

House of Representatives

Supplementary Order Paper

Tuesday, 2 July 2013

Consumer Law Reform Bill

Proposed amendments

Hon Craig Foss, in Committee, to move the following amendments:

Clause 2

In *clause 2(1)*, replace “**subsection (2)**” (line 5 on page 9) with “**subsections (2) and (3)**”.

Replace *clause 2(2)(a)* (line 11 on page 9 to line 2 on page 10) with:

- (a) in **Part 1, sections 6(3), 7, 9, 10, 11, 12B, 18, 22, 23, 23A, 25, 30, 31, 35, 35A, 35B, 36, 39, 40A, 41, 43, 59, and 63** (relating generally to contracting out, unsubstantiated representations, unsolicited goods and services, disclosure of trader status, layby sales, uninvited direct sales, extended warranties, auctions, infringement offences, carriage of goods, the guarantee as to delivery, and gas and electricity); and

After *clause 2(2)* (after line 3 on page 10), insert:

- (3) **Sections 11A and 26A** (relating to unfair contract terms) come into force on the day that is 15 months after the date on which this Act receives the Royal assent.

Clause 6

In *clause 6(3)*, replace the new definition of **transparent** (lines 14 to 19 on page 12) with:

- “**transparent**, in relation to a term in a contract, means a term that—
- “(a) is expressed in reasonably plain language; and
 - “(b) is legible; and
 - “(c) is presented clearly; and
 - “(d) is readily available to any party affected by the term

In *clause 6(3)*, delete the definition of **uninvited direct sale agreement** (lines 26 and 27 on page 12).

In *clause 6(3)*, after the new definition of **unfair contract term** (after line 22 on page 12), insert:

“uninvited direct sale agreement has the meaning given in **section 36K**

Clause 7

In *clause 7*, replace *new section 5D(1)* (lines 18 to 30 on page 13) with:

- “(1) Despite **section 5C(1) and (2)**, if the requirements of **sub-section (3)** are satisfied, parties to an agreement may include a provision in their agreement that will, or may (whether directly or indirectly), allow those parties to engage in conduct, or to make representations, that would otherwise contravene section 9, **12A**, 13, or 14(1); and in that case,—
- “(a) the provision is enforceable; and
- “(b) no proceedings may be brought by any party to the agreement for an order under **section 43** in relation to such a contravention of section 9, **12A**, 13, or 14(1).

In *clause 7*, *new section 5D(3)*, replace “**(1)(b)**” (line 3 on page 14) with “**(1)**”.

Clause 9

In the heading to *clause 9*, replace “**section 12A**” (line 7 on page 15) with “**sections 12A to 12B**”.

In *clause 9*, replace “section are” (line 8 on page 15) with “sections are”.

In *clause 9*, replace *new section 12A* (line 11 on page 15 to line 38 on page 16) with:

“12A Unsubstantiated representations

- “(1) A person must not, in trade, make an unsubstantiated representation.
- “(2) A representation is **unsubstantiated** if the person making the representation does not, when the representation is made, have reasonable grounds for the representation, irrespective of whether the representation is false or misleading.
- “(3) This section does not apply to a representation that a reasonable person would not expect to be substantiated.
- “(4) In this section and **sections 12AA to 12B**, **representation** means a representation that is made—
- “(a) in respect of goods, services, or an interest in land; and
- “(b) in connection with—
- “(i) the supply or possible supply of the goods or services; or
- “(ii) the sale or grant or possible sale or grant of the interest in land; or

“(iii) the promotion by any means of the supply or use of the goods or services or the sale or grant of the interest in land.

“12AA Court must have regard to certain matters

“(1) In proceedings concerning a contravention of **section 12A**, and in assessing whether a person had reasonable grounds for a representation, a court must have regard to all of the circumstances, including—

“(a) the nature of the goods, services, or interest in land in respect of which the representation was made:

“(b) the nature of the representation (for example, whether it was a representation about quality or quantity):

“(c) any research or other steps taken by or on behalf of the person before the person made the representation:

“(d) the nature and source of any information that the person relied on to make the representation:

“(e) the extent to which the person making the representation complied with the requirements of any standards, codes, or practices relating to the grounds on which such a representation may be made, and the nature of those requirements:

“(f) the actual or potential effects of the representation on any person.

“(2) **Subsection (1)** does not limit section 44.

“12AB Limitation on commencement of proceedings in relation to unsubstantiated representations

Despite anything to the contrary in Part 5, only the Commission may commence proceedings, apply for an order, or apply for an injunction in relation to a contravention of **section 12A**.

In *clause 9, new section 12B*, replace “industry or profession” (line 3 on page 17) with “trade, business, industry, profession, occupation, activity of commerce, or undertaking”.

In *clause 9, new section 12B(a)*, replace “industry or profession” (line 7 on page 17) with “trade, business, industry, profession, occupation, activity of commerce, or undertaking”.

New clause 10A

After *clause 10* (after line 19 on page 17), insert:

10A New section 14A inserted

The following section is inserted after section 14:

“14A When vendor bids are misrepresentations

- “(1) This section applies where property (being goods, services, or an interest in land) is offered for sale—
- “(a) by auction (as defined in **section 36V**); or
 - “(b) by any other bidding process in which all bids are disclosed.
- “(2) The vendor of the property makes a false or misleading representation with respect to the price of the property if the vendor, or any agent acting on behalf of the vendor, makes a vendor bid for the property.
- “(3) However, **subsection (2)** does not apply if—
- “(a) there is a reserve price for the property; and
 - “(b) the bid is made before the reserve price is reached and is clearly identified as a vendor bid.
- “(4) If property is unsold at the end of an auction or other bidding process referred to in **subsection (1)**, any subsequent reference to a particular bid as being the amount at which the property was passed in is a false or misleading representation with respect to the price of the property if the bid was a vendor bid.
- “(5) In this section, **vendor bid** means a bid made by the vendor or any person (including an auctioneer) acting as agent for the vendor.”

Clause 11

In *clause 11*, new *section 21D(3)*, replace “Order in Council” (line 25 on page 20) with “regulations”.

Clause 11A: new section 26A

In *clause 11A*, replace *new section 26A* (lines 30 to 36 on page 20) with:

“26A Unfair contract terms in standard form consumer contracts

- “(1) If a court has declared, under **section 46I**, that a term in a standard form consumer contract is an unfair contract term, a person must not—
- “(a) include the unfair contract term in a standard form contract (unless the term is included in a way that complies with the terms (if any) of the decision of the court); or
 - “(b) apply, enforce, or rely on the unfair contract term in a standard form contract.
- “(2) The prohibitions in **subsection (1)** do not apply to any contract entered into before this section comes into force; but if the contract is varied or renewed on or after this section comes into force, the contract must be treated as a new contract for the purposes of **subsection (1)**.”
- “(3) However, in the case only of a contract of insurance (as defined in section 7 of the Insurance (Prudential Supervision)

Act 2010) entered into before this section comes into force, the prohibitions in **subsection (1)** do not apply to—

- “(a) the contract; or
- “(b) any variation of the contract; or
- “(c) any new contract that has the effect of operating as a renewal of the contract, and any subsequent renewal.”

Clause 12B: new section 28B

In *clause 12B*, replace *new section 28B* (lines 1 to 8 on page 22) with:

“28B Disclosure of trader status on Internet

- “(1) This section applies when—
 - “(a) goods or services are offered for sale to consumers on the Internet; and
 - “(b) the offer is able to be accepted via the Internet.
- “(2) If the vendor of the goods or services is in trade, the person making the offer must make it clear to potential purchasers that the vendor is a person in trade.
- “(3) If the offer and any resulting sale are managed by an intermediary that is not party to the sale (such as an intermediary that operates an online bidding process), the intermediary must take reasonable steps to ensure that the person offering the goods or services for sale complies with **subsection (2)**.”

Clause 15: new section 31A

In *clause 15*, replace *new section 31A(1)(b)* (lines 13 to 15 on page 25) with:

- “(b) there is no other requirement, under any other enactment, for a supplier in those circumstances to—
 - “(i) report to a government agency; or
 - “(ii) do any other thing in relation to goods of a kind referred to in **paragraph (a)** (for example, to have in place a process for the voluntary recall of goods of that kind).

Clause 17: new section 33C

In *clause 17*, *new section 33C(3)*, replace “**(1)(a)**” (line 25 on page 29) with “**(1)(b)**”.

Clause 18: new section 36B

In *clause 18*, *new section 36B(1)(a)*, after “goods until” (line 7 on page 32), insert “all or a specified portion of”.

Clause 18: new section 36K

In *clause 18*, *new section 36K(2)(a)(i)*, delete “referred to in **subsection (1)**” (lines 31 and 32 on page 39).

Clause 18: new section 36L

In *clause 18*, replace *new section 36L(2)(b)* (lines 6 to 8 on page 41) with:

- “(b) either—
 - “(i) the total price payable, and any other consideration to be given, under the agreement is disclosed in the agreement; or
 - “(ii) if the total price or consideration is not ascertainable at the time at which the agreement is entered into, the method by which the total price or consideration will be calculated is disclosed in the agreement; and

Clause 18: new section 36UA

In *clause 18*, *new section 36UA(2)(a)*, replace “Order in Council” (line 11 on page 50) with “regulations”.

In *clause 18*, *new section 36UA(3)*, replace “Order in Council” (line 17 on page 50) with “regulations”.

Clause 18: new section 36Z

In *clause 18*, *new section 36Z(4)*, replace “**and (2)**” (line 29 on page 52) with “**to (3)**”.

Clause 18: new section 36ZAA

In *clause 18*, replace *new section 36ZAA* (line 33 on page 52 to line 6 on page 53) with:

“36ZAA Vendors selling in trade

The Consumer Guarantees Act 1993 does not apply to goods sold at auction if—

- “(a) the goods are goods that are ordinarily acquired for personal, domestic, or household use; and
- “(b) the vendor is selling the goods in trade as a supplier (within the meaning of the Consumer Guarantees Act 1993); and
- “(c) the goods are acquired in trade; and
- “(d) the notice of the terms of the auction specifies that in the circumstances described in **paragraphs (a) to (c)** the Consumer Guarantees Act 1993 does not apply as between the vendor and the purchaser.

Clause 18: new section 36ZA

In *clause 18*, replace *new section 36ZA(1)(c)* (lines 23 to 29 on page 53) with:

- “(c) the property is offered for sale with a reserve price and the vendor bid is less than the reserve price.

In *clause 18*, replace *new section 36ZA(2) and (3)* (lines 30 to 36 on page 53) with:

- “(2) In this section, **vendor bid** means a bid made by the vendor or any person (including an auctioneer) acting as agent for the vendor.

Clause 18: new section 36ZC

In *clause 18*, *new section 36ZC(2)*, delete “registered” (line 14 on page 54).

In *clause 18*, replace *new section 36ZC(2A)(a) and (b)* (lines 21 to 23 on page 54) with:

- “(a) the vendor—
 “(i) is in trade; or
 “(ii) is selling goods other than goods of a kind ordinarily acquired for personal, domestic, or household use or consumption; and

Clause 19

In *clause 19*, *new section 37(e)*, after “order” (line 5 on page 55), insert “or decision”.

Clause 22

In *clause 22(2)*, *new section 40(1)*, delete “summary” (line 5 on page 56).

In *clause 22(4)*, *new section 40(1B)*, delete “summary” (line 16 on page 56).

Clause 23: new section 40C

In *clause 23*, replace *new section 40C(1)(a)* (lines 24 and 25 on page 57) with:

- “(a) be proceeded against by filing a charging document under section 14 of the Criminal Procedure Act 2011;
or

In *clause 23*, replace *new section 40C(2)* (lines 27 to 30 on page 57) with:

- “(2) Despite section 21 of the Summary Proceedings Act 1957, leave of a District Court Judge or Registrar to file a charging document is not necessary if the Commission commences proceedings for an infringement offence by filing a charging document under the Criminal Procedure Act 2011.

Clause 26: new section 46C

In *clause 26*, *new section 46C(1)(a)*, after “within a 10-year period” (lines 27 and 28 on page 64), insert “(whether before or after this section comes into force)”.

In *clause 26*, *new section 46C(1)(a)*, delete “of” (line 28 on page 64).

In *clause 26*, *new section 46C(1)(b)*, after “within a 10-year period” (line 33 on page 64), insert “(whether before or after this section comes into force)”.

In *clause 26*, replace *new section 46C(1)(c)* (line 35 on page 64 to line 2 on page 65) with:

- “(c) has been prohibited by an overseas jurisdiction, in connection with the contravention of any law relating to fair

trading, from carrying on activities that are substantially similar to those referred to in **section 46D**.

Clause 26A: new section 46I

In *clause 26A*, replace *new section 46I(2)(c)* (lines 28 and 29 on page 66) with:

- “(c) the declaration is not prohibited by **section 46K(1)**;
and

Clause 26A: new section 46L

In *clause 26A*, after *new section 46L(3)* (after line 22 on page 68), insert:

- “(4) For the purpose of **subsection (1)(b)**, and despite anything in **section 46M**, in relation to contracts of insurance only, the following terms must be taken to be terms that are reasonably necessary in order to protect the legitimate interests of the insurer:
- “(a) a term that identifies the uncertain event or that otherwise specifies the subject matter insured or the risk insured against:
 - “(b) a term that specifies the sum or sums insured or assured:
 - “(c) a term that excludes or limits the liability of the insurer to indemnify the insured on the happening of certain events or on the existence of certain circumstances:
 - “(d) a term that describes the basis on which claims may be settled or that specifies any contributory sum due from, or amount to be borne by, an insured in the event of a claim under the contract of insurance:
 - “(e) a term that provides for the payment of the premium:
 - “(f) a term relating to the duty of utmost good faith that applies to parties to a contract of insurance:
 - “(g) a term specifying requirements for disclosure, or relating to the effect of non-disclosure or misrepresentation, by the insured.
- “(5) In **subsection (4)**,—
- “**contract of insurance** has the meaning given in section 7 of the Insurance (Prudential Supervision) Act 2010
 - “**premium** has the meaning given in section 6 of the of the Insurance (Prudential Supervision) Act 2010
 - “**uncertain event** has the meaning given in section 7 of the Insurance (Prudential Supervision) Act 2010.

Clause 27: new section 47F

In *clause 27*, *new section 47F(2)*, delete “summary” (line 4 on page 70).

Clause 27A

In *clause 27A(3)*, *new section 47G(4)*, after “the statement” (line 25 on page 70), insert “or”.

In *clause 27A(3)*, *new section 47G(4)*, replace “**section 47F**” (line 26 on page 70) with “section 47J”.

Clause 28: new section 47L

In *clause 28*, *new section 47L(2)(db)*, replace “from” (line 36 on page 72) with “to”.

In *clause 28*, *new section 47L(2)(dc)*, replace “have been” (lines 1 and 2 on page 73) with “are”.

Clause 35A: new section 5A

In *clause 35A*, replace *new section 5A* (line 22 on page 76 to line 7 on page 77) with:

“5A Guarantee as to delivery

“(1) Where a supplier is responsible for delivering, or for arranging for the delivery of, goods to a consumer there is a guarantee that the goods will be received by the consumer—

“(a) at a time, or within a period, agreed between the supplier and the consumer; or

“(b) if no time or period has been agreed, within a reasonable time.

“(2) Where the delivery of the goods fails to comply with the guarantee under this section, Part 2 gives the consumer a right of redress against the supplier and, in that case, the consumer may,—

“(a) if the failure is of a substantial character, reject the goods under section 18(3); and

“(b) in any case, obtain damages under section 18(4) (other than damages relating to the remedies set out in section 18(2)), whether or not the consumer also rejects the goods.

“(3) For the purposes of this section, the reference in section 20(1)(b) to an agent of the supplier must be treated as including any carrier or other person who undertakes to deliver the goods on behalf of the supplier.

“(4) A consumer’s rights of redress under Part 2 in relation to the guarantee under this section are limited to those specified in **subsection (2)**.”

Clause 36: new section 7B

In *clause 36*, *new section 7B(4)*, after “supply of gas” (lines 17 and 18 on page 79), insert “(other than non-reticulated gas)”.

Clause 40A

In *clause 40A*, replace *new section 43(2)(b)* (lines 6 and 7 on page 82) with:

- “(b) the goods or services are, or (in connection only with the guarantee of acceptable quality in **section 7A**) the gas or electricity is, supplied and acquired in trade; and

In *clause 40A*, *new section 43(2A)(b)*, replace “goods or services” (line 19 on page 82) with “goods, services, gas, or electricity (as relevant)”.

In *clause 40A*, *new section 43(2A)(c)(ii)*, replace “the other” (line 26 on page 82) with “another”.

Clause 53A

In *clause 53A(1)*, replace *new section 32A(1A)* (lines 32 to 35 on page 89) with:

- “(1A) Despite section 21(1)(a) of the Summary Proceedings Act 1957, leave of a District Court Judge or Registrar to file a charging document is not necessary if the Secretary commences proceedings for an infringement offence by filing a charging document under the Criminal Procedure Act 2011.”

Clause 53B

After *clause 53B(1)* (after line 10 on page 90), insert:

- (1A) Section 32B(1)(b) is amended by omitting “specified in respect of that offence in section 33A” and substituting “prescribed in respect of that offence”.

Clause 53D: new section 33

In *clause 53D*, *new section 33(2)*, delete “summary” (line 33 on page 90).

In *clause 53D*, *new section 33(3)*, delete “summary” (line 2 on page 91).

Clause 67A

In *clause 67A*, replace “a person described in **section 67(1)**” (line 11 on page 98) with “disqualified from registration under **section 67(1)**”.

Clause 74

In *clause 74(1)*, replace “must” (line 5 on page 101) with “may”.

In *clause 74(1)(f)*, delete “described in **section 67(1)**” (lines 24 and 25 on page 101).

In *clause 74(1)(f)*, after “behalf” (line 26 on page 101), insert “, knowing that the person is disqualified from registration”.

Clause 84

In *clause 84(1)*, delete “on indictment” (line 2 on page 107).

In *clause 84(2)*, delete “summary” (line 7 on page 107).

After *clause 84(2)(b)* (after line 12 on page 107), insert:

- (ba) engages a person to conduct an auction on his or her behalf, knowing that the person is disqualified from registration:

Clause 88

After *clause 88(1)* (after line 27 on page 108), insert:

- (1A) The Auctioneers Regulations 1958 (SR 1958/25) are repealed.

Schedule 1

In *Schedule 1*, item relating to the Search and Surveillance Act 2012, item relating to section 47(2) of the Fair Trading Act 1986 (page 111), insert in the fourth column “All (except sections 118 and 119)”.

In *Schedule 1*, item relating to the Search and Surveillance Act 2012, item relating to **section 47L** of the Fair Trading Act 1986 (page 111), insert in the fourth column “All (except sections 118 and 119)”.

Schedule 3

In *Schedule 3, Part 2*, replace the item relating to section 8 of the Real Estate Agents Act 2008 (line 33 on page 116) with:

Section 8: replace “licensed as an auctioneer under the Auctioneers Act 1928” with “registered as an auctioneer under **Part 2 of the Consumer Law Reform Act 2011**”.

Explanatory note

This Supplementary Order Paper proposes to amend the Consumer Law Reform Bill. It replaces SOP 207. The proposed changes that are additional to those in SOP 207 are marked with an asterisk below.

The following proposed changes affect the Fair Trading Act 1986:

- delaying commencement of the contracting out provisions until 6 months after Royal assent:
- delaying commencement of the unfair contract term provisions until 15 months after Royal assent:
- substituting a new definition of transparent in section 2(1):
- recasting, without making substantive changes to, provisions relating to the *trade exception for contracting out, and unsubstantiated representations:
- inserting a *new section 14A* that sets out that, in certain circumstances, a vendor bid, or quoting a vendor bid, will be a false or misleading representation as to price:
- substituting a *new section 26A*, which is about unfair contract terms. The replacement—
 - clarifies that a term that has been declared to be an unfair contract term can nonetheless be included in a standard form contract if it is included in such a way that it complies with any terms set out in the decision of the court that made the declaration:
 - *clarifies that the prohibitions relating to unfair contract terms do not apply to contracts entered into before the section comes into

force, but that variations and renewals of such contracts must be treated as new contracts:

- *provides that, for contracts of insurance only, the prohibitions not only do not apply to contracts entered into before the section comes into force, but also do not apply to variations and renewals of such contracts:
- amending *new section 28B*, which is about disclosure of trader status in Internet sales. The change narrows the scope of the provision so that it will apply only where offers are made in relation to sales that are intended to be completed via the Internet. It also helps future-proof the provision by omitting the reference to an Internet “site”, because the Internet may be available otherwise than on a site:
- amending *new section 31A* to make clear that, in relation to voluntary recalls of goods, *new section 31A* applies only if there is no other requirement to report to a government agency or if there is no other requirement to take any action in relation to those goods:
- amending *new section 36L* to clarify the disclosure requirements in relation to the total price payable, or other consideration to be given, in relation to uninvited direct sales agreements:
- replacing *new section 36ZAA* to clarify when the Consumer Guarantees Act 1993 does not apply to a sale by auction:
- adjusting *new section 36ZA*, which is about vendor bids at auctions, to reflect the *new section 14A*:
- *amending *new section 36ZC* to clarify when the rules about auctioneers paying vendors and providing them with accounts of sale do not apply:
- *clarifying, in *new section 46C*, that management banning orders can be sought in respect of conduct occurring before the section comes into force, and recasting 1 paragraph of that section for clarity:
- *amending *new section 46L*, which is about unfair contract terms, to identify a range of terms that, in contracts of insurance, must be taken as being reasonably necessary in order to protect the legitimate interests of insurers.

The following proposed changes affect the Consumer Guarantees Act 1993:

- replacing *new section 5A*, which relates to guarantees as to delivery where the supplier is responsible for delivering, or arranging for the delivery of, goods to a consumer:
- amending *new section 7B(4)* to exclude non-reticulated gas:
- amending *new section 43* to include references to *new section 7A* (which deals with guarantees of acceptable quality in relation to the supply of gas and electricity).

This Supplementary Order Paper also makes a number of drafting amendments intended to clarify the policies implemented by the Bill, and makes a range of minor and technical amendments affecting the Fair Trading Act 1986, the Con-

sumer Guarantees Act 1993, the Weights and Measures Act 1987, and the proposed new Auctioneers Act. It also revokes the Auctioneers Regulations 1958.
