

NEW ZEALAND BUSINESS ROUNDTABLE

Submission on Consumer Law Reform Discussion Paper

July 2010

1. Introduction

1.1 This submission on the Ministry of Consumer Affairs' Consumer Law Reform discussion paper is made by the New Zealand Business Roundtable, an organisation comprising primarily chief executives of major New Zealand business firms. The purpose of the organisation is to contribute to the development of sound public policies that reflect overall New Zealand interests.

2. Context

2.1 This submission focuses on making three high-level comments on the discussion paper: problem definition, the need for the law to protect reputable suppliers and customers alike, and the case for general and enduring statute law rather than for detailed law that can quickly become obsolescent.

2.2 For more detailed comments on the discussion paper, we commend Business NZ's submission. We broadly agree with the thrust of its comments.

3. Problem definition – the Consumer Law Reform objective

3.1 We strongly support the Minister of Consumer Affairs' objective of seeking to improve the quality of regulation in respect of consumer law. In reviewing each piece of consumer law the first question to ask is why the law is necessary. Since the alternative to government regulation is regulation by the common law, answering the first question requires net deficiencies in outcomes under the common law to be identified. It is not always obvious what these may be. For example, fraudulent misrepresentation is illegal under the common law.

3.2 ***Purpose statements.*** If the problem that justifies recourse to legislation is identified, the purpose of the legislation would naturally be to overcome that problem. Purpose statements for the Fair Trading Act, the Consumer Guarantees Act and the Weights and Measures Act are proposed in section 5 of the discussion paper. Unfortunately, none of these statements identify what the problem is that these Acts seek to remedy. For example, a common element is the objective of "promoting consumer well-being". What needs to be established is why legislation is necessary for the pursuit of such an objective.

- 3.3 This deficiency in the proposed purpose statements needs to be rectified. It may be easiest to do this for Weights and Measures legislation since the benefits of standardisation in terms of reduced transaction costs are self-evident and the precedents go back at least as far as [Magna Carta](#).
- 3.4 In considering the case for continuing with statutory remedies, careful consideration needs to be given to the place for *caveat emptor* and the importance of supplier reputation. Consumers wanting a lower price product from a less reputable supplier should be allowed the choice, but *caveat emptor* needs to prevail in general in order to preserve incentives to invest in reputation. Of course there are always exceptions in particular cases, and such exceptions might help identify the proper purpose of any legislative restrictions on private arrangements.
- 3.4 **Harmonisation with Australia.** One objective of the review is "[t]o achieve harmonisation with the Australian Consumer Law, as appropriate, in accordance with the government's agenda of a single economic market with Australia (SEM)". This statement raises the question of what test should be used to determine the appropriate degree of harmonisation. We concur with Business NZ's view that it is only appropriate to harmonise when the benefits to New Zealanders exceed the costs. Since the same test applies to all government laws and regulations, harmonisation is not an objective in its own right. Nor is it a consideration that shifts the burden of proof on to those who would argue against harmonisation. Instead harmonisation is just a relevant consideration when considering the more general question of whether proposed legislation is necessary in the public interest.

4. Protecting consumers or protecting citizens generally?

- 4.1 The discussion document follows common approaches in assuming that the government needs to legislate to protect consumers from suppliers rather than to protect reputable suppliers and customers alike. Suppliers can be unfairly treated by customers in ways that go far beyond simple shoplifting or damage to goods on the shop floor. As one example, some may damage the products supplied or misrepresent the supplier's offer in order to opportunistically

demand a full refund. As another, customers might use a tool or garment once for an important occasion and return it demanding a full refund on the grounds that they have changed their mind. Customers might use the threat of adverse publicity to get their way.

- 4.2 Suppliers are vulnerable to opportunistic demands in part because of their undiversified investments in capital and reputation. In corrupt countries, this vulnerability is illustrated by their need to pay 'protection money' to gangs and/or the police. In countries like New Zealand it is illustrated by a demand by a regulator or a politician that is backed by the threat to use regulation to take private property without compensation in the event of non-compliance.
- 4.2 If the law does not protect suppliers' investments in capital or reputation adequately, supply will be unduly inhibited. The increased costs of supply would harm customers at large and the community more generally in the longer run.
- 4.2 It follows that any general presumption that suppliers have incentives to 'rip off' customers is invidious. In reality, competition forces suppliers who want repeat business to offer value for money. We conclude that there should be a presumption in favour of general laws that protect suppliers and customers alike against fraudulent claims and the improper use of force.

5 Stability of consumer law

- 5.1 Consumer law can aim to be general, leaving the courts to determine to how to apply it to particular cases, such as those arising from new technologies, or it can aim to be particular. If the latter, it risks becoming quickly outmoded or dated. As the discussion paper has noted, the development of the internet has provided another medium for voluntary exchanges that may make some existing prescriptive law outdated. There seems to be a presumption in the discussion paper that laws that have lasted a few decades need to be reviewed because circumstances will have materially changed. We suggest that refocusing consumer statutes on general propositions should increase their durability.

6 Conclusions

- 6.1 This submission supports the Minister's objective of improving the efficiency of existing consumer law and suggests this goal could be facilitated by a greater focus on problem definition and greater recognition of the desirability of a more generic approach.
- 6.2 We also ask that a regulatory impact analysis, certified as adequate by the Regulatory Impact Analysis Team of the Treasury, be undertaken for any specific proposals arising from the review. This should be done from a national interest perspective, not just the (possibly short-term) interests of consumers. The Cabinet Manual requires an RIA or an equivalent analysis to be included in official discussion papers as well, but this instruction does not appear to have been followed by the Ministry.
- 6.3 We do not wish to make an oral submission but would be happy to meet informally with Ministry officials.