

## Consumer Law Reform Bill

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The Consumer Law Reform Bill (**Bill**), a significant and wide-ranging piece of legislative reform, recently had its second reading in Parliament and is expected to be introduced into law later this year. The Bill proposes amendments to various consumer laws such as the Fair Trading Act 1986 (**FTA**) and Consumer Guarantees Act 1993 (**CGA**), and includes new stipulations on how and on what terms businesses can trade with consumers.

The focus is to modernise New Zealand consumer law and align it further with similar regulations currently in effect in Australia. As a consequence, it is recommended that businesses review their current trade practices and ensure that they are prepared for the most significant overhaul of consumer laws in recent times.

### Unfair Trading Terms

A key feature of the Bill is its proposed amendment to the FTA in relation to “unfair contract terms”. If a business’ standard form consumer contracts include terms that are “unfair”, then these may be set aside by the courts and deemed unenforceable. The Bill provides examples of terms that could fall into this category, having particular regard to where one party may:

- avoid or limit the purpose of the contract;
- terminate, vary or renew the contract;

- unilaterally determine whether a contract has been breached or interpret its meaning;
- be penalised for breach of contract (and the other may not);
- assign the contract.

Businesses can expect an increase in compliance costs as they review their standard contracts and, in particular banks, with their multitude of standard form documentation, can expect a busy time ahead.

### Unsubstantiated Representations

The Bill also provides a general requirement that businesses making representations be able to substantiate their claims. This seems a reasonable requirement, however the Bill does place the burden on the business making the representation to prove its claim if challenged (previously the burden lay with the Commerce Commission to make its case). This may increase compliance costs for some businesses, as extra resources are directed towards preparing documentation in the event of potential challenges, and require further care be taken when making any claim.

Most importantly for a business is that it have reasonable grounds for making a representation, irrespective that it may not be false nor misleading.

Excluded from this general rule are representations that a reasonable person would not expect to be

substantiated. This exception was included so as not to inhibit creative advertising or its use of “puffery” claims.

### **Contracting Out**

Another proposed amendment permits parties in trade, if it is “fair and reasonable”, to contract out of sections 9 (misleading and deceptive conduct), 12 (false or misleading representations) and/or 14 (false representations in relation to land) of the FTA.

Although it will be left for the courts to decide what is “fair and reasonable”, the Bill does provide that regard should be had to the features of the parties’ bargain such as respective bargaining positions, access to legal advice and ability to negotiate. Similarly, businesses will also be permitted to contract out of certain CGA provisions if in doing so it is “fair and reasonable”.

### **Penalties**

The Bill proposes enhancing the enforcement powers of the Commerce Commission and the penalties applicable for serious breaches of the FTA. The maximum penalty for a breach is increased to \$200,000 for individuals, and \$600,000 for companies. Furthermore, any individual who is convicted of two or more breaches of the FTA may now be banned from being a director or acting in trade for up to ten years.

New powers of the Commerce Commission include the ability to conduct compulsory interviews under the FTA and enter premises without a warrant in order to investigate product safety.

The rationale behind the increase in deterrents and powers is that it will enable consumers to transact with more confidence and protect reputable suppliers and consumers from inappropriate market conduct.

### **Carriage of Goods Act 1979**

There is some good news for those relying on freight and distribution companies for safe passage of their products and/or raw materials. The Bill proposes that the maximum recoverable amount under the CGA for damaged goods be increased from \$1,500 to \$2,000. If passed, this will be the first time that the maximum recoverable amount has changed since last amended in 1989.

### **Conclusion**

Businesses should be proactive and review their contract terms in particular as a matter of priority. Those already following developed best practice guidelines may not be greatly affected however other businesses, particularly those with multiple standard form consumer contracts, are best advised to undertake a thorough review now before it is too late.

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