</p> <p>Cost to government:</p> <p>Not taking advantage of the opportunity the Consumer Law Reform presents to address the problems with the uncertainty about the existing law. The need for specific law is not apparent and principles-based protections in the Fair Trading Act would be in line with modern law.</p> <p>The possible tools available to consider potential poor business practices which could be used by the Commerce Commission are reduced.</p>
<p>POLICY OPTIONS</p>	
<p><i>(1) No change</i></p>	<p>The Ministry does not favour this option. The costs and benefits are as in the above section.</p>
<p><i>(2) Industry self-regulation</i></p>	<p>Whilst the Direct Selling Association and the Direct Marketing Association have good codes of conduct, their membership does not cover all the market and problems are occurring outside of their coverage. This option would not address the consumer detriment problems noted above.</p>
<p><i>(3) Including in the Fair Trading Act regulation of unsolicited direct sales the same as the Australian Consumer Law (ACL) provisions</i></p>	<p>Main provisions:</p> <ul style="list-style-type: none"> • Applies to all sales regardless of payment method; • Definition of direct selling uses the concept of invitation to enter into negotiation; • Prohibits the supply of goods valued at over \$500 during the

	<p>cooling-off period;</p> <ul style="list-style-type: none"> • Regulates the time direct sellers can call on consumers; • Enforced by the Commerce Commission. <p>The benefits to consumers are:</p> <p>The application to all sales means that consumers who bought by cash or credit card are now protected. The detriment from pressure selling exists regardless of how the good is paid for.</p> <p>A definition using “invitation to enter into negotiation” better covers the cause of the vulnerability in direct selling situations than the concept of initial approach. This definition clarifies what is direct selling and assists in deterring enticement practices, and thus provides better protection through increased certainty and application.</p> <p>Consumers have time to reconsider the purchase without the ‘temptation’ of the good in possession.</p> <p>Consumers knowing that direct sellers can only call at specified hours may assist in reducing inconvenience and vulnerability.</p> <p>The benefits to Government are:</p> <ul style="list-style-type: none"> • Alignment of Australian and New Zealand consumer law; • Meeting the SEM Agenda; • Increased scope of Commerce Commission allowing for improved enforcement of market conduct. <p>The costs to businesses are:</p> <p>The scope of regulation of unsolicited direct selling is extended to all sales not just credit sales.</p> <p>Businesses that do not sell by credit arrangements (which are not currently covered by the DDSA) will need to provide documentation to meet disclosure requirements.</p> <p>Prohibition of supply is not favoured because it puts direct sellers at a disadvantage in relation to store and online retailers, and there appears to be few problems with consumers being able to return goods.</p> <p>Regulation of hours is also not favoured as there have not been significant issues in New Zealand.</p> <p>The protection provisions of the ACL go further than the DDSA and include prescription not considered necessary in New Zealand.</p>
<p><i>(4) Adopting some of the Australian Consumer Law (ACL) provisions – but not prohibiting supply of goods during the cooling-off period nor regulating the hours direct sellers may call on consumers. The minimum payment covered by unsolicited direct selling regulation is increased to \$100.</i></p>	<p>This is the Ministry’s preferred option.</p> <p>The benefits are:</p> <p>Consumers and businesses benefit from a clear definition of unsolicited direct sales as noted above under (3).</p> <p>Businesses: By not adopting the full ACL approach, costs associated with the more prescriptive provisions are avoided. (There has been considerable complaint from the Australian Direct Selling Association about the costs associated with the prescriptive provisions.)</p> <p>Government: Harmonisation of Australian and New Zealand consumer law, meeting the SEM Agenda.</p>

	<p>Increased scope of Commerce Commission allowing for improved enforcement of market conduct.</p> <p>The costs to businesses are:</p> <p>The scope of regulation of unsolicited direct selling is extended to all sales not just credit sales and therefore some businesses will have to provide documentation to meet disclosure requirements.</p>
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Unsolicited Goods and Services

<p><i>What is the problem</i></p>	<p>The Sales of Goods Act 1908 says that retaining goods demonstrates an intention to purchase them. Some traders send goods to consumers or businesses without being asked and rely on the consumer's inertia to not return the goods. Because of the Sale of Goods Act, a recipient's right to choose whether to purchase the goods is removed as they have demonstrated an intention to purchase the goods by not returning them.</p> <p>Consumers and businesses are also harmed by the unfair practices of some traders who invoice for goods or services that the trader knows have not been delivered or were not ordered. Some consumers and business will pay for these invoices under pressure.</p> <p>The current legislation is the Unsolicited Goods and Services Act 1975 (UGSA).</p> <p>While the UGSA provides protection for consumers and business who receive unsolicited goods or services or false invoices, it is not well-recognised and is written in outdated language that is hard to understand. The penalties are also outdated.</p> <p>Despite the UGSA, traders are using unsolicited goods and services to increase sales, or false billing to increase revenue, often targeting the vulnerable consumers or small businesses who are most likely to succumb to inertia and are not in a financial position to bear the burden of the unwanted cost.</p> <p>The UGSA is self-enforcing and therefore relies on recipients enforcing their rights, which is often difficult when the law is not easy to understand and there is a power imbalance between consumer and trader. As well, there is a lack of awareness of the UGSA. The National Consumer Survey found only 1% of New Zealanders can name the UGSA.</p> <p>The UGSA also imposes a burden on consumers to care for unsolicited goods as if they own them until the trader collects them, for 3 months or 1 month if they tell the trader that they do not wish to purchase the goods. The consumer will be liable for any damage to the goods during that period.</p>
<p>Measure of Consumer and Business Detriment / Magnitude of Problem</p>	<p>Detriment from unsolicited goods includes situations when:</p> <ul style="list-style-type: none"> • People pay for goods and services they did not want and are removed of the ability to choose what they purchase. • People are forced to pay for the return of an unwanted good to the trader. • People carry the risk and are liable for any damage to the good before the trader collects it within the 1 month or 3 month timeframes. • Vulnerable people feel pressured into purchases with traders

	<p>that may exert pressure from a distance.</p> <p>Detriment from false billing for goods and services not ordered or delivered includes:</p> <ul style="list-style-type: none"> • People pay for goods or services that they have not received. • People are threatened with debt collection procedures by a trader for false invoices and feel confused and vulnerable. <p>The impact on individual consumers or businesses of unsolicited goods may be small– it will typically be the cost of a small good that can be sent in the mail. The cost to individuals who pay for unsolicited services or false invoices can vary and may be large. However, a large number of individual cases will have a detrimental effect on the market as a whole.</p> <p>Despite the UGSA, the Ministry of Consumer Affairs received 3 complaints in 2010 from consumers about unsolicited products, such as educational DVDs, and services, such as text messages sent to cell phones.</p> <p>The Commerce Commission reports that it receives significant complaints from consumers and small businesses about false billing and unsolicited directory entries.</p> <p>Consumer NZ has, on its website, two 2009 examples of consumers feeling pressured to pay for unsolicited goods, showing that the unfair practice is still used by traders. Other media also report on unsolicited goods and services periodically.</p>
<p>The likely consequences of taking no policy action /Cost of Status Quo</p>	<p>Costs to Consumers:</p> <p>Direct costs related to purchasing goods which were not ordered.</p> <p>Costs, including anxiety, of having to hold unordered goods for up to 3 months. Costs arising because of consumers lack of understanding and recognition of the protections offered by the UGSA.</p> <p>Costs to Government:</p> <p>Not taking advantage of the opportunity the Consumer Law Reform presents to address problems with the existing law on unsolicited goods and services and to reduce the number of law consumers are required to recognise.</p>
<p>POLICY OPTIONS</p>	
<p><i>(1) No change to the status quo</i></p>	<p>The Ministry does not favour this option. The costs to consumers and businesses are as above.</p> <p>Businesses argue that any law change has a compliance cost related to increased uncertainty about how the law will be monitored and applied.</p>
<p><i>(2) Require traders to inform recipients of unsolicited goods or services about their rights and obligations under the UGSA.</i></p>	<p>The Ministry does not favour this option.</p> <p>The benefit in relation to the status quo is:</p> <p>Consumers and businesses continue to be protected by the current legislation and more are aware of, and exercise their, rights under the UGSA in relation to unsolicited goods, but not false invoices.</p> <p>The cost in relation to the status quo is:</p> <p>Including information on all unsolicited goods will incur a</p>

	compliance cost for traders.
<i>(3) Including in the Fair Trading Act regulation of unsolicited goods and services along the same lines as the Australian Consumer Law (ACL) provisions with no modifications.</i>	<p>The Ministry does not favour this option.</p> <p>The benefits in relation to the status quo are:</p> <p>The new provisions are better understood and more widely recognised by consumers and businesses. The protections do not change.</p> <p>The increased scope of Commerce Commission and more appropriate penalties allows for improved enforcement. Full alignment of Australian and New Zealand consumer law, meeting the SEM Agenda, benefits New Zealand's trade position.</p> <p>The cost in relation to the status quo is:</p> <p>Increase costs to the Government of enforcement by the Commerce Commission.</p>
<i>(4) Including in the Fair Trading Act regulation of unsolicited goods and services along the same lines as the Australian Consumer Law (ACL) provisions, with a modified collection period of 10 days.</i>	<p>This is the Ministry's preferred option.</p> <p>The benefits in relation to the status quo are:</p> <p>The new provisions are better understood and more widely recognised by consumers and businesses. The period of time that a recipient bears the burden of caring for an unsolicited good is reduced from the maximum of 3 months to 10 working days.</p> <p>Better alignment of Australian and New Zealand consumer law, meeting the SEM Agenda, benefits New Zealand's trade position. Increased scope of Commerce Commission and more appropriate penalties allows for improved enforcement.</p> <p>The costs in relation to the status quo are:</p> <p>Increase costs to the Government of enforcement by the Commerce Commission.</p> <p>The shorter timeframe for collection of 10 working days, as opposed to 1 month or 3 months, will require traders to collect unsolicited goods sooner than under the current provisions.</p>
<i>(5) Including in the Fair Trading Act regulation of unsolicited goods and services along the same lines as the United Kingdom's Unsolicited Goods and Services Act 1971 (whereby unsolicited goods are treated as a gift).</i>	<p>The Ministry does not favour this option.</p> <p>The benefits in relation to the status quo are:</p> <p>Consumers and businesses bear none of the risk of caring for unsolicited goods as any unsolicited goods become the property of the recipient immediately.</p> <p>Increased scope of Commerce Commission and more appropriate penalties allowing for improved enforcement of market conduct.</p> <p>The cost in relation to the status quo is:</p> <p>The practice of encouraging consumers to purchase goods by sending goods unsolicited used by traders is effectively banned.</p>

The Consumer Guarantees Act (CGA)

Electricity and the CGA	
What is the problem?	In 2003 the Consumer Guarantees Act (CGA) was amended to clarify that it applies to the supply of electricity and gas. As a result of some continued uncertainty on behalf of electricity

	<p>retailers about their potential liability to consumers, the major retailers took a case to the High Court against the Electricity and Gas Complaints Commission's interpretation that the responsibility for the acceptable quality guarantee rested with retailers.</p> <p>The judgment concluded that electricity retailers may be liable to consumers for breaches of the guarantee of acceptable quality. This view accords with the general objective of the CGA.</p> <p>The CGA creates a theoretical incentive for retailers and distribution companies to minimise the costs from faults. In the case of retailers in particular, their ability to respond to the incentive is limited, because nothing they do directly affects the quality of the electricity they supply.</p> <p>Electricity retailers are concerned that they are responsible for faults over which nothing they do directly affects the quality of the electricity supplied. They have not been able to negotiate indemnities with the lines companies that are more likely to be actually responsible for the faults the retailers are liable for.</p> <p>There is a gap between the "goods" guarantee and the "services" guarantee under the CGA, which means retailers have more responsibility and liability than the lines companies, so even if lines companies indemnify retailers to the extent of lines companies' own responsibility under the CGA, the indemnity would not cover the full extent of retailers' liability for breaches of the CGA acceptable quality guarantee.</p> <p>The gas industry has a similar structure to the electricity industry and the same issues have been raised.</p> <p>The law is clear that consumers can seek redress from the retailer about a quality breach. Retailers, however, are reluctant to provide redress for something they cannot control. This has resulted in delays for individual consumers obtaining redress, with sometimes significant individual impact.</p>
<p>Measure of Consumer and Business Detriment / Magnitude of Problem</p>	<p>Retailers are not in a position to manage any of the liability imposed on them under the CGA. This risk will then be priced into tariffs and passed through to consumers. Some retailers advise that they have not yet priced this risk into their tariffs because of the effects of competition in the electricity sector, and difficulties understanding the magnitude of the risk because of the complexity of the High Court judgment and the small number of claims by consumers. The value of the risk, once quantified, may pose a barrier to entry for small, new entrant retailers.</p> <p>Any costs and losses allocated from consumers to retailers or lines companies will ultimately be borne by other consumers (through the prices they pay) or by retailer or lines company shareholders (if the costs are not recoverable through prices).</p> <p>Rules and regulations made under the Electricity Industry Act do not provide for compensation to consumers or retailers when a transmission or distribution fault causes unacceptable electricity quality. Distribution companies have to meet some service requirements under agreements with retailers, the Electricity Industry Code and the regulation of price and quality under the Commerce Act, but these are minimal. Standards generally apply across a whole network, and are not set with regard to consumers' expectations. For example, a lines company only has to meet the Commerce Act quality standard 2 out of 3 years, and</p>

	<p>the Commerce Commission has several options open to it to promote compliance – applying for compensation on behalf of consumers is just one. Transpower has no enforceable service obligations under the Code or agreements with retailers.</p>
<p>The likely consequences of taking no policy action /Cost of Status Quo</p>	<p>Electricity and gas retailers have not been able to negotiate indemnities with the distribution and transmission companies that are more likely to be actually responsible for the faults the retailers are liable for, because these companies are natural monopolies.</p> <p>The problems were raised in submissions by retailers on the Electricity Industry Bill. In response to these submissions, the Commerce Committee recommended that Parliament should add a section to the Bill requiring the new Electricity Authority to consider forcing lines companies to indemnify retailers in agreements between them (called use of system agreements) for retailers' liability to consumers for breaches of acceptable quality caused by faults on the lines companies' networks.</p> <p>However this is an indirect solution, which may or may not be effective. A more appropriate solution is to amend the CGA as the source of the responsibility or liability being imposed on retailers and lines companies. An amendment to the CGA would also be more permanent than indemnities in use-of-system agreements, which can be renegotiated.</p> <p>The current loss allocation is not efficient. It is not possible for efficient loss allocation to be achieved contractually because of the natural monopoly status of distribution and transmission.</p>
<p>POLICY OPTIONS</p>	
<p><i>(1) No change to the status quo.</i></p>	<p>The Ministry does not favour this option. The costs are outlined above.</p>
<p><i>(2) Amend the Consumer Guarantees Act so that suppliers of electricity are required to meet the service guarantee of reasonable skill and care only.</i></p>	<p>The Ministry does not favour this option.</p> <p>The benefit in relation to the status quo is: Retailers and distribution and transmission companies: Neither party would be responsible to consumers for damage or inconvenience caused by the unacceptable quality of electricity.</p> <p>The costs in relation to the status quo are: Consumers: Individual consumers will have to meet the cost of electricity faults where the fault is not caused by a lack of reasonable skill and care by a lines company, or the cause cannot be determined. Individual consumers would have to prove that the service provider (usually the lines company) has not met a reasonable standard of skill and care. It would be very difficult for consumers without technical and legal expertise to meet the burden of proving that a lines company has breached the service guarantee.</p> <p>This option is not consistent with the general principle of the CGA.</p>
<p><i>(3) Amend the Consumer Guarantees Act to provide for a statutory indemnity for retailers against distribution and transmission companies for</i></p>	<p>The Ministry does not favour this option.</p> <p>The benefits in relation to the status quo are: Consumers: Allocating responsibility to the party that causes the</p>

<p><i>breaches of skill and care.</i></p>	<p>defect by breaching the reasonable skill and care obligation creates an incentive to adhere to standards of reasonable skill and care where there is currently no obligation. Better performance by lines companies of their obligations may result in electricity that is of a more acceptable quality.</p> <p>Retailers: Would have less liability than under the status quo.</p> <p>The costs in relation to the status quo are:</p> <p>Retailers: Would have no indemnity from lines companies for faults which are not caused by a failure of reasonable skill and care by lines companies, and which therefore fall through the gap between guarantee for the service and the good.</p> <p>Distribution and transmission companies: Will face the costs of loss or inconvenience to consumers for breaches of reasonable skill and care in providing line or transmission services.</p>
<p><i>(4) Amend the Consumer Guarantees Act to provide for a statutory indemnity for retailers against distribution and transmission companies for breaches of acceptable quality that occur on their networks.</i></p>	<p>This is the Ministry's preferred option in combination with options (5) and (6).</p> <p>The benefits in relation to the status quo are:</p> <p>Consumers: Allocating responsibility to the party that has the most control over the cause of a breach of acceptable quality creates an incentive to manage more of the risks. Retailers are not in a position to respond to that incentive, but in some cases lines companies are. The cost of the unmanageable risk that is put back onto consumers will be less and tariffs will decrease over time, or increase less than the status quo. The quality of electricity will better reflect that expected by consumers.</p> <p>Retailers: While retailers will still be liable to consumers for breaches of acceptable quality, the indemnity would apply where the retailer can prove that a lines company has breached its duty to provide line function services with reasonable skill and care. The barrier for new entrant retailers will be removed.</p> <p>The cost in relation to the status quo is:</p> <p>Lines companies: The uncertainty of the acceptable quality guarantee will be transferred to lines companies. There may be some transaction costs in resolving disputes about liability with retailers. There may also be some situations where lines companies are required to compensate retailers or consumers through industry specific rules on top of CGA liability.</p>
<p><i>(5) Amend the Consumer Guarantees Act to provide for a statutory indemnity for retailers against distribution and transmission companies for breaches of acceptable quality that occur on their networks, except where the retailer has been compensated under industry specific regulation, or the distributor or transmission company was following an instruction under industry specific</i></p>	<p>This is the Ministry's preferred option in combination with options (4) and (6).</p> <p>The benefits in relation to the status quo are:</p> <p>Distribution and transmission companies: They are not required to compensate retailers twice for the same event, or if they were following orders from a market operator or industry regulator, such as the system operator or Electricity Authority.</p> <p>Government: This option achieves cohesion between different regulatory frameworks.</p>

<i>regulation.</i>	
<i>(6) Amend the Electricity Industry Act to allow the approved electricity and gas dispute resolution scheme to resolve disputes between retailers and lines companies in relation to CGA liability.</i>	<p>This is the Ministry's preferred option in combination with options (4) and (5).</p> <p>The benefit in relation to the status quo is:</p> <p>Consumers, retailers and distribution and transmission companies: The Electricity and Gas Complaints Commission (EGCC) has expertise and experience in resolving complaints about electricity and the CGA. Its expertise and experience could be used to settle disputes between lines companies and retailers. The EGCC already considers CGA responsibility between retailers and lines companies where parties disagree. Allowing centralised dispute resolution will reduce transaction costs and ensure consistency.</p> <p>The cost in relation to the status quo is:</p> <p>Retailers and distribution and transmission companies: An increase in levies payable to the EGCC will result but will be less than for dispute resolution through the courts.</p>
Extended Warranties	
The consumer problem and its source/ What is the problem?	<p>Extended warranties are an insurance typically offered in association with the purchase of goods, typically electronics and secondhand vehicles. Extended warranties provide remedies that are similar to those already provided under the CGA (repair, replace, refund). They may also offer a range of benefits not covered by the Act, such as on-site repair and coverage of fair wear and tear. This said, there are some extended warranties that do not offer any substantive additional benefit meaning that the cost to the consumer can be considered as an economic rent.</p> <p>For consumers, the issue with extended warranties is that they do not necessarily have sufficient information to make an informed value decision regarding the warranty. The issue arises from the extended warranty providers' use of detailed policies and retailers' lack of understanding of the law and of the extended warranty products they are selling.</p> <p>From a business perspective the issue is that all extended warranties are being categorised as an economic rent not offering any benefit on top of the legislation. For "genuine" extended warranties this generalisation has the potential to discredit their product and disadvantage the provider by reducing their ability to promote and sell their product.</p>
Measure of Consumer and Business Detriment / Magnitude of Problem	<p>The detriment to the individual consumer is that they may spend their money on an essentially irrelevant and useless product. This is not an efficient use of their resources.</p> <p>The 2009 National Consumer Survey indicated that the majority of consumers have the preconceived notion that an extended warranty will actually provide additional benefits and therefore be a good purchase decision.</p> <p>The 2007 Consumer New Zealand Mystery Shopper exercise found there was strong retailer emphasis on selling extended warranties, confusing or misleading sales patter and a distinct lack of knowledge of the CGA and its application to retail situations. The Commerce Commission has indicated that enforcement regarding retailers' product claims is difficult because of the lack of documentation.</p>

	The magnitude of detriment to businesses offering “genuine” extended warranties results from the ongoing negative publicity categorising all extended warranties as an economic rent. Recent critique by Consumer New Zealand and Target highlight this.
The likely consequences of taking no policy action /Cost of Status Quo	Consumers will continue purchasing extended warranties on an uninformed basis and potentially paying an economic rent for access to remedies already provided by law.
POLICY OPTIONS	
<i>(1) No change</i>	The Ministry does not favour this option. The costs to consumers and businesses are as above.
<i>(2) Including in the Consumer Guarantees Act a requirement to disclose what an extended warranty provides above the statutory guarantees of the Act, and a 7 day cooling-off period.</i>	This is the Ministry’s preferred option. The benefits are: Consumers will have the information to be able to make an informed value decision about the extended warranty, reducing the potential that they pay an economic rent. Retailers will have clear information to convey to consumers about the extended warranties they are selling or promoting. Extended warranty providers and critics will be able to clearly differentiate “genuine” products from those that offer no benefit. The documentation will provide the Commerce Commission with a better basis on which to investigate representations regarding extended warranties. The costs are: Businesses will be required to assess and modify documentation for their extended warranty products to identify the benefits above those provided statutorily under the CGA.
<i>(3) Including in the Consumer Guarantees Act requirements to disclose what the warranty provides above the statutory guarantees of the Act, to provide a 7 day cooling-off period; and to provide a 7 day opt-in period.</i>	The Ministry does not favour this option. The benefits are: Consumers will have the information and time to be able to make an informed value decision about the extended warranty reducing the potential that they pay an economic rent. It would also provide consumers with the right to purchase an extended warranty after purchasing goods for which a warranty was offered. The costs are: Businesses will be required to assess and modify documentation for their extended warranty products to identify the benefits above those provided statutorily under the CGA. Businesses would also face costs associated with administering a 7 day cooling-off period and 7 day opt-in period. Further, some providers already offer after sale extended warranty products and the requirement on all providers potentially damage the market position of those providers.

Auctions Conduct and Licensing

The consumer problem and its source / What is the problem?	<p>Auctions are a form of sale still commonly used. They provide an important market mechanism to dispose of goods in a quick and efficient manner. Auction sales are exempt from the CGA guarantees. The issues relating to auction sales include:</p> <ul style="list-style-type: none"> ▪ Confusion as to whether the CGA applies to goods sold via internet auction (i.e. through websites such as Trade Me). ▪ That legislation removes basic consumer guarantees when goods are bought using this method of sale.
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	<p><u>Auction Conduct and Licensing</u></p> <p>A further issue which is directly related to auctions is to do with the licensing of auctioneers. The regime currently used is a negative licensing one, however it has not been changed since its introduction in 1928. An associated problem concerns the fees that are charged for an individual to become licensed as an auctioneer. The regime that is currently used has not been assessed within the Ministry of Economic Development occupational regulation framework.</p> <p>Auction conduct is also of concern as consumers who attend auctions do not know or understand the rules about how the auction should be run. "Vendor bids" are a pressing issue, the use of which is common among some auction houses. The Sale of Goods Act and the Property Law Act provide specific rules about conduct at auctions.</p>
<p>Measure of Consumer and Business Detriment / Magnitude of Problem</p>	<p>Consumers face detriment with respect to auctions as they deal with confusion about the CGA. The exemption in this Act makes it unclear to the average consumer when they are, and when they are not, protected by the guarantees provided for in the CGA. This confusion has arisen from new means of purchasing goods through the internet; methods which were never considered when the CGA was enacted.</p> <p>The assessment of the problem about auctions is largely anecdotal. Trade Me and Consumer NZ have expressed concerns that due to changes in technology and the unforeseen ability to purchase goods through the internet, there is no reason for outdated legislation which did not provide for such sales methods, to mean that consumers are not protected when making purchases in today's economy. Additionally, Dr Jackie Blue's Private Members Bill – the Consumer Guarantees Amendment Bill – noted the problems with the CGA exemption and seeks to clarify the issue by specifically providing that competitive online sales by suppliers are covered by the CGA.</p> <p><u>Auction Conduct and Licensing</u></p> <p>The fact that there is no central register of all licensed auctioneers makes it difficult for both consumers and businesses to know whether or not they are dealing with an individual who is licensed, and who has not had their licence revoked for an offence under the Auctioneers Act or another relevant piece of legislation.</p> <p>The detriment is principally economic, as consumers could potentially pay significantly more than is warranted if they are unaware that vendor bids are allowed in auctions, for example. A few businesses that conduct auctions do not allow vendor bids, regardless of the fact that if notified, they are allowed under legislation. Many businesses still do however, and this can cause a large detriment to consumers where they are unaware of such practices.</p>
<p>The likely consequences of taking no policy action /Cost of Status Quo</p>	<p>A significant group of consumers are excluded from protection under the CGA due to the specific exemption in the Act. Certain traders who sell goods through "internet auction" would use this exemption to avoid having to provide guarantees to consumers, especially where the means of sale are not technically auction sales.</p> <p>As internet auctions are very widely used these days, such an exemption will affect a large number of consumers in their day to</p>

	day purchasing.
POLICY OPTIONS	
<i>(1) No change</i>	This option is not favoured. The costs to consumers and businesses are as above. This option would not address the problems that have been identified with the current law.
<i>(2) Negative licensing regime similar to that used for secondhand dealers, pawnbrokers, and motor vehicle traders covered in a new Part of the Fair Trading Act</i>	<p>This is the Ministry's preferred option with respect to the licensing of auctioneers.</p> <p>The licensing would be in accordance with the occupational regulation framework. As significant harm could be caused to individuals selling or purchasing at auctions, some form of licensing is necessary. The Additional Paper on "Auctions, Auctioneers, and the Consumer Guarantees Act" (on the Ministry of Consumer Affairs website) discusses the licensing issue in detail and explains why a negative licensing regime is the best option.</p>
<i>(3) Rules about the conduct at auction to be contained in a new Part in the Fair Trading Act</i>	<p>This is the Ministry's preferred option.</p> <p>The benefits are:</p> <p>Consolidating all the various provisions relating to conduct at auctions (that are currently in three separate pieces of legislation) into one piece of legislation will enable both consumers and businesses to easily identify what is and is not allowed to be done at an auction sale. It will reduce uncertainty for all parties concerned. Such consolidation will mean greater transparency in auction sales, which means consumers are able to make a more informed decision. It could also lead to lower prices where vendor bids are clearly notified and consumers are fully aware of the situation.</p> <p>The conduct at auctions would fall under the Commerce Commission's purview, which will be beneficial to consumers as it will improve the enforcement of market conduct. Further discussion and information can be found in the Additional Paper.</p> <p>The costs are:</p> <p>Where the increase in transparency subsequently leads to lower prices, this could result in a decrease in commission to the auctioneer. However, as vendor bids are not being banned altogether but are simply required to be clearly identified, this cost may not realistically eventuate.</p>
<i>(4) All auction sales are covered by the guarantees in the CGA, except the guarantee of acceptable quality for secondhand goods sold by a registered auctioneer</i>	<p>This is the Ministry's preferred option.</p> <p>The benefits are:</p> <p>Providing the consumer with the CGA guarantees that previously did not apply to any sales conducted by auction, will protect the consumer to a greater degree. It will also serve to increase the consumer's confidence when both buying and selling at auction.</p> <p>The costs are:</p> <p>Businesses compliance costs could be increased as they are now required to provide guarantees as to repair, replacement parts, etc, for goods sold at auction, where previously they would not have to. This could lead businesses to pass on this increase in compliance costs to consumers by placing higher reserve prices on items.</p>

CONSULTATION

The discussion document “Consumer Law Reform” was released in June 2010. Two stakeholder meetings were held – one in Auckland and one in Wellington in July 2010. Both were well attended with between 60-100 present at each covering business and consumer interests. 112 submissions were received commenting on the discussion document proposals. Oral hearings of submissions were also held on 9 and 10 August.

As part of the consultation process, 5 Additional Papers were produced by the Ministry of Consumer Affairs on unfair contract terms, unconscionability, referencing good faith in a Fair Trading Act purpose clause, electricity and the Consumer Guarantees Act and layby sales. The latter 4 topics are contentious issues and these papers respond to comments made in the submissions and provide further analysis. These papers were forwarded to all those who made submissions and the opportunity afforded for further response (though with a short response period). A number of submissions on these papers were received. Several other Additional Papers have also been forwarded to submitters for their information providing background to the recommendations on the Consumer Law Reform as a result of the consideration of submissions.

The Minister of Consumer Affairs also met with a number of stakeholders including businesses, the Commerce Commission and the Disputes Tribunals Referees. Officials from the Ministry of Consumer Affairs met with a number of stakeholders including the Small Business Advisory Group, the Legislative Design Committee, electricity retailers and lines companies, Transpower, the Electricity Authority.

RECOMMENDATIONS

MCA recommends the Fair Trading Act is amended to include regulatory provisions related to unsolicited direct selling, sale by auction, layby sales and unsolicited goods and services. The existing laws covering these matters would be repealed.

MCA recommends that additional provisions are added to Part 1 of the Fair Trading Act related to unfair contract terms, unconscionable conduct and making unsubstantiated claims.

MCA recommends the Consumer Guarantees Act is amended to remove the exemption for sales by auction and competitive tender (except auction of secondhand goods by a registered auctioneer), to require information disclosure and a cooling off period for extended warranties and to provide that electricity suppliers – retailers, distributors and transmission companies – must meet the guarantee of acceptable quality.

IMPLEMENTATION

It is proposed the above recommendations are implemented through a Consumer Law Reform Bill.

MONITORING, EVALUATION AND REVIEW

It is proposed that there is a requirement to review the effectiveness of the new laws and report to Parliament within 5 years of the amendment legislation coming into force.