john mcbride
BARRISTER

CONSUMER AND COMPETITION LAW IN NEW ZEALAND

INTRODUCTION

New Zealand's consumer and competition laws are scatted across a number of statutes:

Consumer law

- Sale of Goods Act 1908
- Door to Door Sales Act 1967
- Lay-by Sales Act 1971
- Unsolicited Goods and Services Act 1975
- Fair Trading Act 1986
- Weights and Measures Act 1987
- Consumer Guarantees Act 1993
- Privacy Act 1993
- Credit (Repossession) Act 1997
- Gambling Act 2003 (re sales promotions)
- Credit Contracts and Consumer Finance Act 2003
- Motor Vehicle Sales Act 2003
- Food Act 1981 plus Food Standards Australia and New Zealand - FSANZ Code (Food Code)
- The yet to be passed new Public Health Act would give the ability to make regulations to deal with non-contagious health risks such as obesity, the obvious target being food advertising and labelling.

"Voluntary" consumer law

There is an increasing tendency for industry to self-regulate. Depending on your viewpoint, that is either because industry is seeking to head off government regulation, or is simply acting as a good citizen. In this category in consumer law we have:

- The Advertising Standards Association Codes and complaints procedure: www.asa.co.nz;
- The Television Commercials Approvals Bureau - TVCAB: www.tvcab.co.nz, which pre-vets all TVCs;
- The New Zealand Television Broadcasters Council - NZTBC: www.nztbc.co.nz, which promulgates standards for both programmes and TVCs, and is becoming increasingly active in the area of food advertising.

Competition law

- Commerce Act 1986
- Secret Commissions Act 1910
- Electricity Industry Reform Act 1998
- Telecommunications Act 2001
- Dairy Industry Restructuring Act 2001

The key laws

However, the 3 key laws (which are described below) are:

- Fair Trading Act 1986
- Consumer Guarantees Act 1993
- Commerce Act 1986.

THE FAIR TRADING ACT 1986

The prohibition on misleading and deceptive conduct

The central thrust of the Fair Trading Act is simple and easy enough for traders and their marketing people to understand: don't mislead or deceive.

That general prohibition bites on any *conduct* that is *likely* to *mislead or deceive*. "*Conduct*" includes the obvious forms, eg advertisements, labels, packaging, claims made verbally in-store. It can also bite on projections, estimates and opinions for which there was no reasonable basis, eg in the sale-of-business situation.

There are add-on prohibitions of certain types of misleading conduct to do with goods, services, employment, land, and the false use of trade marks. Sellers' warranties and exclusion clauses are caught if they claim to exclude rights they are prohibited from excluding, in particular liability under the Consumer Guarantees Act and the Fair Trading Act itself. Even silence might amount to misleading conduct, eg real estate agent says: look at that amazing view, but fails to mention the about-to-be-constructed high rise that will obscure it.

"Unfair trade practices"

As well, a number of specific and *unfair trade practices* are prohibited, including:

- Falsely offering gifts/prizes
- Bait advertising
- Referral selling
- Pyramid selling
- Receiving payment without intending to supply (eg proforma invoicing)
- Using physical force, harassment or coercion
- Importing goods bearing a false trade description.

However the specific prohibitions and the unfair trade practices are in effect just examples of conduct in trade that is likely to mislead or deceive, ie would in any case be caught by the general prohibition.

Safety and Information standards

The Fair Trading Act gives the Ministry of Consumer Affairs power to make product safety, service safety, and consumer information standards. Examples to date are:

- Safety standards for children's toys (to deal with the choking hazard if under 3 year olds swallow small parts); bicycles; children's nightwear (fire hazard in nightwear and some children's day clothes as well), baby walkers, cots, cigarette lighters
- The consumer information standards for fibre content, country of origin and care labelling for clothing; the requirement for a SIN (Supply Information Notice) to be displayed on motor vehicles offered by dealers or at car markets.

"The consumer take out" - aka the "moron in a hurry" test

The test of *misleading/deceptive* is not about what the trader intended to convey. It is: what would ordinary people in the target audience likely take from the claim? It is a "consumer take-out" test. *Ordinary* people means not just the intelligent, astute and educated, but also the less than averagely intelligent, the gullible and the less well educated. However the "moron in a hurry test" nickname is not quite accurate: the test does not actually go so far as protecting "entirely moronic" people.

Two-pronged enforcement

The Fair Trading Act is enforced in 2 ways:

- The Commerce Commission [1] "*investigates*" and prosecutes criminal breaches.
- "Any person" can make a private/civil claim. This is intended to (and does) encourage traders to self police the Fair Trading Act, in the form of suing competitors who are misleading consumers. The Fair Trading Act is a frequent add-on to copyright, trade mark infringement and passing off claims.

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[1] www.comcom.govt.nz

The Commerce Commission does not have the resources to investigate all potential breaches. Thus it has policies to focus on breaches it assesses as having higher levels of consumer "*detriment*" and/or "*seriousness*" and/or where there is a more widespread "*public interest*".

The Commission also targets particular sectors and practices from time to time, which might be seen as a "hit list". The 2007-08 hit list areas include:

- Motor vehicle dealers who fail to comply with the new Supply Information Notice - SIN consumer information standard
- Consumer finance providers' compliance with the Credit Contracts and Consumer Finance Act
- Food/dietary/nutrition claims
- Telecommunications and energy sector price advertising
- Small print which disguises the total price
- Misleading consumers about their legal rights, eg terms of trade and exclusion clauses that seek to exclude or limit Consumer Guarantees Act rights
- Lifting immigrant traders' compliance with safety and consumer information standards
- Unsafe products
- Added in 2008: "green washing": false and misleading eco-friendly or sustainability claims.

The Commission uses an escalation process, in that investigations can result in:

- A finding that no breach occurred
- A "*compliance advice*" letter
- A "*warning*" letter
- A formal "*settlement*", which will be published on their website
- *Prosecution.*

Penalties

The maximum penalties were doubled in July 2003, to $200,000 for a corporate and $60,000 for an individual. The effect of the doubling is already apparent in the Court sentencing decisions. The maximum penalties are per defendant and per charge and, although both the Fair Trading Act and the common law require regard to be had to the "*totality*" of the offending when it comes to delivering the penalty, breaches over a period of time and/or involving somewhat different types of offending can result in the Commerce Commission laying multiple charges. As well the Commerce Commission now regularly pursues not only the company but also (especially in the case of smaller companies) individual directors.

In light of the 2003 doubling in the maximum penalties, the Commission is actively seeking higher sentences. It is also starting to seek compensation orders in favour of

affected consumers. Recent case law developments are reviewed in the "Fair Trading Act - Recent Case Law" article on this site.

Compliance programmes

Traders should have (and should maintain) Fair Trading Act compliance programmes. These can be simple through to comprehensive, depending on the size of the business and its risk of breaching the FTA, but key points are:

- Identify special risk areas
- Educating staff
- Checking all advertising and promotional material
- Complaint handling
- Learning from mistakes
- Keeping the programme up to date.

The Commerce Commission's "The Fair Trading Act - A General Guide" available on their website www.comcom.govt.nz and as a booklet, is a detailed and useful guide and has a helpful section on developing a Fair Trading Act compliance programme.

THE CONSUMER GUARANTEES ACT 1993

The Consumer Guarantees Act 1993 ("CGA") aims to ensure that goods and services meet consumers' reasonable expectations. The flip-side aim is to get suppliers and manufacturers to disclose the true nature and limitations of their goods and services.

It is important for traders (not to mention consumers) to understand the cornerstone notions of the Consumer Guarantees Act. Australian companies doing business in New Zealand should note that our law is markedly different from the consumer protection provisions in Part V (Divisions 2 and 2A) and Part VA of the Australian Trade Practices Act 1974. The New Zealand law is based on Saskatchewan (Canada) consumer protection legislation plus pre-1993 New Zealand case law.

The cornerstone notions of the CGA

"Guarantees"

The CGA implies statutory guarantees when a *supplier* supplies *goods/services* to a *consumer*:

- Suppliers of goods: guarantee that the *goods* are of *acceptable quality*, meaning reasonably fit for their purpose, of acceptable appearance/finish, free from minor defects, safe and durable. Suppliers guarantee that goods correspond with any *description* (eg sample/demo model). They guarantee the buyer will get clear ownership. If no price can be ascertained, the price must be reasonable. "*Goods*" does not include a whole building or an apartment (unless it is removable) but individual components of buildings, and building services are covered in the meaning of "*services*".

- Manufacturers: guarantee *acceptable quality* and correspondence with the *description* the manufacturer applied to the goods. As well they guarantee that spares and repairs will be available for a reasonable period, and that they will honour any express guarantee.

- Service suppliers: guarantee the service will be provided with *reasonable skill and care* and be *reasonably fit for its purpose*. Unless timing and price were somehow agreed they guarantee the service will be completed within a reasonable time and at a reasonable price.

"Supplier"

- Only suppliers "*in trade*" are caught, so the CGA does not cover the private sale situation. But it does include a broker or financier that lent money on the goods/services. It does not include the wholesaler in the supply chain: the rationale of the CGA is to place the risk for defective goods on suppliers and/or manufacturers because they have the best ability to put the problem right.

"Manufacturer"

- "Manufacturer" is given an extended definition: it also includes the importer or distributor, if the manufacturer does not have a place of business in New Zealand. Plus it includes anyone who put their brand/trade mark on goods or claimed to be a manufacturer of them.

"Consumer"

- This is a key definition - "*Consumer*" means anyone who acquires (from a *supplier*) goods/services of a kind ordinarily acquired for personal, domestic or household use or consumption, as an end user. You are not a *consumer* if you purchase in order to resupply, or to manufacture or repair in the course of trade. A critical point about the *consumer* definition is that a company or business which purchases as an end user will be a *consumer*. Eg a company that purchases a PC or PC repair services as an end user (ie not to resell the PC or strip it down for parts for use in a PC repair business) will be a *consumer*.

"Limited contracting out"

- It is not possible to contract out of the CGA in a true consumer transaction. Suppliers who seek to do so would breach the Fair Trading Act because the attempt would likely mislead the consumer about their legal rights.

- However the supplier can contract out if the purchaser is purchasing (or claims to be purchasing) for purposes of a business, and acknowledges in writing that the CGA does not apply. This is referred to as *contracting out for business purposes*.

- It is important for suppliers to contract out (and for manufacturers to ensure their downstream retailers contract out) where there is a supply for business purposes. The *consumer* definition includes business "end users" of a wide range of goods/services that have mixed business/personal uses. It is the business purchaser that is likely to suffer the greatest loss if goods/services are defective. For example, in the case of *A & W Holdings (NZ) Limited v Hosking* [2] a defective electric blanket

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[2] 14/4/1999, Cartwright J High Court Auckland HC 191/98

caused a fire that destroyed part of the purchaser's house. Had the purchaser been a hotel, the consequential loss claim could have been a lot more than the $50,000 awarded to the Hoskings.

- As well, manufacturers can limit their spares/repairs guarantee by taking "reasonable action" at or before the time their goods are first supplied to a consumer, that spares/repairs will not be available or are available only for a specific period. Manufacturers wanting to use this right should get specific legal advice, as the action must notify the *consumer*, so has to be effective at point of sale or before, and ineffective attempts to utilise the right would risk breaching the Fair Trading Act.

Fair remedies to meet reasonable consumer expectations

- The object of the CGA is for suppliers and manufacturers to resolve consumer complaints quickly, directly and without involving Courts or lawyers. It is a supplier-remedy system, which requires suppliers to provide fair remedies to meet consumers' reasonable expectations.

- There is no government "regulator" to enforce the CGA. The Ministry of Consumer Affairs provides information on CGA rights [3] but does not run cases against traders. If the supplier will not/cannot provide the remedy, the consumer needs to take civil legal action, in the Disputes Tribunal or Motor Vehicle Disputes Tribunal, District Court or High Court.

Remedies for failures which are "not substantial" and "can be remedied"

- If *goods* have a failing/defect which is *not substantial* and *can be remedied*, the consumer can require the supplier to remedy it. The supplier can repair, replace or give a full refund - it is the *supplier's* choice. If (but only if) the supplier will not/cannot provide the remedy within a *reasonable time*, the consumer can get the goods fixed elsewhere and claim the reasonable costs from the supplier [4]. The consumer may also have the right to cancel the contract for a full refund, but this is a somewhat fraught area of the CGA: the right to cancel might have been lost, for a number of reasons, the main one being if more than a *reasonable time* has passed since the goods were purchased and/or the defect was discovered [5].

- Likewise if *services* have a failure which is *not substantial* and *can be remedied*, the consumer can require the service supplier to remedy the failure. If the service supplier will not/cannot remedy the failure within a reasonable time, the consumer can get it remedied elsewhere and claim the reasonable costs from the original supplier, or cancel the contract and get a refund.

Remedies for failures which are "substantial" or "cannot be remedied"

- If *goods* have a *substantial* failing/defect, or cannot be repaired, the consumer can *reject* them and then choose the remedy: replacement or refund. However, as stated above, there are a number of reasons why that consumer might have lost the right to reject (and therefore to get the

[3] www.consumeraffairs.govt.nz
[4] For a clear illustration of the need for the consumer to request the supplier to provide the fix, see *Acquired Holdings v Turvey*, referred to in Recent Cases article on this site
[5] See *Nesbit v Porter*, referred to in Recent Cases article on this site

replacement/refund), the key one being that more than a "*reasonable time*" has passed.

- If *services* have a *substantial* failure, or one which *cannot be remedied*, the consumer also has the choice of remedy: cancel the contract, or sue the supplier for damages. The damages would be the difference between the price the consumer paid, and the real value of the product of the service that failed.

Consequential loss

- Consumers of both goods and services can also claim *consequential loss* provided it was *foreseeable*. However it is important for consumers to understand that if they do not give the supplier the opportunity to remedy a non-substantial/remediable failure (eg if they take the goods straight to a third party repairer) they will lose the right to claim the repair costs [4].

Remedy against manufacturers

- The remedy against *manufacturers*: applies where the goods failed the guarantees of acceptable quality or compliance with description, or the spares and repairs guarantee was breached, or the manufacturer failed to honour its express guarantee. The consumer must give the manufacturer the opportunity to repair, replace or remedy the failure within a reasonable time. If the manufacturer will not/ cannot, the consumer can sue the manufacturer for reduction in value and foreseeable consequential losses. There is no specific right to get a refund from the manufacturer, but if it was a substantial defect the difference in value might be the same as a full refund anyway.

Risk reduction

Individual CGA claims tend to be of low value, because they deal with complaints about modestly priced consumer items. There are higher value claims to do with the construction of houses and boats, motor vehicles, and where there is consequential loss. However the impact of multiple low value claims in Disputes Tribunals across New Zealand, not to mention the claims that suppliers/manufacturers settle direct, is not to be under estimated.

Except as noted, it is not possible to contract out of the CGA. However there are risk reduction techniques, including:

- Have separate contractual documents for consumer and non-consumer transactions, so that you can effectively contract out with *consumers* who acquire or claim to be acquiring for purposes of a business. However, get specific legal advice as to the documentation. Do not expect that a standard form document that invites a customer to contract out will be conclusive if they were in fact purchasing for personal use [6].

- Specify prices.

- Service suppliers specify the timeframe.

- Explain to customers the true nature of the goods/services, and the limitations. If there are risks, clearly disclose them. Make sure the written

[6] See *Kerry Stone Limited v Knowles* (2006) 11 TCLR 768 as an example of standard form contracting-out documentation that was not accepted by the High Court

material accompanying the goods/services is consistent with those explanations.

- Ensure the goods/services come with adequate instructions, ie to explain what must/must not be done in order to make the goods/services function properly and safely.

- Ensure that retention of title clauses are verbally drawn to customers' attention and acknowledged in writing. (Note that retention of title interests also need to be registered on the Personal Property Securities Register ("PPSR": www.ppsr.govt.nz) to be effective against receivers/ liquidators.)

- Manufacturers give clear statements as to any limits on the availability of spares and repairs, making sure these would be effective at or before point of sale.

- Manufacturers require retailers/resellers to contract out when onselling for the purposes of the end user customer's business. Insert an indemnity in the event the retailer/reseller fails to contract out.

- Review adequacy of insurance.

THE COMMERCE ACT 1986

The Commerce Act is a modern competition law statute, sharing key concepts with the US, EU and Australian laws. It is enforced by the Commerce Commission: www.comcom.govt.nz.

The central provisions as to *restrictive trade practices* ("RTPs" - sections 27-46) and as to *acquisitions* (in section 47) are very similar to the Australian Trade Practices Act 1974 sections 45-48 (re RTPs) and section 50 (re acquisitions). Australian, US and EU case authorities are frequently cited in New Zealand decisions and their economic experts frequently give evidence here. However it is important for Australian businesses operating in the New Zealand market to know that the Commerce Act is not identical to the Trade Practices Act 1974, in fact in a number of respects both the law and the regulators' practices are very different. It is another legal area where trans Tasman harmonisation has a considerable way to go.

The Commerce Act is competition law but as its objective says, its roots are in consumer law: it aims "*... to promote competition in markets for the long-term benefit of consumers in New Zealand.*" There are many ways this can be illustrated, but perhaps the clearest is the point that the law is not about protecting individual businesses from more powerful businesses. It recognises that powerful businesses can and should harm and eliminate smaller, weaker businesses, if that is in the interests of delivering benefits of choice, quality and price to consumers.

The key provisions of the Commerce Act are:

- The prohibitions on certain restrictive trade practices (RTPs)

- The prohibition on business acquisitions that would lead to a substantial lessening of competition ("SLC effect") in a market.

The Commerce Act also provides for price control to be imposed in markets where competition is limited. This involves an investigation by the Commerce Commission and report to the Minister of Commerce as to whether controls should be imposed and on which business(es) in that industry. A 2002 recommendation to control airport services prices at Auckland International Airport was not actioned. A 2004 report on gas distribution businesses resulted in price controls being imposed on 2 gas pipeline companies from 2005. As well the Commerce Commission enforces the electricity distribution businesses' price control regime (under the Commerce Act and Electricity Industry Reform Act 1998), the controls on telecommunications charges and access terms (under the Telecommunications Act 2001), and the dairy industry regulatory regime (under the Dairy Industry Restructuring Act 2001).

However the core business of the Commerce Act is the prohibitions on the RTPs and on business acquisitions with SLC effects.

The Restrictive Trade Practices

Can be broken down into:

- Certain *collusive* trade practices which are anti-competitive
- Certain *unilateral* exercises of market power.

The collusive RTPs

- Section 27: the *catch-all* prohibition on collusive practices: prohibits *arrangements* (including nod/wink ones) that have the *purpose* or *likely effect* of *substantially lessening competition* in a market ("SLC effect"). "Arrangements" do not have to be between competitors at the same level of trade, so section 27 could (eg) apply to an arrangement between a manufacturer and its downstream retailers. Typical arrangements are collusive tendering, bid rigging, market sharing, price fixing.

- Section 29: catches *exclusionary* arrangements. This is not a catch-all, it is specific. It prohibits collective boycotts, ie *arrangements* between *competitors* (or, as in the typical situation, between 2+ competitors and one+ who is not) for the *purpose* of *preventing or limiting supply* to/from a victim/target who competes with at least one of the parties to the *arrangement*. For example, 2+ suppliers get together and convince a downstream reseller to stop selling a third supplier's goods. There is no need to prove any *SLC effect*.

- Section 30: price fixing: is also a (relatively) specific prohibition. It catches "*arrangements*" between 2+ *competitors* at the same level of trade (or 2+ competitors and one or more who isn't) for the *purpose* or with the *likely effect* of *fixing/controlling/maintaining* any *price/discount/allowance/rebate/credit*. The prohibition applies to both supply and acquisition prices, for example in the so called "meat companies price fixing case" where 12 meat companies and their employees were found to have been fixing the prices at which they bought stock from farmers in the South Island. As we know courtesy of the oil companies, price following is not price fixing - there has to be a "meeting of minds" which fixes or provides for the fixing/controlling of the price.

The unilateral RTPs

- Section 36: prohibits a business with a *substantial degree of power* in a market from *taking advantage* of that power for the *purpose* of *preventing*

competition in *that or any other market*. The words "*taking advantage*" are important: if a business would likely engage in the same conduct in a competitive market (ie if the business did not have a substantial degree of market power) that conduct would not be characterised as *taking advantage* just because that business does have a *substantial degree of power*. As well, section 36 (like its Australian equivalent section 46 of the Trade Practices Act 1974) requires proof of anti-competitive *purpose*, which can be difficult to prove, especially where there are other reasons for the powerful business(es) to engage in the particular conduct.

Section 36A is a replica provision which applies to taking advantage of a substantial degree of power in a *trans-Tasman market*, which includes an Australian company having that degree of power in New Zealand (and vice versa) plus companies with truly trans-Tasman power. There is a mirror provision in section 46A of the Australian Trade Practices Act 1974.

- Sections 37-41 prohibit *resale price maintenance* ("RPM"). This is not a catch-all, in fact it is very specific. It catches a *supplier* who *specifies* a *minimum* price that its reseller can charge for goods where the supplier seeks to enforce that specific minimum price by refusal to supply or inducements, threats (which could include price discrimination) and the like. RPM is relatively easy for the Commerce Commission to catch because there is a "victim" who is aggrieved and often willing to complain. It therefore features quite prominently in RTP prosecutions.

There is no specific prohibition on predatory pricing, but that practice may still be a breach of section 36. There is no specific prohibition on refusal to supply, however that practice would breach the Commerce Act if it amounted to RPM, a collective boycott, breach of the section 27 catch-all, or misuse of a substantial degree of market power (section 36 or 36A).

The New Zealand law does not have an equivalent of the specific prohibition on *unconscionable conduct* in section 51AC of the Australian Trade Practices Act 1974. A result is that there is little in the New Zealand Commerce Act to specifically redress imbalance in bargaining power between small and large businesses, which is in fact consistent with the point that the Commerce Act is about protecting competition, not about protecting individual competitors in the market.

The RTPs can be authorised by the Commerce Commission where it can be demonstrated that the benefits to the public would outweigh the detriments from the lessening of competition.

Business acquisitions

- Section 47 prohibits business acquisitions that would lead to a substantial lessening of competition in a market. The Commerce Commission frequently grants *clearances* pursuant to section 66, to proposed acquisitions that would not likely have an SLC effect. Its power under section 67 to grant an authorisation for an acquisition that would likely have an SLC effect, on grounds of *public benefit*, is much less frequently utilised. Australian companies should note that the clearance procedures and even the market concentration safe harbour thresholds are significantly different from those used by the ACCC.

The interface of law, economics and public policy

Competition law is an area where law, economics and public policy collide. It involves argument around the key concepts/definitions of *competition*, *market*, *substantial*

degree of power in a market, taking advantage of a substantial degree of power in a market, and benefit to the public. Unsurprisingly therefore, it is a complex area where it is critical for businesses to get specialist advice.

Penalties for breaches are severe

- For breaches of the prohibitions on restrictive trade practices: pecuniary penalties of up to $500,000 for an individual. For a corporate, up to $10m or x3 the commercial gain resulting from the breach, or (if that cannot be ascertained) 10% of the corporate (and its interconnected companies)'s turnover. Corporates must not indemnify individual directors etc for pecuniary penalties, and face penalties of up to x2 the amount of the indemnity if they do so. There can be injunctions and cease and desist orders, and there is potential for civil damages claims and exemplary damages where an RTP breach is established.

- For contraventions of the prohibition on acquisitions with SLC effect: pecuniary penalties of up to $500,000 for an individual or $5m for a corporate. Potential for injunctions, civil damages claims and divestiture (ie unravelling) orders.

Commerce Commission investigation powers and policies

- The Commerce Commission has extensive powers to require persons to supply information or documents and to give evidence, plus has powers of search. Persons in New Zealand can be required to give information/documents for purposes of the Australian competition regulator (the Australian Competition and Consumer Commission - ACCC). The Commission can make non disclosure orders to protect information during the course of an authorisation or clearance application. These "section 100 orders" can also be used as gagging orders to stop word getting out within a company that it is the target of an investigation for an RTP breach.

- As with the Fair Trading Act, the Commerce Commission has enforcement criteria which mean it focuses on conduct it assesses as having higher levels of *detriment* and/or *seriousness* and/or where there is a wider *public interest*.

- As well, the Commission has its "*leniency policy*" to encourage insiders to report breaches of the collusive RTPs, aka cartel behaviour. The first person involved in the cartel to come forward with information about it and to fully co-operate with the Commerce Commission can formally apply for and be granted immunity from prosecution.

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