john mcbride
BARRISTER

CONSUMER LEGISLATION IN NEW ZEALAND

What it encompasses; is there going to be a massive overhaul?

This paper was Part One of the Auckland District Law Society seminar "Consumer legislation - the hidden traps you need to know", Presented on 13 October 2009

1. What does consumer law encompass in New Zealand?

1.1 We can say the key laws are:

- Fair Trading Act 1986 (FTA) *
- Consumer Guarantees Act 1993 (CGA) *
- And don't forget the Commerce Act 1986, which is competition law, but as Section 1A (inserted in 2001) says its "Purpose" is "... to promote competition in markets for the long-term benefit of *consumers* within New Zealand." The benefits should flow both ways: consumer protection (in the form of information and base line protection) should help consumers to activate competition, and competition be good for consumers.

1.2 Also near the top of the pile in terms of importance:

- Credit Contracts and Consumer Finance Act 2003 * (CCCFA),
- which sits alongside the Credit (Repossession) Act 1997 *
- Motor Vehicles Act 2003 *
- Food Act 1981 - or more particularly the Foods Standards Australia New Zealand (FSANZ) Food Code: www.foodstandards.gov.au.

1.3 But consumer law has a much wider gamut. Consider, in chronological order:

- Sale of Goods Act 1908
- Auctioneers Act 1928 *
- Door to Door Sales Act 1967 *

* Denotes legislation which the Ministry of Consumer Affairs (MCA) administers, ie monitors the operation of and provides policy advice on. In the case of the Weights and Measures Act the MCA also has enforcement powers.

- Lay-by Sales Act 1971 *
- Unsolicited Goods and Services Act 1975 *
- Weights and Measures Act 1987 *
- Privacy Act 1993
- Gambling Act 2003 - re sales promotions
- Secondhand Dealers and Pawnbrokers Act 2004
- Unsolicited Electronic Messages Act 2007
- And for possibly upcoming law, take a look at the Public Health Bill, clauses 81, 83, 88A-C and 374, which would enable issue of non-legally-enforceable codes of practice or guidelines, which can morph into "regulations" to "sectors" that could assist in reducing "substances" (eg types of food) that may increase the incidence of diseases like cancer, cardiovascular, diabetes.

1.4 Plus "consumer" complaint rights and dispute resolution processes contained in industry regulation legislation like the:

- The Motor Vehicle Disputes Tribunal (MVDT);
- Lawyers and Conveyancers Act 2006 (Part 7);
- Immigration Advisers Licensing Act 2007 (sections 44-55);
- the new Real Estate Agents Act 2008 (Part 4), and
- Financial Service Providers (Registration and Dispute Resolution) Act 2008 (Part 3 - to come into force by December 2010).

1.5 Plus what we could call "voluntary consumer law" such as:

- The Advertising Standards Association Codes and Complaints Procedure (www.asa.co.nz).
- The Television Commercials Approvals Bureau: www.tvcab.co.nz, which pre-vets TVCs.
- Likewise the Association of New Zealand Advertisers Inc (ANZA) which does voluntary pre-vetting of all pharmaceutical ads (the Therapeutic Advertising Pre-Vetting Systems - TAPS), all liquor ads (LAPS) and also offers to pre-vet liquor promotions (LPPS).
- The New Zealand Television Broadcasters Council - www.nztbc.co.nz - which in 2008 became increasingly active in the area of food advertising to children.
- The Banking Ombudsman Scheme: www.bankomb.org.nz.
- The New Zealand Insurance Savings Ombudsman Scheme: www.iombudsman.org.nz.

- The New Zealand Juice and Beverage Association's voluntary code of practice / compliance standard for truthful and accurate labelling of juice products: www.nzjba.org.nz.

  These are "voluntary" schemes but are also a case of industry self-regulating in order to stem perceived threats of government regulation.

2. How has it evolved? Some overall themes

2.1 An obvious starting point is the 1930s: the landmark case of *Donaghue v Stevenson* [1931] UKHL 3; [1932] AC 562: a form of product safety right based on proximity and foreseeability of harm.

2.2 1962: Kennedy's *Recitation of Consumer Rights*: to safety, to be informed, to choose, to be heard. However in New Zealand the focus remained on contract-type rights, enforced by individuals.

2.3 1986: 12 years after Australia introduced its Trade Practices Act 1974, we get the Fair Trading Act 1986: to constrain misleading behaviour by traders. Alongside individual enforcement by civil actions, it comes with a regulator that has teeth, the Commerce Commission, so we start to see community (as opposed to merely individual) rights emerge.

2.4 The Commerce Act also comes on the scene in 1986. There develops an increasing acceptance that consumer protection is good for competition and competition good for consumers.

2.5 The FTA's partner, the Consumer Guarantees Act 1993, comes without a regulator: the remedies are self-help, with backup of individual claims in the Disputes Tribunals and Courts. This is deliberate - it is based on the Saskatchewan model - but arguably the lack of a regulator detracts from the "community" importance of the law.

2.6 Meanwhile, we experience an explosion of consumer choice and spending, in an increasingly free and globalised market. There is an ever widening range of complex services and goods/services cross-over products. This puts emphasis on the provision and disclosure of information and on consumer "education" generally. The theory is that the best protection is to have "informed" consumers who can make their own choices in the increasingly competitive market.

2.7 More recently there has been the perception that disclosure and consumer "education" may be reaching its limits, or even moving into overload territory, and we may need (in line with similar countries like Australia, the UK, Canada) to extend the baseline rules into some new areas: eg the regulation of unfair terms in standard form contracts, and add regulator powers, eg to make cease and desist orders, issue substantiation notices, product safety warning notices, banning orders against serious or recidivist offenders.

2.8 At the same time, there has been an increasing acceptance by politicians of the "one in one out" regulatory principle.[1] This favours self-regulation over government regulation and says the latter should be resorted to only if there is a solid evidence base to show that the

[1] Well described in the Australian *Best Practice Regulation Handbook* (2007) see www.finance.gov.au/obpr/index.html

benefits of regulation can be demonstrated to outweigh the costs and burdens on business ("evidence-based regulation").

2.9 In light of these conflicting forces, it is unsurprising that we have been experiencing a "rise and rise of dispute resolution schemes"[2] and codes of practice in the consumer law area. These fit the bill in that they constitute self-regulation.[3] But at the same time they give consumers direct, quite informal and low cost processes to resolve their situations. We have seen a flowering of these schemes and codes, both voluntary (such as those mentioned at 1.1.5 above) and not (1.1.4). More are on the way. Alongside the industry specific schemes, it also needs to be appreciated that the Disputes Tribunals do enormous "business" in New Zealand in terms of resolving consumer complaints. The recent increase in their jurisdiction, from $7500 to $15,000 (or from $12,000 to $20,000 with consent of both parties)[4] is further evidence of "the rise and rise" of dispute resolution schemes.

2.10 Query whether "trans-Tasman harmonisation" is a major theme in the development of New Zealand consumer law to date. There are major similarities (FTA, Commerce Act, consumer credit law), and considerable attention is paid to developments in Australia. However, as Rae Nield will point out, there are major differences in the laws, especially regarding that key piece of legislation, the Consumer Guarantees Act. The New Zealand Minister of Consumer Affairs is a member of the Australian Ministerial Council on Consumer Affairs (MCCA),[5] but we are a long way away from trans-Tasman harmonisation in this area.

3. Is there going to be a massive overhaul?

3.1 No, but there will be significant changes. There have been a number of MCA (Ministry of Consumer Affairs) policy reviews in the period 2005-2009. There is a new Minister, who is clearly from the one out end of the "one in one out" camp, and who wants to simplify our gamut of laws and make information about them and about the remedies more accessible: a "One Law - One Door" regime. A new "single national consumer law" is in the throws of being implemented in Australia.

MCA 2006 discussion paper

3.2 The MCA started a policy review in 2005 of how New Zealand consumer protection laws stacked up against the usual overseas comparison countries (Australia, the UK, Canada, the US) and in particular, whether there were new enforcement tools we should consider.

---

[2] For this phrase I am indebted to page 10 of Jennifer McNeill's paper *What have we done in Consumer Protection in Australia,* presented to the University of South Australia's Centre for Regulation and Market Analysis (CRMA)'s Trade Practices Workshop 17/10/08

[3] Enabling the likes of new Consumer Affairs Minister Hon Heather Roy (ACT) to say that: "*When industry self-regulation is working well there is no need for intrusive government regulation or legislation.*" : Hon Heather Roy, address *Effective Market and Consumer Choice*, to the Cosmetic, Toiletry and Fragrance Association of NZ 13/03/09.

[4] Effective 1 August 2009: Disputes Tribunals Amendment Act 2009 (2009/22)

[5] In fact former Minister Hon Judith Tizard chaired the MCCA's 19th meeting, held in Auckland on 23 May 2008, which agreed to support the development and implementation of the new national harmonised, generic consumer law in Australia: see www.beehivie.govt.nz 30/05/08 *Australian consumer law harmonization welcomed.*

3.3 The MCA's "*Review of the Redress and Enforcement Provisions of Consumer Protection Law - International Comparison Discussion Paper*" (May 2006) concluded that we stacked up favourably with the overseas comparators. However it said we could consider adding into the FTA:

- A prohibition on unfair terms in consumer contracts; and
- A number of overseas enforcement tools including: Commerce Commission power to issue product safety warning notices, "cease and desist" orders to stop a trader continuing with alleged misconduct, "substantiation notices" that put the onus on traders to substantiate claims, banning orders against serious/recidivist offenders, court enforcement of settlements with the Commerce Commission, compulsory Commerce Commission interview powers.

3.4 Submissions were invited and reviewed in the MCA's "*Summary of Submissions on the International Comparison Discussion Paper*" released in September 2006. As a broad generalisation, business was opposed, consumer groups in favour, and the Commerce Commission in favour but with the undertone of needing to know they would be resourced to take on any additional functions.

3.5 The MCA thanked the submitters and said it was working on the issues they had raised. It seemed that nothing further happened, but this review has not been forgotten - see 1.3.21 below.

Financial Service Providers

3.6 The CCCFA was enacted in 2003 but came into force in 2005. In 2006 the MCA commissioned 2 reports on fringe lending. The then Minister hosted a financial summit in late 2007, which also focused on fringe lending. These initiatives produced recommendations which fed into the registration and dispute resolution provisions in the new Financial Service Providers (Registration and Dispute Resolution) Act 2008.

3.7 This is already in force, but for the most important part, the registration requirements, which are scheduled to be implemented by December 2010. All "financial service providers" (FSPs), including fringe lenders, will have to be registered. To be registered they will have to be a member of an "approved" dispute resolution scheme, or the "reserve" scheme the MCA is to establish.

3.8 The MCA published its draft guidelines for establishing "Approved Schemes" and the "Reserve Dispute Resolution Scheme" in the form of 2 discussion papers issued in June 2009.[6] It is anticipated that most FSPs will seek to have their own schemes approved, and that the likes of the Banking Ombudsman and the Insurance & Savings Ombudsman schemes would (on application) be approved. FSPs which do not get their own scheme approved will have to be members of the reserve scheme. Thus we are going to get even more uplift for the "rise and

[6] *Draft Guidelines to Assist Schemes applying for Approval under the Financial Service Providers (Registration and Dispute Resolution) Act 2008*, Ministry of Consumer Affairs June 2009; and
Proposed Reserve Dispute Resolution Scheme under the Financial Service Providers (Registration and Dispute Resolution) Act 2008, Ministry of Consumer Affairs June 2009. Closing date for submissions on both was 31 July 2009

rise" of dispute resolution schemes for addressing perceived consumer protection problem areas.

3.9 The other important initiative on the "financial" front is the current CCCFA review. A wide ranging MCA discussion paper titled *Review of the Operation of the Credit Contracts and Consumer Finance Act 2003*, was released by the Minister on 22 September 2009. It also proposed changes to the repossession regime under the Credit (Repossession) Act 1997.

3.10 Submissions do not close until 16 November 2009, but it is not so difficult to see where the Minister wants to go with this review. Her press release on 22 September and speech to the 2009 Financial Summit in Otara on 25 September indicate her thoughts that:

- The CCCFA's not-too-proscriptive mix of disclosure/ information requirements and basic protections against less scrupulous lenders, is for the most part working well, subject to 4 main areas of concern:

- One: the hardship provisions: at the moment consumers in default cannot apply for hardship relief. There is a case to say they should be allowed to do so, and that information on the hardship provisions should be in the required credit contract disclosure information.

- Two: many credit contracts, especially fringe lender ones, have very broad "all present and after acquired property" ("All PAAP") security provisions. Consumers don't know that they are signing for a provision that allows the lender to repossess not only the listed security property, but "all present and after acquired property". They don't know what may be repossessed. The discussion paper proposes that the security property be specifically defined in the credit contract, so people can clearly see what property could be repossessed if they default. Not specifically referred to in the review, but that being the purpose, it would be necessary to specifically deal with the power of attorney clauses in these contracts, which empower the lender to step into the borrower's shoes and specifically appropriate the security interest in the other property in accordance with s 44 Personal Property Securities Act 1999.

- Three: concern about how repossessions are carried out. There is a case to say that an independent agent (eg a Justice of the Peace or warranted officer) should have to authorise repossessions under the Credit (Repossession) Act 1997.

3.11 The fourth area of concern is about the negative aspects of fringe lending practices. Fringe lending is covered by the CCCFA but there are no specific provisions about it. Potential changes are:

- Interest rate caps, along the lines of Charles Chauvel's Credit Reforms (Responsible Lending) Bill, which would cap interest rates in consumer contracts at 48%. The Minister has made it clear she does not support caps, nor does the MCA.[7]

- Registration of financial service providers coupled with compulsory dispute resolution schemes: already enacted in the Financial

[7] See section 10 of the MCA 22/09/09 discussion paper

Service Providers (Registration and Dispute Resolution) Act 2008 regime, ie when that law's registration regime is implemented in late 2010.

- "Responsible Lending Conduct Obligations", along the lines of the Australian Credit Policy law reform package, and also covered in Charles Chauvel's bill. These would oblige lenders to make an assessment to ensure the credit contract meets the consumer's requirements and that the consumer has the capacity to repay. The Minister has made it clear enough that she does not favour this kind of approach, although she would keep a "watch" on how the Australian law fares.

3.12 There are relatively small changes to the Credit (Repossession) Act regime proposed in the CCCFA review. However expect a major review of the repossessions regime in the near future.

Trans-Tasman

3.13 Significant changes to consumer protection law are being implemented in Australia. The process in Australia dates back to their "Productivity Commission" which in December 2006 started an enquiry into their consumer policy framework. This produced a final report on 30 April 2008. In August 2008 their Ministerial Council on Consumer Affairs (MCCA) agreed a series of proposals for quite far-reaching consumer policy reform, drawing on the Productivity Commission's final report.

3.14 In Australia the multiplicity of laws and remedies is further complicated because they have both federal and state consumer laws. The MCCA agreed to move towards "*a single, national consumer law, which represents best practice regulation ... based on the current consumer protection provisions of the Trade Practices Act 1974*". The new law would "*also incorporate appropriate amendments reflecting best practice in state and territory legislation*" [8]. The regulator function will be split between ASIC (re financial services) and the ACCC (everything else), though still with regulatory input from state authorities.

3.15 The Bill to implement phase 1 of this "single national consumer law" was introduced in the Australian parliament on 24 June 2009, in the form of The Trade Practices Amendment (Australian Consumer Law) Bill 2009. Key points of the "Australian Consumer Law" ("ACL"):

- It will go a long way to harmonise their federal law with state law, which solves the problem they have but is not especially relevant to us.

- It includes provisions to specifically address unfair contract terms in business to consumer contracts. The formulation they have chosen is something of a compromise between the Victoria state law and the more watered down model their Productivity Commission came up with.

---

[8] See Dr David Cousins and Mr Sitesh Bhojani, *Consumer Protection Laws in Australia - The Future,* presented to University of South Australia CRMA's Trade Practices workshop 17 October 2008, page 45.
The "best practice in state territory legislation" is a special reference to the unfair contract terms legislation that was included in Victoria state law in 2003: Victoria, Fair Trading Act 1999, Part 2B, section 32W.

- It introduces a number of the new penalties, enforcement powers and consumer redress options which the 2006 MCA discussion paper has considered for New Zealand, including: disqualification orders (ACCC/ASIC can seek orders to disqualify someone from managing a business, as a result of breach of consumer protection law); substantiation notices (ACCC/ASIC can issue a notice requiring a trader to provide information/documents substantiating a representation they have made); infringement notices (ACCC/ASIC power to issue infringement notice with relatively modest financial penalties up to $6000 for suspected breaches of certain less serious provisions); public warning aka name and shame notices (ACCC/ASIC can issue a notice if it has reasonable grounds to believe a trader has breached consumer law, that people are likely to suffer detriment, and it is in the public interest to issue the notice).

- It amends the Australian Securities and Investments Commission Act 2001 (ASIC Act) to introduce corresponding provisions re financial services, in relation to unfair contract terms, penalties, enforcement powers and consumer redress options.

Simplification of " the gamut" in New Zealand: "One Law- One Door"

3.16 The new Minister of Consumer Affairs did not take long to express her view that consumer legislation should be principle-based, not over-prescriptive, and that the "gamut" of consumer legislation and multiplicity of sources of information about it and complaints and disputes procedures is in need of simplification.

3.17 She announced in January 2009, in a speech titled "*Less is More - Can Legislation Improve Consumer Confidence?*" [9] that:

> *"I have proposed that Ministry of Consumer Affairs staff explore a simplification programme, which I have called 'One Law- One Door'. The 'One Law' refers to a goal of a one principle-based piece of consumer-supplier legislation similar to the approach found in the Privacy Act. It might be that the Fair Trading Act forms the basis of this, but time will tell. The many other pieces of legislation that have been overtaken by time or technology could merge into this as appropriate.*
>
> *The 'One Door' refers to a simplified complaints procedure rather than the host of complaints and disputes tribunals, ombudsmen and so on that currently serve to confuse the applicant while adding many layers of cost to the tax payer."*

3.18 The MCA has been directed to commence research on the "One Law-One Door" proposal.[10] The Minister said in late July that she hoped to have legislation passed by the end of the parliamentary term in 2011, and for significant progress to have been made before the end of

[9] Hon Heather Roy, speech to the Marlborough Chamber of Commerce, 21 January 2009, reported in Law Talk No 723, 16/2/09 page 17, and repeated several times since, eg see her 13 March 2009 speech "*Effective market and Consumer Choice*" to the Cosmetic, Toiletry and Fragrance Association of NZ.

[10] Hon Heather Roy, address *Effective Market and Consumer Choice*, to the Cosmetic, Toiletry and Fragrance Association of NZ 13/03/09

2009.[11] The MCA is working on a discussion paper, which we can expect to see by end March 2010. They would invite submissions.

3.19 What can we expect in the discussion paper?

- The simplification would affect only the legislation MCA administers and provides policy advice on, which is listed on their website[12] and is asterisked in the lists at para 1.1 of this paper.
- "One Door" is about whether the existing pieces of legislation can be put into one, the obvious contender being the FTA.
- It is not about "adding to" the FTA. Rather, it is about whether we can clear out the dead wood and convert the still-relevant laws into a "principle-based" consumer law.
- The Minister has used the Privacy Act as an example of "principle-based" legislation (the Information Privacy Principles - IPPs). The Resource Management Act is also principle-based. Likewise the CCCFA (section 3) and as that is a consumer law example we can expect its approach to be examined.
- Of the existing laws, the Auctioneers Act (1928) would look like a goner. The Door to Door Sales Act, Lay-by Sales Act and Unsolicited Goods and Services Act (or the parts of them that remain relevant) would seem a good fit in a "One Law" FTA. But the likes of the Motor Vehicles Act (with its own dispute resolution process, and which is currently being amended), and the Weights & Measures Act (very specific) would not look to be good fits.
- There are likely to be proposals for add-ons, eg to bring online auctions, vehicle sales through competitive tender/auction, and private secondhand vehicle sales within consumer law.
- Credit law would look to remain a stand-alone area, with the new FSPs regime about to incorporate its own registration and dispute resolution processes. But the CCCFA should be merged with the repossession regime in the Credit (Repossession) Act 1997.
- Would the CGA be included, or remain a stand-alone? Don't know. If included, would it get a regulator, ie would the Commerce Commission get to enforce at least parts of the CGA? I suspect the answers will be no and no, but the discussion paper will need to cover these issues.

3.20 "One Door": the Minister has referred to a simplified complaints procedure. However it is my understanding that the discussion paper will focus on the "One Law" and that "One Door" is more about how to put in place a single "portal" consumers can go to, to find out about the consumer law and remedies, which would not appear to require changes to legislation. All sorts of government and non-government agencies (MCA, Commerce Commission, Citizens Advice Bureaux, Consumer Magazine, Family Budgeting Services etc) act as "doors" at present in the sense that they provide information. Few consumers

[11] NZPA, 28/07/09: www.3news.co.nz, 28/07/09
[12] www.consumeraffairs.govt.nz/policylawresearch/index/html

escalate complaints past the goods/service provider.[13] The rationale for a change is that if there is one portal which consumers can access to get information and advice, it is going to be a much simplified and therefore improved process.

3.21 The new discussion paper will also pick up the strands of the 2006 MCA discussion paper, so will raise the issues whether we should incorporate into the "One Law" the additional tools being implemented in the new Australian Consumer Law:

- An unfair contract terms prohibition, and if so, should it follow the new ACL model, or the existing Victoria State model, or other.[14]
- Court enforceability of settlements with/undertakings to the Commerce Commission?
- Substantiation orders, or perhaps a clearer provision about claims that cannot be supported.
- Disqualification orders?
- Infringement notices for the less serious/more obvious breaches, eg non-display of CIN notice, omission of fabric care information on clothing.

3.22 I suspect it is unlikely that an "unconscionable conduct" provision (already in the Australian Trade Practices Act) or a public warning notices provision (in the new ACL) will get traction in New Zealand. Compulsory Commerce Commission interview powers (referred to in the MCA 2006 discussion paper) would hopefully be seen as a step too far - why should the Commerce Commission have more powers than the police?

3.23 However, as can be seen on a number of fronts, 2010 looks to be an interesting time for the development of New Zealand consumer protection law.

[13] 2005 National Consumer Survey, 06/07/2004, viewable on www.consumeraffairs.govt.nz

[14] See section 10 of MCA's September 2009 discussion paper *Review of the Operation of the CCFA 2003*, which says that a prohibition on unfair contract terms in standard form (consumer) contracts is "Under consideration as part of consumer law review". Also see section 6 re "Unsolicited Credit", which specifically refers to the unfair contract terms issue being considered in the One Law - One Door review