

**Submission on Ministry of Consumer Affairs discussion
paper:**

***Review of the Redress and Enforcement Provisions of
Consumer Protection Law - International Comparison***

29 June 2006

Introduction and summary of submission

1. The Ministry of Consumer Affairs (the **Ministry**) has asked for comments on the issues outlined in its discussion paper of May 2006 entitled “*Review of the Redress and Enforcement Provisions of Consumer Protection Law – International Comparison*” (the **discussion paper**).
2. Bell Gully is a leading supplier of competition law services and advises many major New Zealand and overseas businesses on consumer protection law and competition issues (details of our experience are contained on our website www.bellgully.com).
3. Bell Gully agrees that ensuring that the Commerce Commission (the **Commission**) has adequate enforcement tools is vital in ensuring that New Zealand’s consumer protection laws are effective. However, Bell Gully queries whether all of the proposed additional enforcement powers are necessary to achieve that goal. The Commission is already extremely active in its enforcement of the Fair Trading Act (**FTA**) regularly making use of its existing formal powers of investigation and also utilising a number of informal tools. As a result, each year the Commission issues a large number of warnings, enters into a number of settlements and achieves a number of convictions under the legislation. We query whether giving the Commission further formal enforcement tools would materially alter those outcomes.
4. Before finalising the Ministry’s view on the proposals set out in the discussion paper, we would therefore urge further consideration to be given to some issues that may be unique to the New Zealand context. We have set out below our comments on each of the proposals set out in part 3 of the discussion paper and the matters that we consider warrant further consideration by the Ministry. We also have three over-arching comments. These are:
 - (a) We query whether the Ministry has given sufficient consideration to the criminal nature of certain of the provisions of the FTA and whether all of the proposals set out in part 3 are appropriate in the context of a statute containing criminal provisions. For example, we query whether consideration has been given to the use to which substantiation notices (or a failure to comply with a substantiation notice) may be put in the context of a criminal investigation and prosecution.
 - (b) In Bell Gully’s experience, New Zealand businesses are usually prepared to co-operate with Commission investigations. This level of co-operation includes, for example, attending voluntary interviews and agreeing to change behaviour that has given rise to a concern from the Commission. To this end, we query the extent to which the Commission requires some of the additional enforcement tools set out in part 3 of the discussion paper. The Commission has indicated that it would use compulsory interviews in up to 50% of its complex investigations. We would be concerned if the Commission began a practice of using compulsory interviews as a matter of course in circumstances where a co-operative approach with business would have obtained a similar outcome.

- (c) If the FTA was to be amended to include further enforcement functions for the Commission, such as the introduction of a prohibition on unfair terms, the Commission would need to be adequately resourced to perform those additional functions including any associated education campaigns and dialogue with industry. Bell Gully would be concerned if further enforcement functions were imposed on the Commission without further specific resourcing as this could divert the Commission's resources away from its existing core functions.

Unfair terms in consumer contracts prohibition

- 5. Bell Gully queries whether an amendment to the FTA to prohibit unfair terms is required at this time. The discussion paper acknowledges (on page 27) that "a prohibition on unfair terms would provide an opportunity for the Commission to work with industry groups (in an educative way) to develop fair standard terms". However:
 - (a) There are already many industry groups that are effectively self-governing and/or which have worked to develop industry "model" contracts. The electricity and gas industries are examples of this, which have the Electricity and Gas Complaints Commission Code of Practice. Other industries also have ombudsman schemes e.g. banking and insurance. Bell Gully considers that there may be merit in the Ministry giving further consideration to how extensive the concern is of businesses developing "unfair terms" and whether there are not already industry bodies and codes that could be used to address any such concerns.
 - (b) The discussion paper notes that the Ministry is currently conducting a review on industry-led regulation and that it is appropriate that any proposals relating to codes of conduct to be made as part of that review (page 47). Bell Gully suggests that issues relating to standard unfair terms could be incorporated into that review of industry led regulation.
- 6. If an amendment to the FTA is to be proposed by the Ministry, then Bell Gully also notes that:
 - (a) We agree that guidance would need to be provided in the legislation as to what constitutes an "unfair term". To that end, we would support further debate on what may constitute an "unfair term" with a view to an indicative list of unfair terms ultimately being incorporated into the legislation.
 - (b) The discussion paper is not clear as to whether prohibited unfair terms would be for only standard contracts or for both standard and negotiated contracts. This would need to be clarified.
 - (c) The discussion paper also does not discuss the proposed penalties for a breach of an unfair term prohibition. We note that the penalties in the Victorian Fair Trading Act 1999 are quite low as compared with the current penalty provisions in section 40 of the FTA. The Ministry will need to give further consideration to whether a breach of this prohibition should attract a lower penalty than for other offences.

Product safety warning notices and powers of investigation

7. The exercise of a power to authorise persons (exercised under warrant) to seize potentially unsafe products during investigations into that product's safety could irreparably harm a product's goodwill in the marketplace. Similarly the issuing of a warning to the public regarding potentially unsafe products that are the subject of the investigation could also have this effect. Bell Gully considers that if such provisions are to be enacted, then there must be safe guards to ensure that these powers are not exercised in circumstances which would irreparably harm the reputation of a manufacturer or product when, at the end of the day, the relevant product is found to be safe.
8. Bell Gully therefore agrees that further consideration will need to be given to the appropriate thresholds set for the issuing of such a warrant or warning and that those thresholds must balance fairly the interests of the relevant manufacturer, wholesaler or retailer against public interests.
9. We also suggest that if this proposal is to proceed, further consideration be given to the incorporation of appropriate timing provisions so that there is an incentive on the Ministry or Commission to ensure that where a product has been seized or a warning issued an investigation is completed as quickly as possible.

Cease and desist orders

10. The Commission can presently seek to obtain injunctions when necessary and appropriate. When granting injunctions the Court takes into account the whole picture. In our view, the criticism of the balance of convenience test (on page 32 of the discussion paper), namely:

"The balance of convenience test will typically tip in favour of businesses unless it is proven that consumers have suffered a significant detriment, for example, lost their life savings."

is incorrect and is not an appropriate justification for the introduction of cease and desist orders. The approach adopted by the courts in relation to the granting of injunctions takes into account, among other things, the balance of convenience and the overall justice of the situation. This includes weighing the potential harm to consumers but also the rights of traders.

11. The paper lacks detailed analysis of how regularly cease and desist orders in a consumer protection legislation context would be used. Part of the reason as to why the cease and desist provisions in the Commerce Act have not yet been used may be, consistent with Bell Gully's experience, that many businesses are prepared to act in a co-operative manner to address Commission concerns. Given that the power to issue cease and desist orders is a significant responsibility for the Commission, we consider that there would be merit in the Ministry conducting more analysis of the circumstances

in which cease and desist powers may be exercised before finalising any proposals on the need for such provisions.

12. If cease and desist orders were to be introduced in the FTA context then we consider that the Ministry would also need to give further consideration to the appropriate procedure to apply including the appropriate threshold for the making of such orders in an FTA context and appropriate appeal rights. We note that because the cease and desist provisions in the Commerce Act have yet to be used, the robustness of that process has not yet been tested and it may not necessarily be appropriate to simply “lift” the relevant provisions of the Commerce Act into the FTA.

Substantiation notices

13. We recognise the difficulties (and significant cost) the Commission can encounter when seeking to prove some misleading and deceptive representation cases under the FTA. We also recognise that because the Advertising Standards Authority already has a regime in place that can require the substantiation of claims, a requirement to do so in an FTA context should not be an additional burden on business in most cases.
14. However, the FTA contains criminal provisions. A reversal of the traditional onus in circumstances where a defendant is otherwise entitled to a “right to silence” and there is an obligation on the prosecution to prove a charge beyond reasonable doubt would be a significant legal step. We query whether the Ministry has yet considered in detail the use to which substantiation notices (or, more likely, a failure to comply with a substantiation notice) may be put in the context of a criminal investigation and prosecution and urge further detailed consideration of this issue.

Court enforceable undertakings

15. Bell Gully is concerned at the rationale that has been set out in the discussion paper to justify a need for court enforceable undertakings. If the Commission enters into a contractual settlement the terms of the contract would presumably be enforceable and to suggest otherwise must raise a serious question over the enforceability of the great number of administrative settlements the Commission has reached over the years. It is submitted that the Commission can (and has) entered into settlements which provide that (a) the trader would not engage in conduct which contravenes the legislation and, (b) if the trader did so, the Commission could initiate court proceedings not only for the breach of contract but also for the original offences notwithstanding the limitation period set out in the relevant acts (i.e. the trader must waive its right to any limitation defence that may arise subsequent to the entry into the agreement).
16. Bell Gully therefore disagrees that the Commission’s only recourse when a business fails to adhere to the terms of a compensation/settlement agreement is to take court action for the original offences. This is not to say, necessarily, that Court enforceable undertakings would not be a more straightforward method for the Commission to reach a settlement and enforce the terms of settlement. However, in our view, the Ministry needs a better

justification than that set out in the discussion paper to support such a change to the legislation.

Compulsory interviews

17. In Bell Gully's experience, many of our clients are prepared to attend voluntary interviews when requested to do so by the Commission. We therefore query how often the Commission would consider it desirable to use compulsory interview powers and therefore whether a change to the legislation to provide for this is warranted. The Commission has indicated that it would use compulsory interviews in up to 50% of its complex investigations (page 39 of the discussion paper). We would be concerned if the Commission began a practice of using compulsory interviews as a matter of course in circumstances where a co-operative approach with business would have obtained a similar outcome.
18. If a compulsory interview power was to be introduced, Bell Gully agrees that appropriate immunity provisions would need to be considered. Any further issues (such as under the New Zealand Bill of Rights Act) arising from a compulsory interview process in the context of a criminal statute would also need to be considered.

Banning orders

19. If the Ministry is to recommend the introduction of banning orders, Bell Gully considers that there may be some merit in the Ministry giving further consideration to the intended scope of a banning order. For example:
 - (a) Could a ban be imposed on a person for the supply of *all* goods and services or is it intended that a ban would only be able to extend to the supply of goods and services in a similar category to those that were the subject of the offence under the FTA?
 - (b) Would a ban only relate to a person holding a particular position in a business supplying the relevant goods or services (e.g. from acting as a director/promoter) or would it extend to a person having any involvement whatsoever in the particular business activity.

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