

## THE CONSUMER PROTECTION (DEFINITIONS OF GOODS AND SERVICES) BILL

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The Commerce Select Committee of the House of Representatives is currently completing its report on the Consumer Protection (Definitions of Goods and Services) Bill. This Bill is proposed to amend the definitions of 'goods' in various consumer and commercial legislation, in particular to ensure that computer software, electricity, gas, telecommunications signals and water are included within the scope of the respective legislation.

The Bill also amends the definitions of 'services' in the Commerce Act 1986, the Consumer Guarantees Act 1993, and the Fair Trading Act 1986. It also amends the definition of 'supplier' in the Consumer Guarantees Act to clarify that the Act will apply to persons who supply services to consumers even if they do not have a direct contractual relationship with the consumer - something which has hitherto been presumed to have been the case.

The Consumer Protection (Definitions of Goods and Services) Bill 2001 (2001B154-1), a Government Bill, was introduced into Parliament by the Deputy Prime Minister and acting Minister of Consumer Affairs, the Hon Jim Anderton, 30 August 2001. The Government wished to ensure that the Consumer Guarantees Act 1993 applied to all goods and services that are ordinarily acquired for personal, domestic, or household use or consumption, as had been its original intention.

In *Electricity Supply Association of New Zealand Incorporated v Commerce Commission* (1998) 6 NZBLC 102,555, the High Court held that electricity and associated line function services are neither goods nor services for the purposes of the Consumer Guarantees Act 1993. The decision cast doubt on whether other utility products and services were covered by the Consumer Guarantees Act 1993, the Commerce Act 1986, and the Fair Trading Act 1986. The amendments contained in the Bill are intended to clarify that those Acts do apply to those goods and services.

An amendment is also made to the Sale of Goods Act 1908 to clarify that it applies to computer software. The purpose for all of these changes is to ensure that remedies are available to the ordinary consumer. The amendments to the Consumer Guarantees Act 1993 are also designed to ensure that consumers have rights of redress against suppliers of services who are responsible for managing the risk of failure of the consumer guarantees.

The Bill proposes changing the definitions of goods and services to make them consistent with those in other amended consumer and commercial legislation.

Clause 11(1) replaces the definition of goods in the Fair Trading Act 1986 to clarify that the definition covers every kind of personal property, and to specifically include computer software, telecommunications signals, and water (the definition already specifically including electricity and gas). The addition of water and computer software is simply to avoid doubt - the courts have long wrestled with the exact legal nature of electricity in any form. But the extension of "goods" to include all types of personal property is liable to extent the scope of the Act beyond what was perhaps originally intended.

The wording of the new definition is interesting:

### 11 Interpretation

Section 2(1) of the principal Act is amended by repealing the definition of the term "goods", and substituting the following definition:

"goods"—

“(a) means personal property of every kind (whether tangible or intangible); and

“(b) includes—

“(i) ships, aircraft, and vehicles;

“(ii) animals, including fish;

“(iii) minerals, trees, and crops, whether on, under, or attached to land or not;

“(iv) gas and electricity;

“(v) telecommunications signals;

“(vi) to avoid doubt, water and computer software”.

The former definition merely stated that “goods” included

“(i) ships, aircraft, and vehicles;

“(ii) animals, including fish;

“(iii) minerals, trees, and crops, whether on, under, or attached to land or not;

“(iv) gas and electricity;

There may be good reasons to add telecommunications signals, water and computer software. But “goods” traditionally didn’t include “personal property of every kind (whether tangible or intangible)”— though, in its fullest sense, “goods and chattels” once included any kind of property which, regard being had either to the subject matter, or to the quantity of the interest therein, is not freehold (*New Zealand Law Dictionary*, ed GW Hinde and MS Hinde, 3<sup>rd</sup> edition, Wellington, Butterworths, 1979, p 135). But in modern times personal property has been divided into corporeal and incorporeal property. To include intangible property, or choses in action, under the definition of “goods” may have significant consequences.

Personal property may be divided broadly into two types, tangible movables (goods or choses in possession) and intangibles (choses in action). However, the distinction is not so clear as it may at first glance appear. Some intangible things are more solid than others. Rights to money, goods or securities conferred by a document which is considered to represent the right (and which can be transferred by transfer of the document itself) are of this sort. These include bills of lading and other documents of title, negotiable and certain non-negotiable instruments. But most contracts are concerned with what might be called pure intangibles. Even where evidenced by a written document, the nature of these intangible rights is clearly distinct from any physical existence.

As the Fair Trading Act is currently worded, only true tangible goods were included, as well as “minerals, trees, and crops, whether on, under, or attached to land or not … gas and electricity”. The definition of “goods” was that understood by the common law, as influenced by the Sale of Goods Act 1908 - itself a codification of the *lex mercatoria* which grew out of the custom and usages of the merchants.

There are perhaps not many intangibles which we might buy which are not acquired pursuant to a contract of service. Whether it is bad from the perspective of the consumer and other traders is also uncertain, but it is unlikely to prove an unreasonable inconvenience. But it would have been conceptually cleaner to have altered the wording of the “trade” definition to include intangible personal property without distorting the meaning of goods.

Other proposed amendments to the Act are perhaps less significant. Clause 11(2) amends the definition of “services” to clarify that electricity, gas, telecommunications, and water supply services and waste water removal services are included within the definition. This amendment is to avoid doubt. Clause 11(3) also inserts a definition of “telecommunications signal” for the purposes of the new definition of goods. Neither addition amount to a significant change in the Act.

Changes are also proposed to the Consumer Guarantees Act 1993, the Sale of Goods Act 1908 and the Commerce Act 1986. Most of the changes proposed simply have the effect of clarifying doubts about the application of the relevant Acts. However, the proposed changes to the Fair Trading Act may conceivably broaden the range of situations hitherto covered by the Act. Whether this is to be regretted is uncertain, but it would perhaps be preferable to achieve this worthy social goal without distorting the meaning of “goods”.