

“GOODS” AND “SERVICES” IN CONSUMER PROTECTION ACTS

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INTRODUCTION

The Consumer Protection (Definitions of Goods and Services) Bill, which has been enacted as the Consumer Amendment Act 2003, Consumer Guarantees Amendment Act 2003, Fair Trading Amendment Act 2003, and the Sale of Goods Amendment Act 2003 amends the definition of ‘goods’ in various pieces of consumer and commercial legislation, to ensure that computer software, electricity, gas, 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 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 had hitherto been presumed to have been the case.

It is the purpose of this article to briefly outline these changes. More detailed comment is given where warranted. Emphasis is on the consumer legislation most likely to have a direct bearing upon the general public – the Fair Trading Act and the Consumer Guarantees Act. Particular focus is on the proposed change to the definition of “goods” in the Fair Trading Act, for this latter may have unforeseen consequences.

THE BILL

The Consumer Protection (Definitions of Goods and Services) Bill was introduced into Parliament by the then Deputy Prime Minister and acting Minister of Consumer Affairs, the Hon Jim Anderton, on 30 August 2001. The Government was concerned to ensure that the Consumer Guarantees Act 1993 applied to all goods and services that were ordinarily acquired for personal, domestic, or household use or consumption. In response to a written question from the Hon Phillipa Bunkle, MP, Mr Anderton said that:

I am today introducing the consumer protection bill. It will extend the definition of goods, services, and suppliers in the Consumer Guarantees Act, the Fair Trading Act, the Sale of Goods Act, and the Commerce Act. The new definition will include goods and services supplied through a network. This means that, for the first time, protection for consumers is extended to such things as electricity, gas, water, and the Internet (Questions to Ministers, Question 4, 30 August 2001).

Although this legislation could be seen as of a principally technical nature, one motivation was of a more overtly political nature. In an exchange with Ms Bunkle, who was his predecessor as Minister for Consumer Affairs, Mr Anderton made it clear that righting consumer problems blamed on the previous Government’s electricity reforms was the principal reason for the Bill (Questions to Ministers, Question 4, 30 August 2001).

The technical difficulty addressed by these reforms was illustrated by the 1998 decision *Electricity Supply Association of New Zealand Incorporated v Commerce Commission* ((1998) 6 NZBLC 102,555), where the High Court held that electricity and associated line function services were 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 Act are intended to clarify that those Acts do apply to those types of goods and services. An amendment has also been 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.

FAIR TRADING ACT

The Fair Trading Act prohibits misleading and deceptive conduct or conduct that is likely to be misleading and deceptive (s 9; see *Astra Pharmaceuticals (New Zealand) Ltd v Pharmaceutical Management Agency Ltd* [2001] 1 NZLR 415 (CA); *Allison v KPMG Peat Marwick* [2000] 1 NZLR 560 (CA); *Lane Group Ltd v D I & L Paterson Ltd* [2000] 1 NZLR 129; (1999) 13 PRNZ 509 (CA)). This “conduct” (s 2(2); see *Goldsbro v Walker* [1993] 1 NZLR 394 (CA)) must be made by someone in “trade” (ss 2(1) and 9; see *Goldsbro v Walker* [1993] 1 NZLR 394 (CA); *Fairnington Investments Ltd v NZ Kiwifruit Marketing Board* (1994) 6 TCLR 254). Principles of commercially acceptable behaviour are set by the Act, with the terms defined by the Courts on the facts of the case, current business practice, and trade opinion. The test is subjective, from the view of the types of reasonable customers likely to be concerned in each case (*TPC v Annand Thompson Ltd* (1979) ATPR 40). Breach of section 9 is not expressly confined to situations in connection with the supply of goods or services, but the actor must be in “trade”, and this is defined as relating to the supply or acquisition of goods or services or to the disposition or acquisition of any interest in land (s 2(1)).

False representation (s 13) covered a narrower range of behaviour than prohibited by s 9, at least until the amendments to the section in 2000 (the words “or misleading” were inserted after the word “False” in the heading of s 13, and the section itself was amended by substituting the words “make a false or misleading representation” for the words “Falsely represent” wherever they occurred). They do not have to be false (see *Foodtown Supermarkets Ltd v Commerce Commission* [1991] 1 NZLR 466). But a breach may have criminal consequences (s 40). The actor must be in trade (ss 2(1) and 13), when he or she makes a false representation made in connection with supply of goods or services, or their promotion. The representation may be spoken or written, by course of action (or silence; *Mills v United Building Society* [1988] 2 NZLR 392), or the use of pictures and sounds. False means incorrect, and though there need not necessarily be an intent to mislead, as formerly. The representation must be made in connection with one of the matters specified in the section – place of origin, compliance with statutes, suitability of use, failure to disclose extra charges (ss 13(a)-(j)).

Any conduct which is prohibited by the Act can result in civil and/or criminal action. From the perspective of consumer protection the wider the scope of conduct covered the better. The new Act changes the definitions of goods and services to make them consistent with those in other amended consumer and commercial legislation, to ensure that electricity, computer software, gas and water are covered by these provisions.

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, 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) 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 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, 3rd 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 or corporeal than others. Rights to money, goods or securities conferred by a document which is considered to represent the right (and which may be transferred by physical conveyance 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 was previously worded, only truly 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. Some of these customs were written down, and became a code of international commercial customs. They became part of the law of England through the Statute of the Staple 1352-3 (27 Edw III stat 2 (Eng)). Towards the end of the seventeenth century it became unnecessary to plead that one of the parties to an action were a merchant, and once a considered judgment on a custom had been given, the

custom was judicially noticed, and no proof of it were needed in later cases (*Bromwich v Lloyd* (1698) 2 Lutwyche 1582; 125 ER 870). Subsequently this law of the merchants became of general application.

Following upon the initial groundwork prepared by Chief Justice Holt, from 1756 Lord Mansfield led the way in the development of the Law Merchant into the commercial law of modern times. Mansfield, and his followers, established the Law Merchant as an integral part of the common law, relying on the writings of foreign jurists for international custom, and special juries of merchants for current trade customs and findings of fact.

What was once international and customary law has become a national and fixed body of law by the use of case law and precedent. However, the law merchant remains a living body of principles which may be extended by proof of a new custom (immemorial user is not necessary: *Edelstein v Schuler* [1902] 2 KB 144. However, a new custom must not be contrary to an established rule of law: *Goodwin v Robarts* (1876) LR 10 Ex 337 per Cockburn CJ). But the courts have generally understood “goods” to not include intangibles, whether of the pure, or bastard, variety. The law of New Zealand has adopted the old definition of “goods”, as represented in the Sale of Goods Act 1908, itself modelled on the Sale of Goods Act 1893 (UK).

By the passage of the Consumer Protection (Definitions of Goods and Services) Bill the definition of goods in the Fair Trading Act 1986 has been broadened. The importance of the definition lies in its use in the definition of “trade”. This includes the requirement for an association with the supply or acquisition of goods or services – or an interest in land. As broadened, the Act will now apparently cover instances of the supply of intangible personality, such as shares, or book debts.

One example of the possible effect of a broadening of the definition of goods under the Fair Trading Act may be that the purchaser of company shares may be able to sue the seller of shares, in the event that they can show that the vendor engaged in conduct that was misleading or deceptive or likely to mislead or deceive. A private investor who sells shares might not be said to be in trade, but the courts have held that certain one-off sales are covered by the Act (*E and K L Zust Ltd v Shirtcliff and Shirtcliff* (High Court, Christchurch, CP 84/00, 14 December 2000, Master Venning)). Silence can be misleading. If a vendor fails to pass on to a buyer information of which they may be appraised and which may affect the share price, a breach of s 9 may have occurred. Previously, it is unlikely that such conduct would come under the Act, since trade would not have included the sale of shares, unless in connection with services – such as the trading of shares on behalf of the client (*Sim v Global Equity Management (NZ) Ltd* [2001] DCR 744), or the giving of financial advice. However, with the broadening of the definition of “goods”, this is no longer certain.

There are not many intangibles which we might buy which are not acquired pursuant to a contract of service, but shares alone constitute a significant class of property. Whether it was anticipated that the amendment would have this effect is uncertain. 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, rather than goods (whether tangible or intangible).

Other amendments to the Act are perhaps less significant. Clause 11(2) of the Bill amends the definition of “services” to clarify that electricity, gas, and water supply services and waste water removal services are included within the definition. This amendment is to avoid doubt, and does not amount to a significant change in the Fair Trading Act.

ALTERATIONS TO CGA

Clause 6(1) substitutes new definitions of “goods”, “services”, and “supplier” in the Consumer Guarantees Act 1993. These amendments also involve a curious extension of the definition of goods.

The new definition of “goods”, according to the explanatory note which accompanied its introduction into Parliament, seeks to clarify that the definition covers every kind of personal property (other than money and choses in action); and specifically includes electricity, gas, computer software, and water. The addition of water and computer software is simply to avoid doubt. The addition of gas and electricity may be a worthwhile move, as the exact legal status of these have long plagued the courts. It also ensures consistency with the Fair Trading Act.

The wording is as follows:

(1) Section 2(1) of the principal Act is amended by repealing the definitions of the terms goods, service, and supplier, and substituting, in their appropriate alphabetical order, the following definitions

“goods —

“(a) means personal property of every kind (whether tangible or intangible), other than money and choses in action; and

“(b) includes —

“(i) goods attached to, or incorporated in, any real or personal property;

“(ii) ships, aircraft, and vehicles;

“(iii) animals, including fish;

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

“(v) electricity and gas;

“(vi) to avoid doubt, water and computer software; but

“(c) despite paragraph (b)(i), does not include a whole building, or part of a whole building, attached to land unless the building is a structure that is easily removable and is not designed for residential accommodation

The Select Committee, in reviewing the Bill and submissions on it, concluded that the most relevant guarantee, that of acceptable quality, would not cause undue difficulty where the definition of goods extended to include electricity. The reasonable consumer in the context would be likely to be a consumer who understands that electricity is subject to momentary fluctuations, prone to interference by environmental factors and the actions of third parties, and may not be supplied at all due to planned shutdowns or emergencies.

The intended effect of the inclusion of electricity as goods is to render liable the electricity retail companies, as the suppliers of electricity to consumers, and electricity generators, Transpower New Zealand Limited, and line companies as manufacturers of electricity.

As with the new definition of good in the Fair Trading Act, so this definition raises new questions. Are there any examples of intangible personal property, other than money and things in action? Precisely what type of rights is the Act designed to now encompass? Choses in action was once conceived to include things of which the owner had not actual possession, but for the recovery of which he or she had merely a right of action. It was gradually extended to include any kind of personal property the right to which could be enforced only by any action (see *Torkington v Magee* (1902) 2 KB 427, 430 per Channell J). Due to the creation of forms of property unknown at earlier times, in modern times it has been extended to almost any kind of incorporeal personal property. Quite what intangibles the definition of “goods” in the Consumer Guarantees Act now includes is uncertain.

The new definition of “services” incorporates a new paragraph (a) to correspond more closely with the definitions in the Commerce Act 1986 and the Fair Trading Act 1986. Formerly the definition in the Consumer Guarantees Act 1993 was restricted to those services listed in the definition. New paragraph (a) broadens the definition to include any rights, benefits, or facilities that are (or are to be) provided or conferred by a supplier.

A new paragraph (b)(vi) has been added to clarify that electricity, gas, and water supply services, and waste water removal services are included within the definition. One intended effect of this amendment is that the provision of line and network services for utilities such as electricity, gas, water, and waste water will be subject to the Act. A new paragraph (c)(ii) has also been added to provide that the definition does not apply to contracts of service. This is consistent with the definitions in the Commerce Act 1986 and the Fair Trading Act 1986.

The definition of “supplier” has been amended by substituting a new paragraph (a)(ii). The amendment has the effect of clarifying that a person does not have to supply services under a contract with the consumer in order to be regarded as a supplier under the Act, and that supplies of services to groups of consumers are covered by the Act.

Clause 7 amends section 32(b) of the Act to clarify that a consumer may only cancel a contract between the consumer and the supplier for the supply of services and not any other contract that may exist between the supplier and an intermediary. This amendment is consequential on the amendment to the definition of “supplier”, which provides that a person does not need to have a contract for the supply of services to a consumer in order to be regarded as a supplier.

Clause 9 inserts a new section 43A. This gives a non-contracting supplier (such as a line company) the benefit of any liability exclusion contained in the contract of supply (such as between the retailer and the business consumer).

It had been intended that telecommunications signals be included in the definitions of goods in each of the Consumer Guarantees Act, Fair Trading Act, and Commerce Act. However, the Select Committee recommended that this be removed from the Bill, on the grounds that the definition of telecommunication signals in the Bill were wide enough to cover the content of telecommunications. It was argued in submissions to the Select Committee that the inclusion of such a definition could mean that an internet service provider might be liable for the consequential losses of a consumer who relied on incorrect information on a webpage. It was not intended that suppliers of telecommunications signals would be liable for the content of the telecommunications. However, there was the possibility that on the basis of the definition of telecommunications signals used in the original Bill, liability for the content of telecommunications could arise. The Select Committee therefore recommended removing telecommunications signals from the definition of goods, and leaving the supply of telecommunications to be regulated as a service.

COMMERCE ACT

Clause 4(1) substitutes a new definition of “goods” in the Commerce Act 1986 to clarify that the definition covers every kind of personal property, and specifically include computer software, and water (the definition already specifically includes electricity and gas). The addition of water and computer software was again to avoid doubt.

Clause 4(2) amended the definition of “services” to clarify that electricity, gas, and water supply services and waste water removal services are included within the definition. This amendment is to avoid doubt that these were “services” for the purpose of the Act.

SALE OF GOODS ACT

Clause 13 substitutes a new definition of “goods” in the Sale of Goods Act 1908 to include computer software. The amendment is to avoid doubt. Unlike the Fair Trading Act, intangible things are not included within the definition of “goods”, the pre-existing inconsistency of definition between the Acts being increased.

CONCLUSION

Most of the changes to consumer legislation by the Consumer Protection (Definitions of Goods and Services) Bill, enacted as the Consumer Protection (Definitions of Goods and Services) Bill, which has been enacted as the Consumer Amendment Act 2003, Consumer Guarantees Amendment Act 2003, Fair Trading Amendment Act 2003, and the Sale of Goods Amendment Act 2003 have the effect of clarifying doubts about the application of the relevant Acts. However, the proposed changes to the Fair Trading Act, in particular, may conceivably broaden the range of situations hitherto covered by the Act. Whether this is to be regretted is uncertain, but it might have been preferable to achieve this worthy social goal without distorting the meaning of “goods”.