



CAYMAN ISLANDS LAW REFORM COMMISSION



Consumer Protection:

Entrenching Consumer Supremacy in Cayman Islands Legislation

Discussion Paper

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The Cayman Islands Law Reform Commission

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TABLE OF CONTENTS

EXECUTIVE SUMMARY	10
PART A	
RESEARCH OBJECTIVES	19
SUMMARY OF LEGISLATIVE ISSUES AND QUESTIONS FOR CONSIDERATION	20
PART B	
INTRODUCTION	25
DEFINING CRITICAL TERMS	26
Who is a Consumer?	26
What is Consumer Protection?	27
What is Consumerism?	28
Relationship between Consumerism, Constitutionalism and Good Governance	28
PART C	
DOES CONTRACT LAW ADEQUATELY PROTECT CONSUMERS?	29
Obligations of Suppliers to Consumers	29
Privity of Contract	30
Freedom of Contract	30
Caveat Emptor	30
Exclusion Clauses	31
Fundamental Breach	31
DOES TORT LAW ADEQUATELY PROTECT CONSUMERS?	31
Tort Law Limitations	32
DO INTERNATIONAL RULES PROTECT CONSUMERS?	32
(a) The United Nations Guidelines on Consumer Protection	32
<i>Physical safety</i>	33
<i>Promotion and protection of consumers' economic interests</i>	33
<i>Standards for the safety and quality of consumer goods and services</i>	34
<i>Distribution facilities for essential consumer goods and services</i>	34
<i>Measures enabling consumers to obtain redress</i>	34
<i>Education and information programmes</i>	34
<i>Promotion of sustainable consumption</i>	34
(b) The United Nations Measures relating to Food, Water and Pharmaceuticals	35
(c) The United Nations Measures relating to Technology	35
<i>E-commerce and digital consumption</i>	35
<i>Financial services</i>	36
<i>Needs of all consumers should be recognized</i>	36
<i>Emphasis on fairness in the market</i>	36
<i>Health and responsible marketing</i>	36
(d) The United Nations Measures relating to International Cooperation	36
(e) Regional Measures	37

DOES CONSUMER PROTECTION LEGISLATION EXIST IN THE CAYMAN ISLANDS?	38
The Sale of Goods Law (1997 Revision)	38
<i>Sections 13, 14, 15 and 16 Protection</i>	38
<i>Section 55 Limitations</i>	39
The Price Gouging (Emergency Circumstances) Law, 2004	40
WHY DO THE CAYMAN ISLANDS NEED SPECIFIC CONSUMER PROTECTION LEGISLATION?	41
(a) Services in the Marketplace	41
(b) Appliances and Electronic Equipment	42
(c) Motor Vehicle and Accessories	42
(d) New Home Construction	43
<i>Regulation of Builders</i>	45
<i>Dispute Resolution</i>	45
(e) Travel Sector	45
(f) Financial Services	46
(g) Scammers	47
(h) Unfair or Unjust Terms in Contracts	48
(i) High-Pressure Sales	48
(j) E-Commerce and Remote Transactions	49
(k) Consumer Warranties	49
(i) <i>Implied Warranties</i>	50
(ii) <i>Express Warranties</i>	50
PART E	
GLOBAL LEGISLATIVE APPROACHES TO CONSUMER PROTECTION	51
(a) Australia	52
(b) Barbados	53
(c) Canada	54
(d) New Zealand	54
(e) United Kingdom	54
(f) European Community	55
(g) Organisation for Economic Co-operation and Development	55
SPECIFIC LEGISLATIVE PROVISIONS OF OTHER JURISDICTIONS FOR CAYMAN CONSIDERATION	55
(a) Consumer, Manufacturer and Supplier	55
(i) <i>Australia Approach</i>	56
(ii) <i>Barbados Approach</i>	56
(iii) <i>Canada Approach</i>	57
(iv) <i>India Approach</i>	57
(v) <i>South Africa Approach</i>	58
(b) Vulnerable Consumer	59
(i) <i>Australia Approach</i>	59
(ii) <i>United Kingdom Approach</i>	59
(c) Consumer Rights to be Protected	59
(i) <i>India Approach</i>	59

(ii) <i>South Africa Approach</i>	60
(iii) <i>Brazil Approach</i>	60
(d) Obligations to be Imposed on the Providers of Goods and Services	61
(i) <i>Australia Approach</i>	61
(ii) <i>United Kingdom Approach</i>	61
(iii) <i>United States Approach</i>	62
(e) Standard Contracts and Fair Contractual Terms	62
(i) <i>Australia Approach</i>	63
(ii) <i>Barbados Approach</i>	63
(iii) <i>European Union Approach</i>	63
(iv) <i>United Kingdom Approach</i>	64
(v) <i>South Africa Approach</i>	64
(f) Provisions for Disclosure and Labelling	65
(i) <i>Canada Approach</i>	66
(ii) <i>New Zealand Approach</i>	66
(iii) <i>South Africa Approach</i>	68
(g) Safety of Goods and Services	68
(i) <i>Australia Approach</i>	68
(ii) <i>Barbados Approach</i>	69
(iii) <i>New Zealand Approach</i>	71
(iv) <i>United Kingdom Approach</i>	71
(h) Guarantees, Warranties and Conditions	72
(i) <i>Barbados Approach</i>	72
(ii) <i>Canada Approach</i>	72
(iii) <i>New Zealand Approach</i>	72
(iv) <i>European Union Approach</i>	74
(i) Provision for Advertising	74
(i) <i>Australia Approach</i>	75
(ii) <i>Barbados Approach</i>	75
(iii) <i>European Union Approach</i>	75
(iv) <i>Jamaica Approach</i>	76
(v) <i>New Zealand Approach</i>	78
(j) Electronic Commerce	79
(i) <i>Canada Approach</i>	80
(ii) <i>OECD Approach</i>	80
(iii) <i>South Africa Approach</i>	81
(iv) <i>UNCITRAL Approach</i>	83
(v) <i>United Kingdom Approach</i>	83
(k) Consumer Credit Provisions	85
(i) <i>Australia Approach</i>	85
(ii) <i>European Union Approach</i>	85
(iii) <i>New Zealand Approach</i>	86
(l) Redress Mechanisms	86
(i) <i>Australia Approach</i>	87

<i>(ii) South Africa Approach</i>	87
(m) Small Claims	87
(n) Public Enforcement of Consumer Claims	88
<i>(i) Australia Approach</i>	88
<i>(ii) Barbados Approach</i>	88
<i>(iii) OECD Approach</i>	89
<i>(iv) United Kingdom Approach</i>	90
PART F	
POSSIBLE LEGISLATIVE PROVISIONS TO ADDRESS CONSUMER PROTECTION ISSUES IN THE CAYMAN ISLANDS	90
APPLICATION OF THE LEGISLATION AND CONSUMER TERMINOLOGY	92
(i) Should the legislation apply to both goods and services offered to a consumer?	92
(ii) Should we define who will be regarded as a “consumer”?	92
(iii) Should we define what will constitute “goods”?	92
(iii) Should we define what will constitute “services”?	92
(iv) Should we define who will be a “supplier of manufacturer”?	92
(v) Should we indicate what will constitute the supply of goods or services?	93
(vi) Should we indicate the circumstances under which an importer of goods will be regarded as a manufacturer?	93
CONSUMER AFFAIRS COMMISSION AND AUTHORISED OFFICERS	93
(i) Should we establish a Consumer Affairs Commission as the body having oversight of all consumer protection issues?	93
(ii) What specific functions should be assigned to the Consumer Affairs Commission or any other entity established to monitor consumer protection issues?	93
(iii) Should there be provision for monitoring, inspection and investigation powers?	94
(iv) Should an authorized officer be permitted to enter a store or other business premises to inspect?	94
(v) In reasonable circumstances should an authorised officer be empowered to use force for entry to facilitate an investigation?	94
(vi) What documents should an authorised officer be permitted to inspect?	94
(vii) Should the authorised officer be able to seize goods or records?	94
(viii) How should goods or records seized by an authorised officer be treated?	95
(ix) What should be the disclosure responsibilities of authorised officers who are examining books, records and other commercial information?	95
CONSUMER TRIBUNAL	95
(i) As an alternative should a Consumer Tribunal be established to enable consumers to settle their disputes with suppliers?	95
(ii) How should the members of the Consumer Tribunal be appointed?	95
(ii) How should the Tribunal operate?	95
(iv) What jurisdiction should the Tribunal have when seeking to help consumers who have disputes with suppliers?	96
(v) What kinds of orders should the Tribunal be able to make when settling	96

consumer supplier disputes?	
(vi) What role should the Director play in dealing with matters that may be the subject of consumer and supplier disputes?	96
(vii) What decisions of the Director should a supplier be able to appeal to the Tribunal?	96
(viii) What should the Tribunal be able to decide after it hears an appeal of a Consumer Protection Compliance Order?	96
(ix) In what manner should the Tribunal be held accountable for its actions?	96
OBLIGATIONS OF SUPPLIERS	97
(i) Should suppliers be required to be fair to consumers when trading?	97
(ii) What should constitute “misleading or deceptive” conduct on the part of a supplier?	97
(iii) Should the supplier be required to trade fairly if he is supplying a service?	97
(iv) Should the following business practices be prohibited?	97
<i>Misrepresentations</i>	97
<i>Misleading conduct</i>	98
<i>Misleading conduct in relation to employment</i>	98
<i>No intention to supply</i>	98
<i>Gifts and prizes</i>	98
<i>Dual pricing</i>	98
<i>Bait advertising</i>	98
<i>Referral Selling</i>	99
<i>Asserting right to payment without cause</i>	99
<i>Consumer harassment and coercion</i>	99
(v) What should occur if the supplier fails to deliver goods or services within a reasonable time?	99
(vi) What should occur if goods are not delivered or services supplied by a specific date?	100
RESTOCKING FEES	100
Should a supplier be entitled to charge a restocking fee for goods returned?	100
CONDUCT OF REPAIRS	100
(i) What information should the supplier have to give to the consumer when an item is being brought in for repair?	100
(ii) What should the supplier have to do if the cost of the repair will be higher than the estimate?	100
(iii) What should happen if the consumer decides not to complete the repairs?	101
PRICE MARKING	101
(i) What should be the obligation of suppliers with respect to pricing?	101
(ii) Should the pricing provisions apply to promotional material in a store window?	101
UNFAIR TERMS IN CONTRACTS	101
(i) Should we stipulate the circumstances under which a term in a contract will be unfair?	101
(ii) Should we expressly identify terms in a contract that will be considered unfair?	101

(iii) Should an unfair contract term be binding?	103
(iv) Should the consumer be bound by a confusing contract?	103
DISTANCE SELLING	103
(i) What should be the general duty of a supplier who provides goods or services at a distance?	103
(ii) What information should suppliers provide when goods are being sold at a distance?	103
(iii) What should occur if the consumer makes a mistake while ordering goods or services over the Internet?	104
(iv) Should the consumer be provided with a copy of a distance sales contract after he agrees to the contract?	104
(v) What should occur if the consumer does not receive the goods or services agreed to after entering into a distance contract?	104
(vi) Should the consumer be entitled to a refund on cancellation of a distance sale contract?	104
(vii) What should be the obligations of the consumer when goods sold by distance are returned?	104
(viii) What should be the obligations of the supplier when the goods are returned?	104
CONSUMER GUARANTEES FOR GOODS	105
(i) What guarantees should be provided to consumers?	105
(ii) How should we define “merchantable quality” as it relates to goods?	105
(iii) What factors to be considered in determining the merchantability of the goods?	105
(iv) What should occur if the consumer has knowledge of flawed or damaged goods?	105
(v) What obligations should be imposed on a supplier when the consumer tells the business how he wants to use the item and asks for an item that will meet his needs?	105
(vi) What should occur if a consumer buys from a catalogue and the item is different from the picture or description in the catalogue?	105
(vii) What should be the expectation of a consumer if he buys an item after looking at a display or demonstration model in a store?	106
(viii) Should the supplier guarantee that the consumer will find spare parts for his purchase?	106
(ix) Who should be held responsible with respect to a guarantee if there is no manufacturer in the Islands?	106
(x) Should parts and repairs guarantees be covered for used goods?	106
(xi) Should consumers still have guarantees for goods that are supplied at the same time as services?	106
(xii) What will consumers be able to ask of suppliers when they are not satisfied with their merchandise?	106
(xiii) What should occur if the supplier cannot reasonably repair the goods?	107
(xiv) What should properly constitute a refund?	107
(xv) How quickly should a consumer be able to expect the supplier to remedy	107

the failure of a damaged product?	
(xvi) What should happen if the supplier does not repair the goods?	107
(xvii) What should constitute failures of a “substantial” nature with respect to goods?	107
(xviii) Should the consumer be able to collect any damages after returning goods that have a substantial failure?	107
(xix) Should the consumer be able to claim for any damages when there is a failure of guarantees?	108
(xx) How should the consumer and the supplier settle disputes about guarantees for goods?	108
CONSUMER GUARANTEES FOR SERVICES	108
(i) Should the consumer have a guarantee that services will be delivered competently?	108
(ii) Should the consumer guarantees help the consumer who is waiting for a service to be completed within a specific time?	108
(iii) Should a consumer have any guarantee regarding the price of the service?	108
(iv) What should happen when the supplier of the service can remedy a failure?	108
(v) What should the consumer be able to do if the supplier does not remedy the failure?	109
(vi) What should happen if the failure cannot be remedied?	109
(vii) What should constitute a “substantial failure” in a service?	109
(viii) Should the consumer be permitted to collect any damages regarding services that have a substantial failure?	109
(ix) At what stage will a contract be considered cancelled?	109
CONSUMER CREDIT AGREEMENTS	110
(i) How should a “consumer credit contract” be defined?	110
(ii) Who should be a consumer for the purposes of the proposed credit?	110
(iii) Who should be a lender?	110
(iv) Should a lease be regarded as a consumer credit contract?	110
(v) What should a lender be required to tell the consumer before the consumer agrees to the consumer credit contract?	110
(vi) What should happen if the lender does not disclose all relevant information to the consumer?	111
(vii) Should the lender be required to update the disclosure information?	111
(viii) What information will be in the continuous disclosure statement sent to the consumer?	111
(ix) What should the consumer be told before signing a consumer lease?	111
(x) What should happen if the consumer is not given the required information about the lease?	111
(xi) If a lender or lessor does not give the consumer the required information, should the consumer be required to pay the interest charges on the loan or lease?	112
OFFENCES FOR BREACHES OF THE LEGISLATION	112
(i) Should breaches under the law attract administrative penalties to be governed by a progressive penalty system?	112

(ii) What should constitute criminal offences for consumer protection breaches?	112
(iii) Should consumer protection breaches be strict liability offences?	112
DEFENCES FOR BREACHES OF BREACHES OF THE LEGISLATION	113
(i) Should there be a defence to a strict liability offence if the supplier proves that there was due diligence?	113
(ii) Should a newspaper or magazine have a defence if it has published a misleading advertisement or otherwise aided in the commission of an offence by publishing information?	113
INJUNCTIONS AND ORDERS TO HOLD ASSETS OF A SUPPLIER	113
(i) What should the Director be able to do when faced with serious non-compliance?	113
(ii) What stipulations should be attached to an injunction?	113
(iii) What should the Director be able to do if he believes a supplier has committed an unfair practice and has a consumer's money?	113
(iv) Should the supplier be found guilty of contempt if he does not comply with the injunction or the order?	113
SANCTIONS FOR BREACHING THE LEGISLATION	114
(i) What should the court be required to take into account when it fines a supplier for committing an offence?	114
(ii) Should the supplier be allowed to keep the money it has gained from not complying with the legislation?	114
(iii) Should the court be permitted to make an order which publicizes the breach of the supplier?	114
(iv) Should the court be able to sentence people who do not comply with the new legislation?	114
CONCLUSION	114
SCHEDULE	116

Consumer Protection: Entrenching Consumer Supremacy in Cayman Islands Legislation

“A consumer is the most important visitor on our premises. He is not dependent on us we are on him. He is not an interruption to our work; he is the purpose of it. We are not doing a favour to a consumer by giving him an opportunity. He is doing us a favour by giving an opportunity to serve him.”¹

EXECUTIVE SUMMARY

- (i) The Law Reform Commission (LRC) is seeking to examine several issues relating to the introduction of consumer protection legislation aimed at promoting a fair and competitive marketplace in the Cayman Islands while ensuring that adequate protection is available to all consumers. Critical in objective is the achievement of a solution which is applicable to the particular circumstances of the Islands while avoiding the imposition of additional burdens on reputable business enterprises.
- (ii) The issue concerning consumer protection legislation seems to have gained prominence in the Cayman Islands during 2004 when allegations of price gouging arose after the devastating impact of hurricane Ivan. In response, the Price Gouging Control (Emergency Circumstances) Law, 2004 was enacted. In more recent times there have been debates and discussions at the governmental and legislative levels with respect to increased fuel prices, the establishment of a public utilities commission, mortgagee protection legislation and the provision of technological services. All of these issues have as their focus elements of consumer protection.

Defining the Terms

- (iii) In approaching the consumer protection issue it is important to define the core terms of consumer, consumer protection and consumerism. A consumer has come to be defined as any person, natural or legal, to whom goods or services or credit are supplied or sought to be supplied by another person in the course of a business carried on by that other person. It includes any person who uses the goods or services or who the supplier ought to have in contemplation that will be affected by such goods and services.
- (iv) Consumer Protection can be defined as the act of safeguarding the interests of the consumers in matters relating to the supply of goods and services, fraudulent and hazardous practices. It deals with the formulation of rules of law which recognize the

¹ Mahatma Gandhi, 1890.

bargaining weaknesses of the individual consumer and ensures that those weaknesses are not exploited. Consumer protection covers all spheres of our lives ranging from the air we breathe, water we drink, food we eat and prescription drugs we consume. It has an important bearing on the economic and social development of any nation, and this is attested by the importance and prominence given to it globally by various countries, and in particular, by the United Nations.

- (v) The extended concept of consumerism refers to a wide range of activities of government, business and independent organisations designed to protect rights of the consumers. It is a process through which the consumers seek redress, restitution and remedies for their dissatisfaction.

Common Law and Global Protection

- (vi) Consumers have always been protected at common law in contract and this no doubt holds true for consumers in the Cayman Islands as far as the court as an institution through which rights can be enforced.
- (vii) Where contract law does not adequately address the loss of a consumer tort law can intervene to address those limitations inherent in the law of contract. For example, the consumer who is given a defective product by a friend and suffers injury will have a right of redress against the producer of that product in the law of tort under the tort of negligence.
- (viii) As far as global consumer initiatives are concerned, the United Nations Consumer Protection Guidelines have had a significant impact on public policy and law for the protection and empowerment of consumers across the world. The guidelines recommend that all countries should take into account the interests and needs of consumers, particularly those in the developing countries, and should recognize that consumers often face imbalances in economic terms, educational levels and bargaining powers and should also bear in mind that consumers should have the right of access to non-hazardous products, as well as the importance of promoting sustainable economic development and social development.

Consumer Protection Legislation in Cayman

- (ix) The paper poses the question of whether consumer protection legislation exists in the Islands. Any answer to that question would depend on how one defines consumer and what one perceives to be the everyday issues that impact consumers.
- (x) When legislative proposals are debated and a law enacted that process is undertaken with the objective of protecting the rights of individuals, who themselves are

consumers, by stipulating the obligations of parties, establishing standards for a way of operating and imposing remedies and penalties for a breach of a legal requirement.

- (xi) Arguably therefore, consumer protection does exist in the Islands by way of several laws that make up the statute books. However, by the same token, the question needs to be addressed of whether the measures in the various laws meet established requirements for legislation which holistically and effectively protects consumers in relation to the supply of goods and services.
- (xii) Several laws have been identified in the Islands and have been classed in accordance with the UN Guidelines for Consumer Protection. The LRC submits that none of those laws singularly or collectively adequately deal with consumer protection in the manner envisaged globally to protect consumers.
- (xiii) Nonetheless, highlighted are two Laws which attempt to deal with some of the issues with respect to consumer protection. These are the Sale of Goods Law (1997 Revision) and the aforementioned Price Gouging (Emergency Circumstances) Law, 2004.
- (xiv) The Cayman Sale of Goods Law seeks to provide consumers with protection contained in sections 13 to 16 of the Law. These protections relate to implied condition that the goods are free from any charges or encumbrances; that the buyer will enjoy quiet possession of the goods from all undisclosed sources; that where goods are sold by description, the goods will correspond with the description; that where the buyer expressly or by implication makes known to the seller the particular purpose for which the goods are required that the goods will be reasonably fit for that purpose.
- (xv) There are however two important gaps in the protection for consumers provided by the legislative regime of the Sale of Goods Law in that the guarantees, warranties and conditions apply only to goods. Services are not covered by the legislation. Additionally, the remedies for a dissatisfied consumer are damages or a declaration that the contract is void. However, the average consumer does not have ready access to the remedies provided by the Law and given that these remedies are enforceable only through the courts, in practical terms, access to the courts may be expensive and slow.
- (xvi) The Price Gouging Law seeks to prevent increases in prices for commodities during a period of emergency or during a period following a natural disaster. A Price Gouging Control Commission is established to oversee pricing activities and to take the relevant action where a business acts in contravention of the Law. However, its

major limitation is perhaps to be found in its purpose. That is, the Law is only applicable in cases of a state of emergency.

- (xvii) Both the Summary Courts and the Grand Court have an important role to play in providing remedial protection for consumers and so too preventative or proactive protection where, for instance, an injunction is granted to restrain an impending infringement of consumer's rights.
- (xviii) However, the courts are often institutions of last resort after remedies such as negotiations, reconciliation, mediation, or arbitration between consumers and suppliers or providers have failed or when administrative tribunals fail to provide relief.
- (xix) Additionally, consumer protection in the judicial process can be compromised by the scarcity of a clear and comprehensive regime of substantive law as well as by technical, procedural and evidentiary rules which also makes it difficult for consumers to represent their own interests. This may call for imposition of strict liability on sellers given that the majority of consumers may be unfamiliar with the law.

Consumer Protection Problem Areas

- (xx) We highlight several specific areas in which we have determined that consumer issues exists or have the potential to arise. These relate to —
 - the provision of services in the marketplace;
 - the sale of appliances and electronic equipment;
 - motor vehicle and accessories;
 - the construction of new homes;
 - the provision of travel services;
 - the provision of financial Services;
 - activities of scammers and fraudsters;
 - the introduction of unfair or unjust terms in contracts;
 - high-pressure sales;
 - e-commerce and remote transactions; and
 - the issuance of consumer warranties.

Legislative Approaches in other Jurisdictions

- (xxi) There has been a general trend world-wide for the review of consumer policies and the elaboration of consumer protection laws, including constitutional guarantees for consumer protection. Different countries adopt different legislative structures and

institutional models in their efforts to protect consumers. While there is a trend towards comprehensive legislation, drafting preferences have shown that the structure of legislation can be placed on a spectrum. At one end, there are highly comprehensive statutes encompassing a number of areas of consumer protection. At the other end, an array of statutes will deal with specific issues or commercial sectors.

(xxii) It is in this regard that the LRC has examined the laws in a number jurisdictions with a view to identifying emerging international trends and bench-mark best practices. In particular, we provided an overview of the legislative approaches to consumer protection within the following jurisdictions and bodies-

- (a) Australia;
- (b) Barbados;
- (c) Canada;
- (d) New Zealand;
- (e) United Kingdom;
- (f) European Community; and
- (g) Organisation for Economic Co-operation and Development.

(a) Australia

Many Australian states have a relatively integrated legislative regime supplemented by legislation dealing with certain industries or sectors, such as motor vehicle dealers.

(b) Barbados

Barbados has also taken an integrated approach in its Consumer Protection Act, 2002, complemented by a Consumer Guarantees Act, 2002. The Consumer Protection Act, for example, deals with unfair contract terms, unfair trade practices, control of distance selling, product liability, consumer safety, recall of goods, industry codes, and administration and enforcement.

(c) Canada

Like Australia, Canada is a federal jurisdiction with authority over consumer protection being shared between the federal government and the provinces. The federal legislation deals with competition law, including unfair business practices, weights, measurements, textile and precious metal marking.

(d) New Zealand

The New Zealand consumer protection legislation includes the Commerce Act, 1986, the Fair Trading Act 1986, the Consumer Guarantees Act, 1993 and the Credit Contracts and Consumer Finance Act, 2003 and the Sale of Goods Act. Consumers are expected to seek their own remedies under New Zealand legislation, but there are institutional arrangements in place to

simplify the process. There is a Disputes Tribunal that deals with disputes between both private individuals and consumers and suppliers. There is also a special tribunal devoted to motor vehicle cases.

(e) United Kingdom

The United Kingdom has responded to a number of EU Directives and developed legislation, often in the form of regulations, to deal with consumer protection. The Enterprise Act, 2002, sets out a modernised enforcement and compliance regime that applies to a large number of consumer statutes, including the Consumer Credit Act 1974, the Weights and Measures Act 1985, the Trade Descriptions Act 1968, the Tobacco Advertising and Promotion Act, 2002, the Hallmarking Act 1973, and the Lotteries and Amusements Act 1976.

(f) European Community

The European Community has been promoting consumer protection and harmonisation of domestic legislation in the Community through a series of Directives. In many cases, these have now created international standards for the appropriate levels and forms of protection.

(g) Organisation for Economic Co-operation and Development

The Organisation for Economic Co-operation and Development (OECD) has taken an active interest in consumer protection and in matters that can benefit consumers, such as competition policy and development. The OECD has issued several Guidelines that have influenced government action, including the Guidelines on Protection of Privacy and Cross-Border Data Flow of Personal Information (1980) and the Guidelines for Protecting Consumers from Fraudulent and Deceptive Commercial Practices Across Borders (2003).

(xxiii) Areas to be covered in Consumer Protection Legislation

(a) Consumer, Manufacturer and Supplier

The scope of consumer legislation is determined by identifying the target group of people that have to be protected. This is often achieved in most jurisdictions by accurately defining the words consumers, suppliers manufacturers/producers or dealers in legislation in order to isolate transactions and individuals that deserve to be protected.

(b) Vulnerable Consumer

While consumer protection laws are generally designed for the average consumer, the laws in some jurisdictions provide additional protection for those who might be deemed vulnerable. The factors that result in the consumer being identified as vulnerable include age, income, physical/mental disability, level of literacy and some cultural characteristics, such as language, ethnicity and religion. The extent to which a consumer regime takes into account, or gives priority to the position of disadvantaged consumers is essentially one of policy that is premised on fairness and distributional justice.

(c) *Rights to be Protected*

It is important to determine what rights should be the subject of protection in any proposed consumer legislation. These may include—

- the right to be protected against the marketing of goods which are hazardous to life and property;
- the right to be informed about the quality, quantity, potency, purity standard and price of goods and services and to be protected against unfair trade practices;
- the right to be assured access to a variety of goods at competitive prices;
- the right to be heard and that any complaints will receive the necessary attention by appropriate forums;
- the right to seek redress against unfair practices and unfair exploitation; and
- right to consumer education.

(d) *Obligations to be Imposed on the Providers of Goods and Services*

Appropriate provisions may be required to ensure—

- protection against unfair practices (false or misleading representations, unsolicited supplies, pyramid schemes, pricing, referral selling, harassment and coercion);
- protection of consumer transactions (consumer guarantees, and protection in respect of unsolicited consumer agreements and lay-by agreements);
- safety of consumer and product related services (including bans and recall of consumer goods); and
- information standards.

(e) *Standard Contracts and Fair Contractual Terms*

Standard contracts are contracts that do not allow a consumer the opportunity to negotiate its terms and are imposed on the consumer. Most jurisdictions deal with them in their consumer protection statutes by prohibiting abusive terms in contracts. These terms will often either give the supplier an unfair advantage or they create an unjustified burden for the consumer. Abusive terms may be stipulated in standard contracts, in which case, the consumer cannot negotiate out of them. There are various words that are used for abusive contracts. Some legislation refers to them as unfair terms others refer to them as unconscionable terms.

(f) *Provision for Disclosure & Labelling*

Disclosure creates competition between suppliers which results in a more efficient market and improves the quality of products. In most jurisdictions, the market has failed to provide proper disclosures to consumers and this has resulted in the promulgation of statutes that are intended to ensure that there is proper disclosure.

(g) *Safety of Goods and Services*

Safety standards are generally laid down in respect of goods and services. Provision is also made regarding product liability. Product liability generally refers to any liability that is placed on a manufacturer, distributor, retailer or an importer in respect of harm that is occasioned by the use of a product.

(h) *Guarantees, Warranties and Conditions*

In most jurisdictions the terms of a consumer agreement are generally subjected to conditions and warranties. Conditions refer to clauses in a contract that are fundamental and whose non-fulfillment either terminates the contract or prevents the coming into being of the contract. Warranties often refer to terms of a contract that are not so fundamental and their breach does not necessarily result in the nullification of the contract but may result in the payment of damages.

(i) *Provision for Advertising*

Advertising and marketing are usually one the first means of communication between suppliers and consumers. Misleading advertising and representations, as well as other forms of commercial practices are therefore potentially devastating to both the consumers and the competitors of the supplier.

(j) *Electronic Commerce*

The Internet has provided consumers with a powerful tool for searching for and buying goods and services. It has also given rise to the challenge of protecting customers against unsolicited goods and communication; illegal or harmful goods, services and content; dangers resulting from the ease and convenience of buying on-line; insufficient information about goods or about their supplier; the buyer not being in a position to inspect the goods; invasion of privacy; inadequate or conflicting foreign laws; and cyber fraud.

(k) *Consumer Credit Provisions*

In many jurisdictions the need has been felt to protect the interests of consumers in connection with credit contracts and consumer leases as the terms of credit may be disadvantageous to the consumer and also with a view to avoiding problems linked with over-indebtedness.

(l) *Redress Mechanisms*

Consumer empowerment relies upon consumers having the confidence that they will have access to redress should things go wrong. In most jurisdictions, it has been recognized that there are a number of formidable barriers to a consumer obtaining relief in the face of a supplier who is unwilling to fulfil its commitments, in particular when the claim is relatively of small value compared with potential litigation costs.

A number of different ways have been devised in Consumer protection regimes to assist consumers in asserting their rights. These include-

- provision of simple, low-cost Alternative Dispute Resolution mechanisms;
- simplification of court processes - flexible and expedited small claims procedures - to reduce the costs, risk and time involved in making a claim; and
- provision of collective action claims involving a large number of consumers.

(m) Small Claims

In many jurisdictions, given the relatively small monetary value associated with consumer claims and the need for flexible and expedited small claims procedures for consumers - a small claims procedure has been devised. The aim of the small claims procedure has been to provide a flexible, cheaper, faster and less formal procedure than ordinary civil court procedures. In consequence, consumers have better access to justice to resolve small disputes and obtain redress at a cost and burden which is not disproportionate to the value of their claim.

(n) Public Enforcement of Consumer Laws

Where there is a consumer interest that should be protected by law, policy-makers need to consider whether that interest should be protected through public enforcement and sanctions or through private claims and redress.

The LRC has set out these broad principles and approaches with a view to facilitating stakeholder discussion that will define a policy framework for potential consumer protection legislation along the lines of the areas identified for consideration in Part F of this Discussion Paper.

PART A

RESEARCH OBJECTIVES

1. This Discussion Paper seeks to examine several issues relating to the introduction of consumer protection legislation aimed at promoting a fair and competitive marketplace in the Cayman Islands while ensuring that adequate protection is available to all consumers. Additionally, it seeks to achieve a holistic solution which is applicable to the particular circumstances of the Islands while avoiding the imposition of additional burdens on reputable business enterprises.

2. Accordingly, the overall objectives of the Law Reform Commission's (LRC) can be outlined as follows-

- (i) to examine the definition of a "consumer";
- (ii) to examine the adequacy and effectiveness of the laws that purport to deal with consumer protection;
- (iii) to consider the introduction of legislation in order to sensitize consumers, producers, importers and distributors of goods and services of their respective rights and obligations;
- (iv) to examine any existing policies and laws relating to consumer protection including the roles and activities of institutions and agencies established by legislation;
- (v) to examine product liability and service liability of producers manufacturers, distributors and retailers towards the consumers and proffer adequate remedies;
- (vi) to consider the possibility of introducing "strict liability" offences especially where death or injury which occurred was due to a defective product;
- (vii) to consider an inexpensive, expeditious and less intimidating means of redressing complaints of consumers by introducing a consumer affairs commission or consumer tribunal;
- (viii) to consider the creation of consumer protection committees empowered to seek redress for consumers directly; and
- (ix) to ensure that any proposed legislation on consumer protection will serve the economic needs of consumers while conforming with internationally accepted standards of consumer protection law.

3. The LRC is cognisant that this area of the law encompasses several different elements. Some jurisdictions seek to deal with consumer protection issues in multiple pieces of legislation,

touching on different subjects, such as fair competition, consumer guarantees and anti-trust practices, whilst others deal with the issues in a single law.

4. In ventilating the relevant issues, the approach used in this paper is to identify a number of factors supporting the need to introduce specific consumer laws and an analysis of best practices in other jurisdictions. A few sectors of the marketplace are identified to determine if there are opportunities to target specific problems.

SUMMARY OF LEGISLATIVE ISSUES AND QUESTIONS FOR CONSIDERATION

5. The following reflects a summary of the issues to be addressed in determining what elements should feature in consumer protection legislation for the Islands.

(a) Application of the Legislation and Consumer Terminology (*see para. 355*)

- (i) Should the legislation apply to both goods and services offered to a consumer?
- (ii) Should we define who will be regarded as a “consumer”?
- (iii) Should we define what will constitute “goods”?
- (iv) Should we define what will constitute “services”?
- (v) Should we define who will be a “supplier or manufacturer”?
- (vi) Should we indicate what will constitute the supply of goods or services?
- (vii) Should we indicate the circumstances under which an importer of goods will be regarded as a manufacturer?

(b) Consumer Affairs Commission and Authorised Officers (*see para. 356*)

- (i) Should we establish a Consumer Affairs Commission as the body having oversight of all consumer protection issues?
- (ii) What specific functions should be assigned to the Consumer Affairs Commission or any other entity established to monitor consumer protection issues?
- (iii) Should there be provision for monitoring, inspection and investigation powers?
- (iv) Should an authorized officer be permitted to enter a store or other business premises to inspect?
- (v) In reasonable circumstances should an authorised officer be empowered to use force for entry to facilitate an investigation?
- (vi) What documents should an authorised officer be permitted to inspect?
- (vii) Should the authorised officer be able to seize goods or records?
- (viii) How should goods or records seized by an authorised officer be treated?
- (ix) What should be the disclosure responsibilities of authorised officers who are examining books, records and other commercial information?

(c) Consumer Tribunal (*see para. 357*)

- (i) As an alternative, should a Consumer Tribunal be established to enable consumers to settle their disputes with suppliers?
- (ii) How should the members of the Consumer Tribunal be appointed?

- (iii) How should the Tribunal operate?
- (iv) What jurisdiction should the Tribunal have when seeking to help consumers who have disputes with suppliers?
- (v) What kinds of orders should the Tribunal be able to make when settling consumer supplier disputes?
- (vi) What role should the Director play in dealing with matters that may be the subject of consumer-supplier disputes?
- (vii) What decisions of the Director should a supplier be able to appeal to the Tribunal?
- (viii) What should the Tribunal be able to decide after it hears an appeal of a Consumer Protection Compliance Order?
- (ix) In what manner should the Tribunal be held accountable for its actions?

(d) Obligations of Suppliers (*see para. 358*)

- (i) Should suppliers be required to be fair to consumers when trading?
- (ii) What should constitute “misleading or deceptive” conduct on the part of a supplier?
- (iii) Should the supplier be required to trade fairly if he is supplying a service?
- (iv) Should the following business practices be prohibited?
 - Misrepresentations
 - Misleading conduct
 - Misleading conduct in relation to employment
 - No intention to supply
 - Gifts and prizes
 - Dual pricing
 - Bait advertising
 - Referral Selling
 - Asserting right to payment without cause
 - Consumer harassment and coercion
- (v) What should occur if the supplier fails to deliver goods or services within a reasonable time?
- (vi) What should occur if goods are not delivered or services supplied by a specific date?

(e) Restocking Fees (*see para. 359*)

Should a supplier be entitled to charge a restocking fee for goods returned?

(f) Conduct of Repairs (*see para. 360*)

- (i) What information should the supplier have to give to the consumer when an item is being brought in for repair?

- (ii) What should the supplier have to do if the cost of the repair will be higher than the estimate?
 - (iii) What should happen if the consumer decides not to complete the repairs?
- (g) Price Marking** (*see para. 361*)
- (i) What should be the obligation of suppliers with respect to pricing?
 - (ii) Should the pricing provisions apply to promotional material in a store window?
- (h) Unfair Terms in Contracts** (*see para. 362*)
- (i) Should we stipulate the circumstances under which a term in a contract term will be unfair?
 - (ii) Should we expressly identify terms in a contract that will be considered unfair?
 - (iii) Should an unfair contract term be binding?
 - (iv) Should the consumer be bound by a confusing contract?
- (i) Distance Selling** (*see para. 363*)
- (i) What should be the general duty of a supplier who provides goods or services at a distance?
 - (ii) What information should suppliers provide when goods are being sold at a distance?
 - (iii) What should occur if the consumer makes a mistake while ordering goods or services over the Internet?
 - (iv) Should the consumer be provided with a copy of a distance sales contract after he agrees to the contract?
 - (v) What should occur if the consumer does not receive the goods or services agreed to after entering into a distance contract?
 - (vi) Should the consumer be entitled to a refund on cancellation of a distance sale contract?
 - (vii) What should be the obligations of the consumer when goods sold by distance are returned?
 - (viii) What should be the obligations of the supplier when the goods are returned?
- (j) Consumer Guarantees for Goods** (*see para. 364*)
- (i) What guarantees should be provided to consumers?
 - (ii) How should we define “merchantable quality” as it relates to goods?
 - (iii) What factors should be considered in determining the merchantability of the goods?
 - (iv) What should occur if the consumer has knowledge of flawed or damaged goods?
 - (v) What obligations should be impose on a supplier when the consumer tells the business how he wants to use the item and asks for an item that will meet his needs?

- (vi) What should occur if a consumer buys from a catalogue and the item is different from the picture or description in the catalogue?
- (vii) What should be the expectation of a consumer if he buys an item after looking at a display or demonstration model in a store?
- (viii) Should the supplier guarantee that the consumer will find spare parts for his purchase?
- (ix) Who should be held responsible with respect to a guarantee if there is no manufacturer in the Islands?
- (x) Should parts and repairs guarantees be covered for used goods?
- (xi) Should consumers still have guarantees for goods that are supplied at the same time as services?
- (xii) What should consumers be able to ask of suppliers when they are not satisfied with their merchandise?
- (xiii) What should occur if the supplier cannot reasonably repair the goods?
- (xiv) What should properly constitute a refund?
- (xv) How quickly should a consumer be able to expect the supplier to remedy the failure of a damaged product?
- (xvi) What should happen if the supplier does not repair the goods?
- (xvii) What should constitute failures of a “substantial” nature with respect to goods?
- (xviii) Should the consumer be able to collect any damages after returning goods that have a substantial failure?
- (xix) Should the consumer be able to claim for any damages when there is a failure of guarantees?
- (xx) How should the consumer and the supplier settle disputes about guarantees for goods?

(k) Consumer Guarantees for Services (*see para. 365*)

- (i) Should the consumer have a guarantee that services will be delivered competently?
- (ii) Should the consumer guarantees help the consumer who is waiting for a service to be completed within a specific time?
- (iii) Should a consumer have any guarantee regarding the price of the service?
- (iv) What should happen when the supplier of the service can remedy a failure?
- (v) What should the consumer be able to do if the supplier does not remedy the failure?
- (vi) What should happen if the failure cannot be remedied?
- (vii) What should constitute a “substantial failure” in a service?
- (viii) Should the consumer be permitted to collect any damages regarding services that have a substantial failure?
- (ix) At what stage will a contract be considered cancelled?

(l) Consumer Credit Agreements (*see para. 366*)

- (i) How should a “consumer credit contract” be defined?
- (ii) Who should be a consumer for the purposes of the proposed credit?

- (iii) Who should be a lender?
- (iv) Should a lease be regarded as a consumer credit contract?
- (v) What should a lender be required to tell the consumer before the consumer agrees to the consumer credit contract?
- (vi) What should happen if the lender does not disclose all relevant information to the consumer?
- (vii) Should the lender be required to update the disclosure information?
- (viii) What information will be in the continuous disclosure statement sent to the consumer?
- (ix) What should the consumer be told before signing a consumer lease?
- (x) What should happen if the consumer is not given the required information about the lease?
- (xi) If a lender or lessor does not give the consumer the required information, should the consumer be required to pay the interest charges on the loan or lease?

(m) Offences for Breaches of the Legislation (*see para. 367*)

- (i) Should breaches under the law attract administrative penalties to be governed by a progressive penalty system?
- (ii) What should constitute criminal offences for consumer protection breaches?
- (iii) Should consumer protection breaches be strict liability offences?

(n) Defences for Breaches of the Legislation (*see para. 368*)

- (i) Should there be a defence to a strict liability offence if the suppliers proves that there was due diligence?
- (ii) Should a newspaper or magazine have a defence if it has published a misleading advertisement or otherwise aided in the commission of an offence by publishing information?

(o) Injunctions and orders to Hold Assets of a Supplier (*see para. 369*)

- (i) What should the Director be able to do when faced with serious non-compliance?
- (ii) What stipulations should be attached to an injunction?
- (iii) What should the Director be able to do if he believes a supplier has committed an unfair practice and has a consumer's money?
- (iv) Should the supplier be found guilty of contempt if he does not comply with the injunction or the order?

(p) Sanctions For Breaching the Legislation (*see para. 370*)

- (i) What should the court be required to take into account when it fines a supplier for committing an offence?
- (ii) Should the supplier be allowed to keep the money it has gained from not complying with the law?

- (iii) Should the court be permitted to make an order which publicizes the breach of the supplier?
- (iv) Should the court be able to sentence people who do not comply with the new legislation?

PART B

INTRODUCTION

6. Consumer protection law is an area of public law that regulates private law relationships between individual consumers and the businesses engaged in providing goods and services.² Laws protecting consumers have adopted a variety of legal forms to achieve their objectives, including criminal law, tort and contract.

7. In addition to those laws that specify consumer protection as their primary concern, numerous other provisions have the effect of protecting the consumer, for example laws dealing with fraud and protecting property rights.³

8. The issue concerning consumer protection legislation seems to have gained prominence in the Cayman Islands during 2004 when allegations of price gouging arose after the devastating impact of hurricane Ivan. In response, the Price Gouging Control (Emergency Circumstances) Law, 2004 was enacted to prevent businesses from exploiting consumers by way of invoking their superior position to inflate the price of goods and services in what was otherwise considered a state of emergency. In more recent times the interest of consumers have been at the forefront with respect to the price of fuel and the need to disclose the basis for price increases. There have been discussions at governmental and legislative levels with respect to the establishment of a public utilities commission, the need to introduce mortgagor protection legislation and the quality of technology services being received by consumers.

9. The interdependence of the world economy and the international character of many business practices have contributed to the development of global emphasis on consumer rights protection.⁴ The principle of “*Caveat emptor*”, which means buyer beware governed the relationship between the seller and the buyer.⁵ This maxim featured prominently during the period when markets were open and the buyer and seller came face to face. In this arrangement, the seller exhibited his goods and the buyer thoroughly examined them before purchasing. It was assumed that the purchaser would use all care and skill while entering into a transaction. This maxim absolved the seller from any obligation to make disclosures about the quality of the product.

10. However, with the growth of trade and globalization it is impossible for the buyer to examine the goods beforehand as most of the transactions are concluded by correspondence. In

² P. Cartwright, *Consumer Protection and the Criminal Law: Law, Theory and Policy in the UK* [Cambridge University Press, 2001].

³ *Ibid.*

⁴ P.S. Ajesh Kumar, *Consumer Redressal Mechanism in Thiruvananthapuram* (January 19, 2011).

⁵ Benjamin Judah Philip, *Benjamin's Sale of Goods*, Sixth Edition, at p. 647 (London Sweet and Maxwell, 2002).

other cases, given the complex structure of the modern goods, it is only the producer/seller who can assure the quality of the goods. Manufacturing activity has become organized and the producers/sellers are able to operate from a position of strength, buyers on the other hand are still weak and unorganised. In the age of information technology and with the emergence of e-commerce related innovations the consumers are further deprived to a great extent.⁶

11. The concept that ‘consumer is sovereign’ and ‘customer is the king’ can therefore be regarded as questionable concepts. It however needs to be recognized that consumer protection is a socio-economic programme to be pursued both by the Government as well as business given that the satisfaction of the consumer is in the interest of both. The Government, in our view, therefore has a primary responsibility to protect the consumers’ interests and rights through appropriate policy measures, legal structures and administrative framework.⁷

DEFINING CRITICAL TERMS

12. To assist in an understanding of this issue we perhaps would benefit from an understanding of the meaning behind the main terms which are at the center of any discussion relating to consumer protection issues. These are “consumer”, “consumer protection” and “consumerism”.

Who is a Consumer?

13. Our research has not identified any universally agreed definition of the term “consumer”.⁸ As far back as 1890, Mahatma Gandhi, in a speech in South Africa attached great importance to what he described as the “poor consumer”, who according to him, should be the principal beneficiary of the consumer movement. He stated that “a consumer is the most important visitor on our premises. He is not dependent on us we are on him. He is not an interruption to our work; he is the purpose of it. We are not doing a favour to a consumer by giving him an opportunity. He is doing us a favour by giving an opportunity to serve him.”⁹

14. Former US President John F. Kennedy said: “Consumers by definition include us all. They are the largest economic group, affecting and affected by almost every public and private economic decision. Yet they are the only important group whose views are often not heard”.¹⁰

15. The definition of “a consumer” differs from jurisdiction to jurisdiction¹¹ and varies as writers and authors on consumer protection are unable to exhaust them. Mickelburg¹² defines “consumer” as “a person to whom goods, services or credit are supplied or sought to be supplied by another in the course of a business carried on by him.”

⁶S. S. Singh Professor of Justice and Administration IIPA, New Delhi Sapna Chadah Assistant Professor, Consultancy Project on Consumer Protection and Welfare IIPA, New Delhi India, Consumer Protection in India Some Reflections.

⁷*Ibid.*

⁸P. Cartwright, *supra*.

⁹<http://www.socialmediatoday.com/content/gandhis-key-transformative-customer-service>.

¹⁰ On 15th March, 1962.

¹¹ See later jurisdictional analysis.

¹² Consumer Protection at page 3.

16. O'Grady¹³ defines a consumer as simply the final or end users of all goods or services. Tarr,¹⁴ defines a consumer as any person, natural or legal, to whom goods or services or credit are supplied or sought to be supplied by another person in the course of a business carried on by that person.

17. In today's jurisprudence, a consumer has come to be defined as any person, natural or legal, to whom goods or services or credit are supplied or sought to be supplied by another person in the course of a business carried on by that other person. It includes any person who uses the goods or services or who the supplier ought to have in contemplation that will be affected by such goods and services.¹⁵ Ultimately the consumer is the final end user of all goods and services supplied.¹⁶

What is Consumer Protection?

18. Consumer Protection can be defined as the act of safeguarding the interests of the consumers in matters relating to the supply of goods and services, fraudulent and hazardous practices. It deals with the formulation of rules of law which recognize the bargaining weaknesses of the individual consumer and ensures that those weaknesses are not exploited.¹⁷

19. Arguably, consumer protection covers all spheres of our lives ranging from the air we breathe, water we drink, food we eat and prescription drugs we consume. It has an important bearing on the economic and social development of any nation, and this is attested by the importance and prominence given to it globally by various countries, and in particular, by the United Nations.¹⁸

20. The history of the protection of a Consumer's rights by law has long been recognised dating back to 1824. Annually, the 15th of March is observed as the World Consumer Rights Day. On that day, in 1962, President John F. Kennedy of U.S. called upon the U.S. Congress to accord its approval to the Consumer Bill of Rights. These rights are (i) right to choice; (ii) right to information, (iii) right to safety and (iv) right to be heard. President Gerald R. Ford added the right to consumer education and other rights such as a right to a healthy environment and a right to basic needs.

21. The Consumer International¹⁹ body indicated that when dealing with consumer Protection we are dealing with the right to choose, the right to be informed, the right to be heard, the right to safety the rights to the satisfaction of basic needs, redress, education and a healthy environment. All these rights are now recognized and adopted by the United Nations General Assembly which published the UN Guidelines for Consumer Protection based on these rights in 1985.

¹³O. Grady, Consumer Remedies (1982) 60 Canadian Bar Review (No. 4).

¹⁴Tarr, Consumer Protection Legislation and the Market Place (1981 8-1) 5 Otago 1. R. p. 397.

¹⁵*Ibid.*

¹⁶O. Grady, Consumer Remedies, *supra* at note. 13.

¹⁷See Robert Lowe, "Commercial Law, p. 457.

¹⁸Nigerian Law Reform Commission.

¹⁹Consumers International (CI) is the world federation of consumer groups that, working together with its members, serves as the only independent and authoritative global voice for consumers.

What is consumerism?

22. Consumerism refers to a wide range of activities of government, business and independent organisations designed to protect rights of the consumers.²⁰ It is a process through which the consumers seek redress, restitution and remedies for their dissatisfaction and frustration with the help of their organised or unorganised efforts and activities. Over time, consumerism has developed into medium to aid and protect the consumer by exerting legal, moral and economic pressure on producers and providers in order to ensure that people receive better value for their money.

23. There are various components of consumerism. First and foremost is self-protection by consumers. A consumer must be aware of his rights, raise his or her voice against exploitation and seek redress for his grievances. Consumers' consciousness determines the effectiveness of consumerism. It is the duty of the consumer to identify his rights and to protect them.

24. Voluntary Consumer Organisations engaged in organising consumers and encouraging them to safeguard their interests is another important element of the consumerism movement. The success of consumerism lies in the realisation of the business that there is no substitute for voluntary self-regulations. While some businesses may come together to adopt a code of conduct for regulating their own activities, regulation of business through legislation is one of the more certain and effective means of protecting the consumers.

Relationship between Consumerism, Constitutionalism and Good Governance

25. There is a close link between Consumerism and Constitutionalism. As observed by the Planning Commission of the Government of India:

“Constitutionalism and consumerism both seem to be twin sisters with similar objectives. Constitutionalism, in a politically organized society, is concerned with the protection and promotion of an individual's rights, dignity and welfare as a citizen. Similarly, consumerism is concerned with the protection, promotion and welfare of the rights of the individual as a consumer. In the final analysis, it is the individual, who is the concern of both whether as a citizen or as a consumer. Constitutionalism provides the policy framework, institutional mechanism, finances and functionaries for better service and empowerment of the citizen. On the other hand consumerism provides ways and means to demand quality goods, better services, better protection, empowerment, welfare and value for money. Thus, both are supplementary and complementary to each other. Constitutionalism promotes by way of constitutionally directed fundamental duties of a citizen, development of a scientific temper and spirit of inquiry and consumerism facilitates consumers to know about the products and services in detail and in all its aspects. Finally, constitutionalism as well as consumerism is an art and science for ensuring quality of life. Therefore, promoting consumerism is directly related to the promotion of constitutionalism. In a more practical perspective the focus of both is good governance in all its dimensions, i.e., transparency, accountability, responsiveness, efficiency, effectiveness and

²⁰S. S. Singh, Professor of Justice and Administration IIPA, New Delhi, *supra*.

economy at all levels with a vision to develop a better society guaranteeing thereby a better life to all citizens.”²¹

26. The effective, efficient and fair implementation of consumer protection laws is a condition precedent for the promotion of a culture of good governance. Generally speaking, the thrust of good governance is – efficiency, effectiveness, ethics, equality, economy, transparency, accountability, empowerment, rationality, impartiality and participation. With these objectives in mind, arguably there is indeed a co-relation with the concerns of the consumer protection law and the policies of government.

27. Further, from the point of view consumer protection law, it may generally be emphasised that the concerns of consumer rights protection are to ensure fair trade practices, quality goods and deficiency-free services with information being provided to consumers with regard to quality, quantity, potency, composition and price of their choice of purchases. The proper and effective implementation of laws dealing with the protection of the consumers’ rights would promote the cause and concern of good governance.²² Having regard to the principles enshrined in the Cayman Islands Constitution²³, one can argue that intertwined in the desire to promote good governance is the need to ensure that appropriate laws are in place to make such good governance a reality.

PART C

DOES CONTRACT LAW ADEQUATELY PROTECT CONSUMERS?

Obligations of Suppliers to Consumers

28. Consumers have always been protected at common law in contract and this no doubt holds true for consumers in the Cayman Islands as far as the court as an institution through which rights can be enforced. A supplier (whether producer, manufacturer, distributor, retailer) who has a contract for supply of goods is liable for breach of contract if the product is defective.

29. The consumer who is a party to the contract is entitled to sue the supplier if he suffers damages or personal injury from use of the defective product.²⁴ The common law further laid the foundation for the growth of consumer protection law by laying a firm basis of obligations owed by traders to their customers. The basic obligations on the traders who sold goods should be to ensure that those goods are of merchantable quality and reasonably fit for their purpose. Similarly, the basic obligation on traders who provided services that they must carry out their work in a proper workmanlike manner.²⁵

²¹ Report of the Working Group on Consumer Policy (2007), at pp. 3-4. .

²² *Ibid.* at pp. 4-5.

²³ Order 2009.

²⁴ Cheshire and Fifoot’s, Law of Contract 9th Ed.

²⁵ Benjamins, *supra* at p. 486.

Privity of Contract

30. However, a limitation in the ability of the law of contract to protect consumers is the doctrine of privity of contract. The doctrine states that a contract cannot confer rights or impose obligations on someone who is not party to that contract.²⁶ For example, a consumer cannot generally sue a manufacturer in contract for producing faulty goods, nor can he sue a retailer in contract for supplying faulty goods which were purchased on his behalf by a friend. Due to criticism of the doctrine and academic and judicial support for reform in the case of *Darlington Borough Council v. Wilshier Northern Ltd* Steyn LJ argued that ‘there is no doctrinal, logical, or policy reason why the law should deny effectiveness to a contract for the benefit of a third party where that is the expressed intention of the parties’.²⁷

31. If the law of contract is seen as having among its functions a deterrent role, it will be important that the person who is best able to determine the characteristics of a product is subject to liability. In some cases, it will be impossible to sue the retailer, for example if he has become insolvent or cannot be traced, and so the consumer may be left without a remedy. The consumer will only have a remedy against the manufacturer in tort if the product is not merely defective, but dangerous.²⁸ There are some cases however where the court will find a collateral contractual relationship between manufacturer and purchaser, and bypass privity rules.²⁹

Freedom of Contract

32. The protection given by the common law was affected by the principles of “freedom of contract”. Historically, courts imposed certain obligations on people they considered their duties important to consumers. For example, innkeepers were held strictly liable for the loss of a guest’s goods. The reason being that innkeepers had greater opportunity for theft than most other people and likely to be associates of thieves.

33. Ferrymen, common carriers of goods, veterinary surgeons, barber surgeons and even sellers of food were placed under strict liability. They were regarded as followers of “common callings” and their liabilities arose not out of agreement, but from their status and from the idea that such people who offer their services to the public at large should show care, skill and honesty in their dealings. Apart from these occasions where strict liability was imposed by the common law, the spirit of laissez- faire prevailed and freedom of contract continues to be operational.³⁰

Caveat Emptor

34. The common law principle of caveat emptor requires a buyer to beware of what he is buying by imposing a duty on him to inspect the product to identify any defects therein before

²⁶See for example *Tweddle v. Atkinson* (1861) 1 B&S 393.

²⁷[1995] 1 WLR 68. Mitchell describes privity as ‘a rule which is almost universally regarded as unjust’. See C. Mitchell, ‘Privity Reform and the Nature of Contractual Obligations’ (1999) 19(2) *Legal Studies*, 229.

²⁸ See the wording of Part I of the Consumer Protection Act, 1987.

²⁹*Carlill v. Carbolic Smoke Ball Co. Ltd* [1893] 1 QBD 256.

³⁰ Sir Guenter Treitel, *The Law of Contract*, (Eleventh Edition, 2003).

buying. This typically resulted in an imbalance of bargaining power. However, Lord Devlin, enunciated that “courts could not relieve in cases of hardship and oppression because the basic principle of freedom of contract included freedom to oppress”³¹.

Exclusion Clauses

35. The efforts of the court to save consumers from the imposition of implied obligations of merchantability and fitness for purpose were affected by exclusion or exemption clauses by sellers who were allowed in law to exclude, by contract, express or implied in the name or freedom of contract. Lord Denning however posited that reasonable notice of the exclusion clause must be brought to the notice of consumers was thwarted by draftsmen through carefully worded clauses.

Fundamental Breach

36. Arguably, the most important protection the common law affords consumers is found in the doctrine of fundamental breach or breach of a fundamental term. This principle states that an exemption clause does not apply where there is a fundamental breach or breach of a fundamental term. Fundamental breach is a breach that changes the whole nature of the contract. In a breach of a fundamental term the contract still exists but the essence of the contract no longer exists.

37. However, both fundamental breach and breach of a fundamental term aim at the same thing as both are a breach of condition which entitles the party aggrieved to repudiate the contract and claim compensation.

38. When we examine these contract law principles it can be argued that consumers in the Cayman Islands can avail themselves of contract common law resolve disputes which arise out of a breach of consumer related issues. The question however is whether the time and cost associated with court resolution is inimical to consumers getting the protection in a timely and cost effective manner.

DOES TORT LAW ADEQUATELY PROTECT CONSUMERS?

39. Glanville Williams identified the principle aims of tort as: appeasement, justice, deterrence, and compensation.³² Loss distribution and economic efficiency was later added.³³ The effect of tort law is to transfer resources from one party to another in order to return the victim to their position prior to the commission of the tort.

40. Tort liability rules provide an incentive for producers to take cost-effective measures to prevent defects. Some of the limitations inherent in the law of contract can be addressed through the law of tort. For example, the consumer who is given a defective product by a friend and

³¹ The Common Law, Public Policy and the Executive” Presidential Address to the Bentham Club (1956) Current Legal Problems, p. 10).

³² G. Williams, ‘The Aims of the Law of Tort’ (1951) 4 CLP 137.

³³ M. Jones, Textbook on Torts (4th edn, London, Blackstone Press, 1993), p. 14.

suffers injury will have a right of redress against the producer of that product in the law of tort under the tort of negligence.

Tort Law Limitations

41. However, tort law is subject to its own limitations which may place obstacles in the way of consumers' obtaining access to justice. Whereas contract law is concerned primarily with agreements made by the parties, tort law imposes duties irrespective of the parties' intentions, and irrespective of any contractual relationship.³⁴ This may seem to be wider than contract, but in some cases it will have a restricted effect.

42. First, tort liability often only arises where the plaintiff can prove fault. Under *Donoghue v. Stevenson* a manufacturer owes a duty of care in negligence to the ultimate consumer of the manufacturer's product.³⁵ However, this duty will only give rise to liability where it has been breached. That is, where the plaintiff can prove fault against the manufacturer. Unlike strict liability in contract, this is often difficult to establish.

43. Secondly, the law of tort does not, in general, allow recovery for pure economic loss. If a consumer buys a defective washing machine the consumer will be able to recover damages from the supplier in contract. If the washing machine had been given to the consumer as a present, he would not be able to seek redress, either from the supplier or the manufacturer. This is because the consumer is not part of a contractual relationship, and there is no general right in tort to recover damages for the cost of putting a product right, which is classified as pure economic loss. This contrasts with the situation where the washing machine burns a hole in the consumer's kitchen floor. Here the consumer would be able to recover damages for the cost of correcting that as the product has caused property damage outside itself.

DO INTERNATIONAL RULES PROTECT CONSUMERS?

(a) The United Nations Guidelines on Consumer Protection

44. The United Nations Consumer Protection Guidelines were initially adopted by the General Assembly on 16th April, 1985 and subsequently updated on 26th July, 1999. These Guidelines have had a significant impact on public policy and law for the protection and empowerment of consumers across the world.

45. Generally, the guidelines recommend that all countries should take into account the interests and needs of consumers, particularly those in the developing countries, and should recognize that consumers often face imbalances in economic terms, educational levels and bargaining powers and should also bear in mind that consumers should have the right of access to non-hazardous products, as well as the importance of promoting sustainable economic development and social development.

³⁴Although there will be occasions when tort law depends on the parties entering into a relationship, for example, in relation to negligent statements or liability of employers.

³⁵ [1932] AC 562.

46. Accordingly, the guidelines are based on seven basic legitimate needs of consumers. These are-

- (a) the protection of consumers from hazards to their health and safety;
- (b) the promotion and protection of the economic interests of consumers;
- (c) access of consumers to adequate information to enable them to Consumer education;
- (d) availability of effective consumer redress;
- (e) freedom to form consumer groups in order to present their views in decision-making processes affecting them; and
- (f) the promotion of sustainable consumption patterns.

47. Additionally, the guidelines themselves are organized under seven key areas and are supplemented by measures specific to certain sectors. These are -

- (a) Physical safety;
- (b) Promotion and protection of consumers' economic interests;
- (c) Standards for the safety and quality of consumer goods and services;
- (d) Distribution facilities for essential consumer goods and services;
- (e) Measures enabling consumers to obtain redress;
- (f) Education and information programmes; and
- (g) Promotion of sustainable consumption.

48. The sector-specific measures currently cover food, water and pharmaceuticals.

49. The UN Guidelines suggest several measures to be adopted under each head. The following highlights those suggestions.

Physical safety

50. Governments should adopt or encourage the adoption of appropriate measures, including legal systems, safety regulations, national or international standards, voluntary standards and the maintenance of safety records to ensure that products are safe for either intended or normally foreseeable use.

Promotion and protection of consumers' economic interests

51. Government policies should seek to enable consumers to obtain optimum benefit from their economic resources. They should also seek to achieve the goals of satisfactory production and performance standards, adequate distribution methods, fair business practices, informative marketing and effective protection against practices which could adversely affect the economic interests of consumers and the exercise of choice in the market place.

Standards for the safety and quality of consumer goods and services

52. Governments should, as appropriate, formulate or promote the elaboration and implementation of standards, voluntary and otherwise, at the national and international levels for the safety and quality of goods and services and give them appropriate publicity. National standards and regulations for product safety and quality should be reviewed from time to time, in order to ensure that they conform, where possible, to generally accepted international standards.

Distribution facilities for essential consumer goods and services

53. Governments should, where appropriate, consider-
- (a) adopting or maintaining policies to ensure the efficient distribution of goods and services to consumers; specific policies should be considered to ensure the distribution of essential goods and services where this distribution is endangered. Such policies could include assistance for the creation of adequate storage and retail facilities in rural centres, incentives for consumer self-help and better control of the conditions under which essential goods and services are provided; and
 - (b) encouraging the establishment of consumer cooperatives and related trading activities, as well as information about them, especially in rural areas.

Measures enabling consumers to obtain redress

54. Governments should establish or maintain legal and/or administrative measures to enable consumers or, as appropriate, relevant organisations to obtain redress through formal or informal procedures that are expeditious, fair, inexpensive and accessible. Such procedures should take particular account of the needs of low-income consumers.

Education and information programmes

55. Governments should develop or encourage the development of general consumer education and information programmes, including information on the environmental impacts of consumer choices and behaviour and the possible implications, including benefits and costs, of changes in consumption, bearing in mind the cultural traditions of the people concerned. The aim of such programmes should be to enable people to act as discriminating consumers, capable of making an informed choice of goods and services, and conscious of their rights and responsibilities. In developing such programmes, special attention should be given to the needs of disadvantaged consumers, in both rural and urban areas, including low-income consumers and those with low or non-existent literacy levels. Consumer groups, business and other relevant organisations of civil society should be involved in these educational efforts.

Promotion of sustainable consumption

56. Sustainable consumption includes meeting the needs of present and future generations for goods and services in ways that are economically, socially and environmentally sustainable. Responsibility for sustainable consumption is shared by all members and organisations of

society, with informed consumers, Government, business, labour organisations, and consumer and environmental organisations playing particularly important roles.

57. Government policy-making should therefore be conducted in consultation with business, consumer and environmental organisations, and other concerned groups. Business has a responsibility for promoting sustainable consumption through the design, production and distribution of goods and services. Consumer and environmental organisations have a responsibility for promoting public participation and debate on sustainable consumption, for informing consumers, and for working with Government and business towards sustainable consumption.

(b) The United Nations Measures relating to Food, Water and Pharmaceuticals

58. In advancing consumer interests, particularly in developing countries, Governments should, where appropriate, give priority to areas of essential concern for the health of the consumer, such as food, water and pharmaceuticals. Policies should be adopted or maintained for product quality control, adequate and secure distribution facilities, standardised international labelling and information, as well as education and research programmes in these areas.

59. Governments should adopt appropriate measures in other areas, such as pesticides and chemicals in regard, where relevant, to their use production and storage, taking into account such relevant health and environmental information as Governments may require producers to provide and include in the labelling of products.

(c) The United Nations Measures relating to Technology

60. In July 2012, with the participation of Consumer International, the United Nations Conference on Trade and Development (UNCTAD) initiated a process to amend and improve the UN Guidelines on the basis of considerable changes to the consumer market as they relate to developments in technology and business practices.

61. In relation to these developments, several recommendations were made with respect to-

- (a) E-commerce and digital consumption;
- (b) Financial services;
- (c) The needs of all consumers should be recognized;
- (d) Emphasis on fairness in the market; and
- (e) Health and responsible marketing.

E-commerce and digital consumption

62. In relation to E-commerce and digital consumption protection of online privacy should be strengthened and enforced and the principle should be established that consumers should have equal protection regardless of how a purchase is made. Intellectual property rights should not be enforced in ways that undermine consumers' access to knowledge.

Financial services

63. Financial service providers should abide by such general principles of consumer protection as fair contracts, disclosure and redress, and consumers should be represented in regulation and redress procedures. Governments should establish specific statutory provisions for access, competition and systemic stability, the latter including deposit guarantees.

Needs of all consumers should be recognized

64. Protection should extend to all consumers not just those in the formal economy. Recognition that state-owned enterprises, as well as private corporations, have responsibilities to consumers. There should be guaranteed access to essential goods and services and these should be acknowledged as ‘a legitimate need of consumers’. Stronger consumer protection is needed across borders, for e-commerce and for stronger protection of the rights of travellers and tourists.

Emphasis on fairness in the market

65. Contracts and terms of service should be free of lengthy and complex small print, and should not lock consumers in to unreasonable commitments nor contain unfair terms or restrictions. To promote fair competition, governments and regulators should have the powers to tackle market structures as well as abusive practices. Greater recognition of the role of consumer organisations in monitoring, testing, education redress and regulation.

Health and responsible marketing

66. Restrictions should be placed on the marketing of food and beverages to children and bans or severe limits placed on the advertising of tobacco and alcohol. Improved guidance in specific sectors such as water, energy, food and pharmaceuticals.

(d) The UN Measures relating to International Cooperation

67. Governments should-

- (a) develop, review, maintain or strengthen, as appropriate, mechanisms for the exchange of information on national policies and measures in the field of consumer protection;
- (b) cooperate or encourage cooperation in the implementation of consumer protection policies to achieve greater results within existing resources;
- (c) cooperate to improve the conditions under which essential goods are offered to consumers, giving due regard to both price and quality. Such cooperation could include joint procurement of essential goods, exchange of information on different procurement possibilities and agreements on regional product specifications,
- (d) develop or strengthen information links regarding products which have been banned, withdrawn or severely restricted in order to enable other importing

countries to protect themselves adequately against the harmful effects of such products;

- (e) governments should work to ensure that the quality of products, and information relating to products are disseminated; and
- (f) such products, does not vary from country to country in a way that would have detrimental effects on the population.

68. Though these guidelines do not have any legal backing, they have been regarded as step in the right direction and have to a great extent influenced the consumer protection policies and legislation in several countries.

(e) Regional Measures

69. Articles 184 and 185³⁶ of the Revised Treaty of Chaguaramas reflect commitments among CARICOM nations to promote consumers' interests within the Community. These commitments include agreement to enact harmonized legislation that will provide a consistent level of protection for consumer transactions across the Caribbean. The Cayman Islands are an Associate Member of Caricom and by extension should place itself in a reasonable position to respond with respect to issues that affect consumers within the CARICOM body in the interests of regional cooperation. The Caribbean Law Institute (1995) and CARICOM's Single Market and Economy Unit (2003) has suggested draft model consumer protection legislation to assist nations with the goal of harmonizing standards in support of trade liberalization.

70. By working with model laws and also incorporating best practices and recent thinking emerging throughout North America, Europe, and other jurisdictions, perhaps and if it is so

³⁶ Article 185 provides-

The Member States shall enact harmonised legislation to provide, inter alia:

- (a) for the fundamental terms of a contract and the implied obligations of parties to a contract for the supply of goods or services;
- (b) for the prohibition of the inclusion of unconscionable terms in contracts for the sale and supply of goods or services to consumers;
- (c) for the prohibition of unfair trading practices, particularly such practices relating to misleading or deceptive or fraudulent conduct;
- (d) for the prohibition of production and supply of harmful and defective goods and for the adoption of measures to prevent the supply or sale of such goods including measures requiring the removal of defective goods from the market;
- (e) that the provision of services is in compliance with the applicable regulations, standards, codes and licensing requirements;
- (f) that goods supplied to consumers are labelled in accordance with standards and specifications prescribed by the competent authorities;
- (g) that hazardous or other goods whose distribution and consumption are regulated by law are sold or supplied in accordance with applicable regulations;
- (h) that goods or materials, the production or use of which is likely to result in potentially harmful environmental effects, are labelled and supplied in accordance with applicable standards and regulations;
- (i) that producers and suppliers are liable for defects in goods and for violation of product standards and consumer safety standards which occasion loss or damage to consumers; and
- (j) that violations of consumer safety standards by producers or suppliers are appropriately sanctioned and relevant civil or criminal defences to such violations are available to defendants.

determined Cayman can formulate legislation that is flexible enough to evolve with emerging global trends while ensuring that the legislation can concurrently adapt quickly to future marketplace changes.

PART D

DOES CONSUMER PROTECTION LEGISLATION EXIST IN THE CAYMAN ISLANDS?

71. The question of whether consumer protection legislation exists in the Islands is premised on how one defines consumer and what one perceives to be the everyday issues that impact consumers. This paper purports to later examine those issues.

72. When legislative proposals are debated and a law enacted that process is undertaken with the objective of protecting the rights of individuals, who themselves are consumers, by stipulating the obligations of parties, establishing standards for a way of operating and imposing remedies and penalties for a breach of a legal requirement. Arguably therefore, consumer protection does exist in the Islands by way of several laws that make up the statute books. However, by the same token, do the measures in the various laws meet established requirements for legislation which holistically and effectively protects consumers in relation to the supply of goods and services?

73. In the Schedule we have identified several laws in the Islands and have classed them in accordance with the UN Guidelines for Consumer Protection discussed in earlier paragraphs. It is submitted that none of these laws singularly or collectively adequately deal with consumer protection in the manner envisaged globally to protect consumers.

74. That being said we wish to highlight two Laws which attempt to deal with some of the issues with respect to consumer protection. These are the Sale of Goods Law (1997 Revision) and the aforementioned Price Gouging (Emergency Circumstances) Law, 2004.³⁷

The Sale of Goods Law (1997 Revision)

75. The Sale of Goods Law (1997 Revision) is based on the United Kingdom's (UK) Sale of Goods Act, 1893.

Sections 13, 14, 15 and 16 Protection

76. The Cayman Sale of Goods Law seeks to embrace the principles established under the UK Sale of Goods Act by providing consumers with protection contained in sections 13, 14, 15 and 16 of the Law.

³⁷Other Laws such as the Price Gouging Law (2004 Revision), the Contracts Law (1996 Revision) and the Contracts (Rights of Third Parties) Law, 2014 deal respectively with price inflation, frustrated performance of a contract and misrepresentation and third party rights in contracts. The LRC also takes note of the intent of the Government to formulate legislation for the establishment of a Public Utilities Commission which will have as one of its functions the regulation of the utility sector in the interest of the ordinary consumer. Further, proposals are being formulated to protect consumers in timeshare arrangements.

77. Section 13 imposes on the seller an implied condition that in the case of a sale he has the right to sell the goods and in the case of an agreement to sell, he will have that right at the time when property in the goods is to pass. There is an implied warranty imposed on the seller that the goods are free from any charges or encumbrances and that the buyer will enjoy quiet possession of the goods from all undisclosed sources.

78. In cases where it is expressed or necessarily implied that the seller is to transfer only such title as he or a third person has, there is an implied warranty that any charges or encumbrances known to the seller and unknown to the buyer have been disclosed to the buyer before the contract is made and that neither the seller nor anyone whose title is being transferred by the sale nor anyone claiming through either of them will disturb the buyer's possession.

79. Section 14 imposes on the seller an implied condition that where goods are sold by description, the goods will correspond with the description. If the sale is by sample as well as by description, then the goods must correspond with the description.

80. Section 14(2) provides that where goods are bought by description from a seller who deals in goods of that type, there is an implied condition that the goods shall be of merchantable quality. If, however, the buyer has examined the goods there is no implied condition as regards defects

81. Section 15 provides that where the buyer expressly or by implication makes known to the seller the particular purpose for which the goods are required are required so as to show that the buyer relies on the seller's skill or judgment, there is an implied condition that the goods shall be reasonably fit for that purpose. This is so however only where the goods are sold in the course of the seller's normal business.

82. Section 16 provides that in a contract for sale by sample there is an implied condition-

- that the bulk will correspond with the sample in quality;
- that the buyer will have a reasonable opportunity to compare the bulk with the sample; and
- that the goods will be free from any defects that renders them unmerchantable and that would not be apparent on reasonable examination of the sample.

Section 55 Limitations

83. The protection given to the consumer by sections 13 to 16 appear to be clear and effective, but the protection afforded by these sections can be excluded by the parties to a contract under section 55 of Law. This section provides that where any right, duty or liability would arise under a contract of sale by implication of law, it may be varied by express agreement, the course of dealing between the parties or usage in the trade if the usage is such as to bind both parties to the contract.

84. In practice, this provision allows sellers to exclude all or any of the duties and liabilities imposed on them by the Law, and to incorporate their own terms into a contract of sale in a

standard form agreement formulated by them without reference to the buyer. Most vendors and suppliers make consumers accept the exclusion or limitation of the protective provisions embodied in the Law. However, those terms are subject to the question of reasonableness having regard to all the circumstances.

85. For all intents and purposes the Sale of Goods Law does not address the issue of inequality in bargaining power between the buyer and the seller. The ability to create contracts that expressly excluded the terms have the potential to operate to the detriment of consumers.³⁸

86. From a reform perspective there are two important gaps in the protection for consumers provided by the legislative regime of the Sale of Goods Law. First, the guarantees, warranties and conditions apply only to goods. Services are not covered by the legislation, creating a gap for guarantees regarding the provision of services.

87. Second, the average consumer does not have ready access to the remedies provided by the Law. The remedies for a dissatisfied consumer are damages or a declaration that the contract is void. However, these remedies are enforceable only through the courts. In practical terms, access to the courts (and hence the remedies) may be expensive and slow. Unless the claim is substantial, it will not be worth the investment of time, energy and money to litigate. Plus there is the additional difficulty that the costs of the legal action that may be awarded to a successful party are limited, depending on the court in which an action is pursued, leaving that party at risk of being out-of-pocket.

The Price Gouging (Emergency Circumstances) Law, 2004

88. The purpose of the Price Gouging Law is to prevent increases in prices for commodities during a period of emergency or during a period following a natural disaster. A Price Gouging Control Commission is established to oversee pricing activities and to take the relevant action where a business acts in contravention of the Law.

89. This Law represents a step in the right direction given that commodity and service pricing issues are critical matters when it comes to consumer protection. However, its major limitation is perhaps to be found in its purpose. That is, the Law is only applicable in cases of a state of emergency.

90. It is the view of the LRC that legislation should serve the ultimate purpose of providing remedies to a party and bringing certainty to ones rights and obligations. Principles and protections placed over a body of laws which purport to address a certain issue and in this case, consumer protection issues can be viewed as inimical to the identification of such principles and the remedies to which one may have access. Though several of the laws identified do have some element of consumerism, consumer protection may not have been the main objective as far as the consumption of goods and services is concerned in these Laws. The primary objective may well have been the establishment of standards which once complied with may serve the purpose of

³⁸This was a position that changed under the UK Unfair Contract Terms Act, 1985.

ultimately protecting the consumer. But in general terms, these protections appear to be secondary.

WHY DO THE CAYMAN ISLANDS NEED SPECIFIC CONSUMER PROTECTION LEGISLATION?

91. Both the Summary Courts and the Grand Court have an important role to play in providing remedial protection for consumers and so too preventative or proactive protection where, for instance, an injunction is granted to restrain an impending infringement of consumer's rights.

92. However, the courts are often institutions of last resort after remedies such as negotiations, reconciliation, mediation, or arbitration between consumers and suppliers or providers have failed or when administrative tribunals fail to provide relief.

93. Consumer protection in the judicial process can be compromised by the scarcity of a clear and comprehensive regime of substantive law as well as by technical, procedural and evidentiary rules which also makes it difficult for consumers to represent their own interests. This may call for imposition of strict liability on sellers given that the majority of consumers may be unfamiliar with the law.

94. The Following seeks to highlight several specific areas in which we have determined that consumer issues exists or have the potential to arise.

(a) Services in the Marketplace³⁹

95. In Cayman the growth of the service sector in areas such as tourism, travel, telecommunication, utilities, education, fitness, home improvement, product repair, financial and technology-based services has meant that protection existing in law for the sale of goods needs to be more effectively extended to the sale of services.

96. As will be seen later, some jurisdictions have developed minimum and implied warranties for services; improved contract disclosure requirements; rules relating to estimates; prohibitions on charging advance fees.

97. Based on the dynamic nature of the service sector and the innovative offerings emerging daily, it is perhaps most important that consumer law be flexible enough to rapidly adapt to new, unanticipated services. This will ensure that barriers to positive innovation can be easily removed.

³⁹**Consumer Scenario:** *A woman takes her dress to be cleaned at the dry-cleaner. She leaves specific instructions for the garment. The dry-cleaning business fails to follow the care instructions and permanently damages the dress. Once the value of the dress is revealed, the cleaner retracts an initial offer to replace the dress relying instead on the cleaning contract which limits store liability.*

(b) Appliances and Electronic Equipment⁴⁰

98. Major Appliances and Electronic Equipment are two categories of consumer complaints which anecdotally tend to represent the majority of complaints for consumers in the Islands.

99. As discussed above, the Sale of Goods Law provides civil remedies for consumers when products are not of merchantable quality, however the cost and intricacies involved in accessing the court system results in frustration amongst consumers.

100. Retailers are often willing to attempt repairs, but consumers often times complain of multiple attempts to repair the item, unwillingness of merchants to replace faulty goods, and loss of use of the products for extended periods of time.

101. New remedies in this regard may enhance consumer rights and business responsibilities regarding the repair and replacement of defective goods. Some jurisdictions have developed laws that impose obligations jointly on manufacturers, suppliers, and retailers. By clarifying the obligations of all parties in the sales chain, consumers may gain clearer opportunities to redress problems that can occur. In some cases, jurisdictions have empowered government officials or third party organisations to pursue action on behalf of multiple claimants to lessen the individual burden on consumers to take action against persistent problems with specific merchants of goods or services.

(c) Motor Vehicle and Accessories⁴¹

102. Cases have been arisen with respect to new and used car sales. Like with major appliances and electronic equipment, most complaints are concentrated among a very small number of retailers who arguably have a monopoly in the new and used car sales sector.

103. Given that a motor vehicle is one of the most expensive purchases a consumer will make, it is important that effective redress rights are available to buyers of all vehicles, whether new or used or imported.

⁴⁰**Consumer Scenario #1:** A man buys a television set with a full warranty. Shortly after buying it, the set stops working. Several months pass as multiple repair attempts do not resolve the problem. The store has not offered him a replacement television but the store has kept his money and he continues to pay his monthly cable bill.

Consumer Scenario #2: A man buys a stove on an extended warranty plan from a well-established retailer in the country. Very soon it becomes clear that the stove is faulty and the customer requests a repair. After multiple attempts, the problem does not go away. The retailer eventually agrees to a new replacement stove, but the man learns that his extended warranty is no longer valid.

⁴¹**Consumer Scenario #1:** A consumer buys a new car that comes with a multi-year parts and service warranty. Soon after, her car starts stalling in dangerous situations, so she brings it into the dealership for repairs. The dealer arranges repairs for the vehicle, but the problem persists. After multiple repair attempts, it becomes clear to the consumer that the dealership is unable to properly resolve the problem. She is frustrated because she continues to make expensive monthly payments for her car, yet has lost the use of the car for months.

Consumer Scenario #2: A family member goes to a repair garage to pick up a car belonging to a recently deceased relative. The family member has no way of verifying the repair charges being requested since neither the garage nor the deceased relative have any written documentation of the repair request or estimate.

104. Most jurisdictions throughout North America directly regulate the sale of motor vehicles through licensing of new and used car retailers. Such regimes often impose specific disclosure requirements on sales. They can also impose minimum disclosures and warranties on repair services, and create specific offenses and remedies for misrepresentations regarding vehicle history and quality.

105. As well, rules have been created giving specific rights and remedies for problems that arise when a vehicle is under a manufacturer's warranty. In the US, these laws are commonly known as "Lemon Laws" which usually provide for arbitration or court-backed dispute resolution processes that can order the buy-back of vehicles when multiple repair attempts fail to correct problems.

106. In Canada, a collaborative approach between consumer groups, governments, manufacturers and retailers has resulted in a non-governmental arbitration program that provides an alternative dispute resolution process which is free to the consumer and provides for similar remedies.

107. Specific rules to govern such repairs to enhance consumer protection have been established. Such rights can include:

- requirement to provide written estimates,
- requirement to not exceed estimate or get express consent for new costs,
- mandatory written disclosure of costs for parts, whether parts are new or used, labour rates etc. and
- minimum repair warranties.

108. Motor vehicle sales problems highlights the need to consider mechanisms for enforcement of warranty rights and create clear disclosure rules.

(d) New Home Construction

109. Similar to a motor vehicle purchase, a home is very often the most expensive single purchase a family will make in a lifetime. As housing prices gradually continue to increase in the Islands, there is a greater need to ensure adequate protection is available to consumers.

110. Purchasing a pre-owned home can afford a buyer the chance to physically inspect the premises and adjust their purchase offering accordingly. However, with new homes, a prospective buyer makes a decision based on drawings and plans and most problems with homes happen within the first few years after construction.

111. While most home builders in the Cayman Islands are committed to providing a quality product to their customers, there are a host of potential problems that can result in serious hardship for consumers. The kinds of problems experienced locally and elsewhere have included:

- bankruptcy of builders/developers resulting in unfinished homes and/or loss of consumer deposits;
- poor workmanship resulting in the need for costly repairs;
- discrepancies between the size and quality of the home promised versus what was delivered; and
- unreasonable delays in delivering finished homes resulting in inconvenience and financial hardship for buyers.

112. Though the Builders Law, 2007 and its associated Regulations are in existence the first issue is that the Law is not in force and secondly there are no minimum or mandatory standards set out in the law which has the potential to consumer protection problems.

113. A number of jurisdictions have determined that some form of voluntary or mandatory regulation is required to protect home owners from potential harm. Regulation can take many forms including:

- Voluntary warranty standards;
- Voluntary standards backed by insurance;
- Voluntary standards backed by industry compensation funds;
- Mandatory standards backed by insurance; and
- Mandatory standards backed by industry compensation funds.

114. New home warranty standards vary from jurisdiction to jurisdiction. However, there are some general forms of protection that are common. These include:

- Short-term coverage for defects in workmanship and materials for a period of one year;
- Medium-term coverage for problems with water penetration and major systems such as water, septic, and electrical (often two years), and
- Long-term coverage for major structural defects such as problems with the foundation, walls, and roof (often from 5-10 years).

115. When a builder is either unable (financial hardship or bankruptcy), or unwilling (disagreement or poor business ethics) to comply with their warranty obligations, consumers can face large costs to ensure their home is fit to live in. There are two common financial compensation approaches generally used to protect consumers in these circumstances:

- *Insurance*: Where builders are required to carry adequate insurance in order to build homes. Under this model, consumers can make warranty claims to an insurer.
- *Industry-financed compensation fund*: Where builders must contribute to an industry fund from which eligible consumers can make claims.

Regulation of Builders

116. Whether voluntary or mandatory, most regulatory schemes for new home builders include an upfront membership or licensing requirement. This involves:

- screening of builders for financial, business, and ethical qualifications;
- establishing rules of professional conduct;
- monitoring of compliance with warranty standards and conditions of membership/license;
- complaints-handling and mediation; and
- inspection and enforcement.

117. In North America, the history of regulation of builders has generally begun with voluntary self-regulation. Over time, more jurisdictions have moved to a mandatory regulatory model where government sets warranty standards and mandates the licensing of builders.

Dispute Resolution

118. When disputes arise between new home buyers and their builder regarding delays in construction or eligibility for repairs under warranty, there are a number of different dispute resolution models that can be used. Typically, the regulator has the authority to rule on disputes and mandate the appropriate corrective action.

119. Most rulings can further be appealed by either party to an independent party who can confirm or overturn the decision by the regulator. There are different dispute resolution models for appealing such decisions including:

- Third-party arbitration: where an independent roster of qualified arbitrators has the authority to hear appeals on warranty eligibility and give a binding or non-binding ruling,
- Quasi-judicial tribunal: where an independent government-run tribunal is given the authority to hear appeals and issue binding orders, and
- Court-based ruling: where decisions by the regulator can be directly appealed to the courts

(e) Travel Sector⁴²

120. Cayman is a busy travel destination and travel-related services are increasingly becoming a source of consumer complaint. The national importance of preserving an affordable and effective service raises the need to consider minimum standards of protection for consumers from costs and inconvenience arising from overbooking, delays, and other service quality issues.

⁴²**Consumer Scenario:** *A family takes a flight from Grand Cayman to Miami. After concluding their business, the family takes a taxi to the airport and lines up to check in for their flight home. At the counter they learn that their pre-reserved flight is fully booked, and that there are no more flights going to Cayman that night. The family has no choice but to take a taxi to a hotel in Miami, and then return by taxi the next morning to catch an early flight home. Through no fault of their own, they must bear the cost of additional taxi fares and hotel accommodation.*

121. Air carriers are regulated at the domestic and international levels. Mostly, this regulation aims to ensure passenger safety, financial stability, and security. However, the area of consumer protection is often unregulated. This is largely because of the international nature of air travel and the difficulty of harmonizing and applying rules to foreign air carriers.

122. Problems with air carriers often relate to issues such as on-time arrivals and departures, stranded consumers, baggage handling, general complaints handling and poor disclosure of contract terms.

123. In the late 90s, consumer concerns in the United States and elsewhere prompted governments to explore imposing new rules governing quality service and rights to refunds. However, the industry responded by agreeing to develop voluntary codes of quality service and committing to increased vigilance in this area.

124. The US Department of Transport requires airlines to report regularly on a number of important performance and service indicators such as airline arrival and departure delays, instances of lost baggage, and complaints-handling. They then publish these reports publicly.

125. Jurisdictions in North America and Europe have created disclosure rules to ensure informed consumer choice. For example, rules regarding contract cancellation rights and conditions help ensure consumers are aware of their rights and responsibilities, including requirements for supporting documentation, visas and other conditions.

126. As well, travel agencies often share similar obligations regarding advertising, brochures, and contract disclosures. Some jurisdictions also create rules and obligations for retailers and air carriers regarding payments to return or accommodate stranded passengers due to bankruptcy, flight cancellations, or over-booking. Often air carriers will voluntarily provide vouchers, refunds, or arrange alternate travel to preserve goodwill with customers and to maintain a future relationship.

(f) Financial Services⁴³

127. The Cayman Islands are regarded as one of the major hubs of the financial world. Given the increasing role of credit arrangements as a means to finance transactions consumer credit offerings are common at financial institutions and increasingly are offered by retailers providing direct financing arrangements.

128. Clear credit disclosure rules are most effective when consistently applied across all service providers. For instance, retailers offering credit, banks and finance companies offering

⁴³ *Consumer scenario: A consumer is shopping around for a new clothes dryer. He is debating whether to take out a bank loan to pay for the dryer or whether to enter into one of several hire-purchase agreements offered by competing retailers. As he shops around, he believes that a particular hire-purchase offer is the most attractive since it is promoted as being as good a deal as paying cash. Once he has entered into the agreement, he more closely reads the small print on the contract. He discovers that unless he can pay the full value of the dryer in a very short period of time, he is locked into a 12 month contract with interest charges, fees and conditions which are less attractive than other options he had initially considered.*

loans, and other short-term lenders. Similarly, better rules can address common areas of confusion among potential buyers such as the meaning of "no interest" statements in advertisements.

129. To ensure laws reflect marketplace practices and provide increased consumer protection, many jurisdictions have created mandatory disclosure requirements for consumer loans and leases and other disclosure documents such as monthly statements and advertisements.

130. Some jurisdictions have also created maximum liabilities for lost or stolen credit cards. In the U.S. the Truth in Lending Act has been in place since the late 60s. It sets out what constitutes a loan or lease covered by the Act, and identifies some key areas of disclosure for consumers including:

- Finance Charge - the amount charged to the consumer for the credit.
- Annual Percentage Rate - the measure of the cost of the credit which must be disclosed on a yearly basis.
- Amount Financed - the amount being borrowed in a consumer loan transaction, or the amount of the sale price in a credit sale.
- Total of Payments - the total amount of the periodic payments by the borrower/buyer.
- Total Sales Price - the total cost of the purchase on credit, including the down payment and periodic payments.

131. Comparing the cost of borrowing can be difficult and confusing – highlighting the need for consistent disclosure rules.

(g) Scammers⁴⁴

132. New protection from scam artists who usually target the most vulnerable while depriving legitimate businesses of service opportunities is an increasing global issue. Such criminals often “shop” for jurisdictions with weaker protection. Lack of protection in the area of services has led to an increasing number of scams throughout North America and we have seen where on a numbers of occasions the Cayman Islands consumer has been impacted in different forms.

133. Scam artists often target those whom they perceive to be the most underprivileged in society and exploit a person’s desperation and take money away from legitimate businesses which might have properly served the scam victims.

134. While reports of scam artist activity are still relatively low in the Islands, such criminals are increasingly sophisticated and becoming international in their reach. Most scams are prosecuted under fraud provisions of the Penal Code. As such, it is the responsibility of the

⁴⁴**Consumer Scenario:** A student sees an advertisement in the local newspaper promoting a work-at home opportunity that seems to offer the kind of flexibility and financial benefits to suit his needs. He is required to pay up front for the inventory necessary to launch his home business. After sending out his payment, his inventory never arrives and he is no longer able contact his prospective “employer”.

police to investigate and charge persons with such offences with a view to taking them before the criminal court for prosecution.

135. However, it is often difficult and expensive to prosecute a person for fraud. More significantly, to prove fraud it is necessary to have victims. Jurisdictions like Canada have recognised that many fraud schemes involve a consumer being asked to pay a sum of money for goods or services that never arrive.

136. To help combat this problem, they amended their consumer laws to make it illegal to charge advance fees for certain goods or services. Other rules to deter scam activity include creating broad prohibitions against deceptive or unconscionable sales representations; and creating stronger enforcement powers and penalties.

(h) Unfair or Unjust Terms in Contracts

137. Contracts between suppliers of goods or services and consumers are as a general rule drawn up by the supplier. The terms of these contracts are primarily designed to protect the interests of the supplier rather than those of the consumer.

138. When a consumer signs a contract, it is very likely that it will contain terms that are detrimental and even unfair to him. However, the consumer generally signs the contract without being given the opportunity to read it in full. Even if he has had the opportunity to read it, he is in no position to bargain for alteration of the terms, for the supplier is unlikely to negotiate with him. If he did not sign it, he simply would not get what he wanted and chances are if you were to go to another supplier he would be faced with similar terms.

139. Controls do exist over exemption clauses and there is legislation⁴⁵ to control extremely unfair terms which are not just exclusion of liabilities but which reach into other terms of the contract on the grounds that they are unjust, harsh or unconscionable.

140. The question therefore arises whether there should be legislation giving the courts power to rewrite or strike down such terms in sale and supply contracts. The critical point with which we are concerned relates to terms which are not merely unfair but are harsh or unconscionable. Since unconscionability is a very high test and a harder test than unfairness, it is envisaged that legislation would apply only to extreme cases.

(i) High-Pressure Sales⁴⁶

⁴⁵ UK Unfair Contract Terms Act, 1977.

⁴⁶ *Consumer Scenario: An elderly couple is approached at their home by a home repair contractor who claims to have noticed a leak in their roof that is causing major structural damage to their home. The contractor claims that there is an urgent need to replace the roof or else far more costly structural damages will occur. The couple is trusting and agrees immediately to an expensive repair contract and pay a large deposit. The couple's son contacts them later that day and learns of the alleged roof and structural problems. He immediately brings an architect to visit the home to discover that there was no urgent emergency repair needed. He also notices that the contract for repair is overpriced.*

141. Increasingly, jurisdictions are taking a common view towards strategies which involve high-pressure sales. This is the relatively common situation where a seller uses aggressive tactics to intimidate a person into entering into a consumer transaction.

142. Most often, problems related to high pressure sales occur when a seller offers unsolicited goods or services to consumers away from a place of business such as at a person's home. In such instances, consumers often feel pressured into purchasing decisions, then immediately regret the purchase, what is commonly referred to as "buyer's remorse".

143. Many consumer laws in North America, Europe and elsewhere address this problem by creating a right to cancel such contracts within a defined "cooling off" period of between five and ten days, which must be clearly disclosed by the seller.

(j) E-Commerce and Remote Transactions

144. Since the introduction of the Internet to the Islands overtime, consumer spending and business investment patterns have changed considerably. Consumers are increasingly taking an international view of their purchasing power, and local businesses take advantage of the opportunity to extend their markets.

145. Many consumers enjoy the convenience of shopping from their homes for certain kinds of goods and services and even engage in comparison shopping and ordering goods and services online. E-commerce, by its very nature, allows shoppers to cross regional and international borders. A consumer in Cayman can instantly purchase goods over the internet from e-commerce merchants across the world. While this opens up convenient access to a whole range of unique goods and services, it also can expose shoppers to consumer protection challenges.

146. The Electronic Transaction Law was formulated in recognition of the increasing use of electronic means to conduct and conclude transactions online. The question is whether this law reflects the need for new rights and responsibilities for sales on-line. Does it pose barriers to merchants and new e-commerce innovations?

147. Any removal of legal e-commerce barriers should be accompanied by new protection to consumers. Some jurisdictions for instance have included enhanced disclosure, cancellation, late-delivery, and clearer rules regarding receipts and documentation. Within the EU there are agreements that a consumer should be able to pursue legal action against a merchant in the country where the consumer made the purchase.

148. Perhaps Cayman should work towards an international standard for protection of consumer rights in this area and any legislative reforms should be drafted so as to preserve the flexibility to adopt international standards as they emerge.

(k) Consumer Warranties

149. A warranty is a commitment from a manufacturer or seller to stand behind the product or service being sold. It represents a promise to correct certain problems when a product or service

fails. When buying a new television or motor vehicle, it is common for the manufacturer to offer some form of limited or comprehensive warranty.

146. Warranties in the highly competitive market of car sales in the Islands are often an important feature that can potentially influence a purchase decision. Car companies worldwide including those in the Cayman Islands offer warranties that cover more, and last longer. In these circumstances, consumers can benefit tremendously, and car makers can work hard to ensure a loyal and repeat customer base.

150. There are essentially two kinds of warranties that can be associated with a product: one is an implied warranty, another is an express warranty.

(i) Implied Warranties

151. The Sale of Goods Law sets out some basic implied warranties that apply to goods. An implied warranty can be viewed as an unspoken promise between a seller and a buyer. Currently, there are no similar provisions for implied warranties on services. The legal language common to many implied warranties worldwide suggests that goods should match their description, be fit for the described purpose, and are of merchantable quality.

152. While the Law may help to ensure that products are of a particular quality and fitness at the time of sale, generally they do not impose a minimum length of time for implied warranties. By nature implied warranties are promises about the condition of products at the time they are sold, but they do not assure that a product will last for any specific length of time. For example, it might not be reasonable to mandate that car tyres be warranted for multiple years, but it may be reasonable to warrant the engine for a longer period of time. The courts often will want to assess normal durability, price and type of use. Similarly, implied warranties don't usually cover problems that can arise with products through abuse, misuse, natural wear and tear, improper maintenance or failing to follow safety directions.

153. Also, where a manufacturer offers a written warranty and a retailer does not, it is possible for a retailer to avoid some liability for implied warranties when properly disclosed.

(ii) Express Warranties

154. Unlike implied warranties, express warranties are explicitly offered to customers – usually to help further a sale. They represent a promise to address and repair defects or malfunctions that can arise.

155. Beyond protection provided by implied warranties, many general consumer protection laws do not mandate express warranties across the wide range of goods and services available. Generally, jurisdictions that have imposed express warranty standards have done so in specific sectors, such as with the sale and repair of new homes and cars.

156. However, some jurisdictions, such as the U.S., have put in place laws to protect consumers who buy products that come with express warranties in writing. The U.S Magnusson-Moss Act, 1975 requires manufacturers who offer written warranties to honour them.

157. The Act is designed to help ensure:

- consumers have access to complete information about warranty terms and conditions before a sale takes place;
- consumers can compare price, feature and coverage of competing warranty products;
- strong incentives for business to honour warranty obligations in a timely and complete fashion;
- disputes are resolved with a minimum of delay and cost to consumers.

158. The Act and its accompanying rules set out three basic requirements to merchants and manufacturers who offer written warranties:

- disclose if the warranty is limited or full
- state certain specified information about the coverage of the warranty in a single, clear, and easy-to-read document.
- ensure warranties are available at the point of sale to be read before
- buying.

159. Having regard to these areas that impact consumers it remains questionable as to whether in particular the Sale of Goods Law, the Price Gouging Law, the Electronic Transactions Law and the Contracts Law among other Laws address these areas in an acceptable manner. Is there not a need for some level of certainty and clarity in the remedies to be afforded to consumers when certain events occur? Is there perhaps a need for the consolidation of several provisions within the various Laws in order to formulate specific legislation dealing with the intricacies of consumer protection issues? The position in Cayman differs to that in other jurisdictions which have in place consumer protection legislation.

PART E

GLOBAL LEGISLATIVE APPROACHES TO CONSUMER PROTECTION

160. There has been a general trend world-wide for the review of consumer policies and the elaboration of consumer protection laws, including constitutional guarantees for consumer protection. Different countries adopt different legislative structures and institutional models in their efforts to protect consumers. While there is a trend towards comprehensive legislation, drafting preferences have shown that the structure of legislation can be placed on a spectrum. At one end, there are highly comprehensive statutes encompassing a number of areas of consumer protection. At the other end, an array of statutes will deal with specific issues or commercial sectors.

161. The LRC has examined the laws in a number jurisdictions with a view to identifying emerging international trends and bench-mark best practices. The jurisdictions examined are- (a) Australia,⁴⁷ (b) Barbados,⁴⁸ (c) Canada,⁴⁹ (d) Ireland,⁵⁰ (e) Jamaica,⁵¹ (f) Jersey,⁵² (g) Malaysia,⁵³ (h) New Zealand⁵⁴, (i) Singapore,⁵⁵ (j) Trinidad and Tobago,⁵⁶ (k) the United Kingdom⁵⁷ (l) the United States of America,⁵⁸ and (m) South Africa.⁵⁹ It is to be noted that other law reform agencies have also examined this area of the law.⁶⁰

162. For purposes of this Part we have provided an overview of the legislative approaches to consumer protection within the following jurisdictions and groups-

- (a) Australia;
- (b) Barbados;
- (c) Canada;
- (d) New Zealand;
- (e) United Kingdom;
- (f) European Community; and
- (g) Organisation for Economic Co-operation and Development.

(a) Australia

163. Many Australian states have a relatively integrated legislative regime supplemented by some legislation dealing with certain industries or sectors, such as motor vehicle dealers. For example, the Victoria Fair Trading Act, 1999 deals in a single statute with unfair practices, implied conditions and warranties, unfair terms in consumer contracts, safety and information requirements, off-business-premises sales, telephone marketing agreements, layby sales, codes of

⁴⁷Trade Practices Amendment (Australian Consumer Law) Act (No.2) 2010.

⁴⁸ Consumer Protection Act, 2003 and Consumer Guarantees Act, 2003.

⁴⁹The Competition Act (which covers such consumer issues as misleading advertising and other deceptive marketing practices), the Hazardous Products Act, the Motor Vehicle Safety Act, and the Consumer Packaging and Labelling Act, British Columbia's Business Practices and Consumer Protection Act 2004, Saskatchewan's Consumer Protection Act, Ontario's Consumer Protection Act 2002, and Manitoba's Consumer Protection Act and Business Practices Act.

⁵⁰ Consumer Protection Act, 2007.

⁵¹ Consumer Protection Act, 2005.

⁵² Consumer Safety (Jersey) Law 2006, Distance Selling (Jersey) Law 2007, and Supply of Goods and Services (Jersey) Law 2009.

⁵³Consumer Protection Act, 1999

⁵⁴ Commerce Act, 1986 and the Fair Trading Act, 1986.

⁵⁵Consumer Protection (Fair Trading) Act 2004; the Consumer Protection (Trade Descriptions and Safety Requirements) Act.

⁵⁶ Trinidad and Tobago Consumer Protection and Safety Act, 1986.

⁵⁷Enterprise Act, 2002.

⁵⁸Trade Commission Act, the Consumer Product Safety Act, and the Fair Packaging and Labeling Act.

⁵⁹ Consumer Protection Act, 2008

⁶⁰Hong Kong Law Reform Commission "Report on Contracts for the Supply of Goods (2002)", Nigeria Law Reform Commission "Workshop Papers on The Reform of Consumer Protection Law (2006)", Uganda Law Reform Commission "Study Report on Selected Trade Laws – Consumer Protection Law (2004),"The Law Commission of England "Paper on Simplifying Consumer Legislation: A response from the Law Commission to the DTI's Consultative Document on Consumer Strategy' (Oct 2004)," and the Joint Consultation Paper of the English Law Commission and Scottish Law Commission on "Consumer Remedies for Faulty Goods' (Oct 2008)."

practice, dispute settlement, enforcement, remedies and sanctions, the Tribunal and administration.

164. The Australian federal Trade Practices Act, 1974 is the model for much of the state consumer protection legislation in Australia, as well as for significant provisions in the legislation. It deals not only with consumer protection and fair business practices, but also with competition policy and sectoral regulation in such areas as telecommunications and electricity. The regulator is the Australian Competition and Consumer Commission. The federal government's jurisdiction is related to corporations, but the state consumer legislation is of general application.

165. The legislatively established position of Director of Consumer Affairs Victoria plays a strong role in promoting consumer protection and ensuring compliance with the legislation. In addition to being responsible for the administration of the Fair Trading Act, 1999, the Director may investigate and prosecute breaches of other consumer acts set out in a schedule. These include the Estate Agents Act, 1980, the Motor Car Traders Act, 1986, and the Retirement Villages Act 1986.

166. The Director is therefore the primary enforcer of consumer legislation, with secondary compliance activities being undertaken by industry organisations enforcing codes of conduct. The Director must submit a report to the Minister annually and the Minister must lay the report before the State Parliament.

(b) Barbados

167. Barbados has taken an integrated approach in its Consumer Protection Act, 2002, complemented by a Consumer Guarantees Act, 2002. The Consumer Protection Act, for example, deals with unfair contract terms, unfair trade practices, control of distance selling, product liability, consumer safety, recall of goods, industry codes, and administration and enforcement.

168. Together with the 2002 Fair Competition Act and the Fair Trading Commission Act a comprehensive legislative package to protect consumers has been established in Barbados.

169. The Barbados Fair Trading Commission is responsible for enforcing competition law and policy, and consumer protection. It also regulates several economic sectors, thereby ensuring that the consumer and competition aspects of economic regulation are being given the appropriate capacity.

170. Barbados also has an Office of Public Counsel that is available to assist consumers in seeking redress for wrongs done to them and has established an administrative adjudicative tribunal referred to as the, the Consumer Claims Tribunal.

(c) Canada

171. Like Australia, Canada is a federal jurisdiction with authority over consumer protection being shared between the federal government and the provinces. The federal legislation deals with competition law, including unfair business practices, weights, measurements, textile and precious metal marking.

172. The provincial legislation deals with the majority of consumer issues, including sale of goods and services, contracts, consumer guarantees, distance selling, remedies, information disclosure and business licensing. The province of Ontario, for example, has the Consumer Protection Act, 2002. Following a trend for more comprehensive legislation, the Act consolidated six other statutes: the Business Practices Act, the Consumer Protection Act, the Consumer Protection Bureau Act, the Loan Brokers Act, the Motor Vehicle Repair Act, and the Prepaid Services Act.

173. Like Ontario's statute, the Saskatchewan Consumer Protection Act, 1997 was a consolidation of a number of other consumer protection statutes. In addition to the guarantees found in older sale of goods legislation, the Saskatchewan Consumer Protection Act requires that spare parts and repair facilities be available for a reasonable period of time. The court can also award damages for losses that occur to the consumer due to a defective product. The Act is limited, however, to dealing with guarantees on products and does not cover services.

(d) New Zealand

174. The New Zealand consumer protection legislation includes the Commerce Act, 1986, the Fair Trading Act 1986, the Consumer Guarantees Act, 1993 and the Credit Contracts and Consumer Finance Act, 2003 and the Sale of Goods Act.

175. Consumers are expected to seek their own remedies under New Zealand legislation, but there are institutional arrangements in place to simplify the process. There is a Disputes Tribunal that deals with disputes between both private individuals and consumers and suppliers. There is also a special tribunal devoted to motor vehicle cases. A Citizen's Advice Bureau or a Community Law Centre can help with the preparation or defence of a claim. Appeals are heard by a District Court Judge only on grounds of unfairness in the conduct of the hearing.

(e) United Kingdom

176. The United Kingdom has traditionally been an important source of legislation and policy for Cayman—as it has for many Commonwealth countries. The UK has responded to a number of EU Directives and developed legislation, often in the form of regulations, to deal with consumer protection.

177. The Enterprise Act, 2002, sets out a modernised enforcement and compliance regime that applies to a large number of consumer statutes, including the Consumer Credit Act 1974, the Weights and Measures Act 1985, the Trade Descriptions Act 1968, the Tobacco Advertising and Promotion Act, 2002, the Hallmarking Act 1973, and the Lotteries and Amusements Act 1976.

178. In terms of institutional models, the UK places a strong reliance on quasi-private sector institutions to achieve protection for consumers. For example, the *Enterprise Act 2002* allows for the designation of consumer protection organisations that will play a role in enforcement by making “super-complaints.”

179. Industry ombudsmen organisations are also considered an important segment of the enforcement and compliance regime, as are other government regulators such as those dealing with telecommunications and public utilities and their associated consumer “watchdogs.”

180. Reflecting the strong role of these complementary organisations and the private sector, the legislation continues the emphasis on industry codes of practice.

(f) European Community

181. The European Community has been promoting consumer protection and harmonisation of domestic legislation in the Community through a series of Directives. In many cases, these have now created international standards for the appropriate levels and forms of protection.

182. Among these are the Directive on unfair terms in commercial contracts (1993); the Directive on distance selling (1997); the Directive on price indications (1998); the Directive on the sale of consumer goods and guarantees (1999); and the Directive on unfair commercial practices (2005).

(g) Organisation for Economic Co-operation and Development

183. The Organisation for Economic Co-operation and Development (OECD) which is an international organisation with members from thirty developed countries and associated members from developing countries across the globe, has taken an active interest in consumer protection and in matters that can benefit consumers, such as competition policy and development. The OECD has issued several Guidelines that have influenced government action, including the Guidelines on Protection of Privacy and Cross-Border Data Flow of Personal Information (1980) and the Guidelines for Protecting Consumers from Fraudulent and Deceptive Commercial Practices Across Borders (2003).

**SPECIFIC LEGISLATIVE PROVISIONS OF OTHER JURISDICTIONS FOR
CAYMAN CONSIDERATION**

(a) Consumer, Manufacturer and Supplier

184. The scope of consumer legislation is determined by identifying the target group of people that have to be protected. This is often achieved in most jurisdictions by accurately defining the words consumers, suppliers manufacturers/producers or dealers in legislation in order to isolate transactions and individuals that deserve to be protected.

(i) *Australia Approach*

185. In Australia, Section 4B of the Trade Practices Act, 1974, provides that for the purposes of the Act, unless the contrary intention appears, a person shall be taken to have acquired particular goods or services as a consumer if-

- (a) the price of the goods or services did not exceed the prescribed amount; or
- (b) where that price exceeded the prescribed amount, the goods or services were of a kind ordinarily acquired for personal, domestic or household use or consumption or the goods consisted of a commercial road vehicle.

(ii) *Barbados Approach*

186. The Barbados Consumer Guarantees Act, 2003 defines a consumer as an individual who-

- (a) acquires from a supplier goods or a service of a kind ordinarily acquired for personal, domestic or household use or consumption; and
- (b) does not acquire the goods or service, or hold himself out as acquiring the goods or service, for the purpose of resupplying them or it in trade, or consuming them or it in the course of a process of production or manufacture; or
- (c) in the case of goods, does not acquire them, or hold himself out as acquiring them, for the purpose of repairing or treating other goods or fixtures on land.

187. The Act defines a supplier as a person who in trade-

- (a) supplies goods to a consumer by transferring the ownership or the possession of the goods pursuant to a contract of sale, exchange, lease, hire or hire-purchase to which that person is a party; or transferring the ownership of the goods pursuant to a gift from that person; or
- (b) supplies a service to a consumer.

188. The word supplier includes, where the rights of the supplier have been transferred by assignment or by operation of law, the person for the time being entitled to those rights; a person who, in trade, assigns or procures the assignment of goods to a financier to enable the financier to supply those goods, or goods of that kind, to the consumer; and a person who, in trade, is acting as agent for another where that other is not supplying in trade.

189. The manufacturer is defined as a person who carries on the business of assembling, producing or processing goods, and includes-

- (a) any person who holds himself out to the public as the manufacturer of goods;
- (b) any person who attaches his brand or mark, or causes or permits his brand or mark to be attached, to the goods;

- (c) where goods are manufactured outside Barbados and the foreign manufacturer of the goods does not have an ordinary place of business in Barbados, a person who imports or distributes those goods.

(iii) *Canada Approach*

190. In Canada, section 1 of the Ontario Consumer Protection Act, 002 defines a consumer as ... an individual acting for personal, family, or household purposes. This definition differs from the definitions that are offered by statutes of most jurisdictions, in the sense that, by stating that a product has to be for personal, family and household purposes, it indirectly prescribes that a consumer has to be a natural person.

191. This approach, in essence, limits protection to a natural person's transactions that are not of a business nature. It differs, however, because it specifies the instances when a non-business related transaction will qualify for protection i.e. the consumer or supplier is required to show that the transaction was for personal, family, or household purposes.

192. A supplier is defined by the Act as a person who is in the business of selling, leasing, or trading in goods or services or is otherwise in the business of supplying goods or services, and includes an agent of the supplier and a person who holds himself out to be a supplier or an agent of the supplier. Goods are defined as any type of property. The Act does not define manufacturers.

(iv) *India Approach*

193. In India, the word consumer is defined in section 2(d) of the Consumer Protection Act, 1986 as "... any person who-

- (i) buys any goods for a consideration which has been paid or promised or partly paid and partly promised, or under any system of deferred payment and includes any user of such goods other than the person who buys such goods for consideration paid or promised or partly paid or partly promised, or under any system of deferred payment when such use is made with the approval of such person, but does not include a person who obtains such goods for resale or for any other commercial purpose; or
- (ii) hires or avails any other services for a consideration which has been paid or promised or partly paid and partly promised, or under any system of deferred payment and includes any beneficiary of such services other than the person who hires or avails of the service for consideration paid or promised, or partly paid and partly promised, or under any system of deferred payment, when such services are availed of with the approval of the first mentioned person but does not include a person who avails of such services for any commercial purposes."

194. It is noteworthy that the definition given by the Indian statute includes third parties, who use goods or services that were offered to the primary consumer. The definition of the consumer also requires that there must have been some consideration exchanged for the goods or services. This consideration may be a part or deferred payment, or a promise or part promise to pay.

195. The Act defines a manufacturer as.... a person who-

- (i) makes or manufactures any goods or parts thereof; or
- (ii) does not make or manufacture any goods but assembles parts thereof made or manufactured by others and claims the end product to be goods manufactured by himself; or
- (iii) puts or causes to be put his own mark on any goods made or manufactured by any other manufacturer and claims such goods to be goods made or manufactured by himself.

196. A trader is defined as a person who sells or distributes any goods and includes the manufacturer thereof, and where such goods are sold or distributed in package form, includes the packer thereof.⁶¹

(v) *South Africa Approach*

197. The South African Protection Act, 2008 adopts a broad definition of a consumer, which encompasses-

- (a) a person to whom those particular goods or services are marketed in the ordinary course of the supplier's business;
- (b) a person who has entered into a transaction with a supplier in the ordinary course of the supplier's business; and
- (c) if the context so requires or permits, a user of those particular goods or a recipient or beneficiary of those particular services, irrespective of whether that user, recipient or beneficiary was a party to a transaction concerning the supply of those particular goods or services.

198. The .supplier is defined as a person who markets any goods or services (a person who promotes or supplies any goods or services).

⁶¹See also Article 2 of Directive 85/577/EEC and Directive 93/13/EEC 230. Article 2 of the Council Directive on Unfair Terms in Consumer Contracts defines a consumer as any natural person who, in contracts covered by this Directive, is acting for purposes which are outside his trade, business or profession. A similar definition is adopted by the Council Directive to Protect the Consumer in Respect of Contracts Negotiated Away from Business Premises.

(b) Vulnerable Consumer

199. While consumer protection laws are generally designed for the average consumer, the laws in some jurisdictions provide additional protection for those who might be deemed vulnerable. The factors that result in the consumer being identified as vulnerable include age, income, physical/mental disability, level of literacy and some cultural characteristics, such as language, ethnicity and religion. The extent to which a consumer regime takes into account, or gives priority to, the position of disadvantaged consumers is essentially one of policy that is premised on fairness and distributional justice.

(i) Australia Approach

200. The Australian Productivity Commission in its Review of Australia's Consumer Policy Framework - Draft Report (Volume 2, 2007), considered that a distinction needs to be drawn between the vulnerable and the disadvantaged consumer.

201. Disadvantage can be defined as a set of individual characteristics which increase the risk of consumer detriment and/or intensify its impact. Such characteristics include poverty, low levels of education and disability.

202. Vulnerability is a broader term based on a consumer's susceptibility to detriment resulting from their personal characteristics (which may include, but is not limited to, disadvantage) and the specific market context concerned.

203. Disadvantage and vulnerability are distinct. A consumer may well be disadvantaged but may be empowered. A group of consumers is vulnerable if they are prevented as a result of their characteristics from realizing the full potential of competitive markets with respect to certain essential commercially provided services that are vital for economic and social inclusion.

(ii) United Kingdom Approach

204. In the UK, section 12 of the Consumers, Estate Agents and Redress Act, 2007 provides for special investigation of complaints made by vulnerable designated consumers to the National Consumer Council. For that purpose, a person is vulnerable if the Council is satisfied that it is not reasonable to expect that person to pursue the complaint on that person's own behalf.

(c) Consumer Rights to be Protected

(i) India Approach

205. In India, the Consumer Protection Act expressly states that the purpose of the Act is to protect the rights of consumers. Section 2 provides that it intends to protect particularly the following rights-

- (a) the right to be protected against the marketing of goods which are hazardous to life and property;

- (b) the right to be informed about the quality, quantity, potency, purity standard and price of goods and services and to be protected against unfair trade practices;
- (c) the right to be assured access to a variety of goods at competitive prices;
- (d) the right to be heard and that any complaints will receive the necessary attention by appropriate forums;
- (e) the right to seek redress against unfair practices and unfair exploitation; and
- (f) right to consumer education.

(ii) *South Africa Approach*

206. The South African Consumer Protection Act, 2008 recognises the following fundamental consumer rights:

- (a) the right of equality in consumer market (and protection against discriminatory marketing); (b) the right to privacy (and to restrict unwanted direct marketing);
- (b) the right to choose (and to return unsafe or defective goods);
- (c) the right to disclosure and information (right to information in plain and understandable language, and to disclosure of price of goods or services);
- (d) the right to fair and responsible marketing;
- (e) the right to fair and honest dealing (freedom from false, misleading or deceptive representations);
- (f) the right to fair, just and reasonable terms and conditions; and
- (g) the right to fair value, good quality and safety.

(iii) *Brazil Approach*

207. In civil law jurisdictions, Codes for Consumer Protection provide for a comprehensive bill of rights for consumers. For example, Article 6 of the Brazilian Code sets out the following basic rights for consumers:

- (a) the consumer's rights to health, safety, education and disclosure;
- (b) protection against misleading and unfair advertising or unfair business practices;
- (c) protection against the amendment of contractual clauses;
- (d) redress against damages, access to the judiciary and consumer administrative bodies, adequate and effective rendering of public services.⁶²

208. Article 7 provides that these rights are in addition to any other rights that are given to consumers by international treaties and conventions, to which Brazil is a signatory.

⁶² L.R.M. Pinto, .Consumer Protection in Brazil: A General View. [George Washington University, 2002].

(d) Obligations to be Imposed on the Providers of Goods and Services

(i) Australia Approach

209. In Australia, the general duty imposed on businesses for the purposes of protecting consumers is found in sections 51 and 52 of the Trade Practices Act. In particular section 52 of the TPA provides that a corporation shall not, in trade, or commerce, engage in conduct that is misleading or deceptive or is likely to mislead or deceive and as such imposes strict liability on undertakings in that it is not necessary that there should have been an intention to mislead or deceive.

210. The test on which the deceptive or misleading character of conduct is decided is that of an ordinary purchaser, including purchasers who fail to take reasonable care of their own interests, but not to the level of unusual stupidity.

211. The Australian Consumer Law, 2011 provides both general protections to consumers in respect of misleading or deceptive conduct, unconscionable conduct, and unfair contract terms, as well as specific protections. These included-

- (a) protection against unfair practices (false or misleading representations, unsolicited supplies, pyramid schemes, pricing, referral selling, harassment and coercion);
- (b) protection of consumer transactions (consumer guarantees, and protection in respect of unsolicited consumer agreements and lay-by agreements);
- (c) safety of consumer and product related services (including bans and recall of consumer goods); and
- (d) information standards.⁶³

(ii) United Kingdom Approach

212. In UK, the EC Unfair Commercial Practices Directive imposes a general duty on traders not to treat consumers unfairly. Various pieces of legislation have imposed duties on businesses for the purpose of protecting consumers.⁶⁴

213. The legislation includes-

- (a) the Consumer Protection Act, 1987 which provides that a person shall be guilty of an offence if, in the course of any business of his, he gives (by any means whatever) to any consumers an indication which is misleading as to the price at which any goods, services, accommodation or facilities are available;
- (b) the Price Marking Order, 2004 which requires the selling price of products to be clearly displayed;

⁶³Trade Practices Amendment (Australian Consumer Law) Act (No.2) 2010.

⁶⁴ Report prepared for BERR by the ESRC Centre for Competition Policy University of East Anglia Norwich. December 2008] at pp. 219-220.

- (c) the Accommodation Agencies Act, 1953 which makes it an offence to demand or accept payment from prospective tenants or landlords under certain conditions;
- (d) the Administration of Justice Act, 1970 (section 40) which renders it an offence to coerce another person to pay money claimed from the other as a debt due under a contract, by harassment and various types of false representation;
- (e) the Business Names Act, 1985 which requires businesses which trade under a name other than the proprietor's true name to prominently display the names and addresses of the proprietor at business premises;
- (f) the Control of Misleading Advertisements Regulations, 1988 and the Control of Misleading Advertisements (Amendment) Regulations 2003 which place a duty on the Office of Fair Trading to consider any complaint that an advertisement is misleading or which does not comply with the conditions under which comparisons are permitted in advertisements; and
- (g) the Consumer Protection (Distance Selling) Regulations, 2000 which impose information disclosure duties on suppliers and provides the consumer with a cooling-off period of seven days for distant contracts.

(iii) United States Approach

214. In the United States, Section 5 of Federal Trade Commission Act imposes a general duty to trade fairly by declaring unfair methods of competition' as well as unfair and deceptive acts or practices unlawful.

215. Any firm violating the FTC Act and other federal consumer protection statutes may face administrative penalties, restitution and other monetary remedies to make good any harm done to the consumer and even criminal charges depending on the nature of the violation.

216. Federal agencies have a wide discretion in terms of making decisions as to whether or not pursue formal action against any violation and what kind of remedies to impose. Additionally,

217. Trade Regulation Rules regarding specific industries sometimes define very specific courses of conduct which the businesses must follow.

(e) Standard Contracts and Fair Contractual Terms

218. Standard contracts are contracts that do not allow a consumer the opportunity to negotiate its terms and are imposed on the consumer. Standard contracts are prevalent in the Cayman market and have the potential to be abused by unscrupulous dealers. Most jurisdictions deal with them in their consumer protection statutes by prohibiting abusive terms in contracts. These terms will often either give the supplier an unfair advantage or they create an unjustified burden for the consumer. Abusive terms may be stipulated in standard contracts, in which case, the consumer cannot negotiate out of them. There are various words that are used for abusive contracts. Some legislation refers to them as unfair terms others refer to them as unconscionable terms.

(i) *Australia Approach*

219. In New South Wales there is the Contracts Review Act that is intended to address abusive contracts. Section 7(1) of this Act permits the courts to set aside terms of a contract that are unfair.

220. The test that is used is one of public interest. In determining whether a clause is in the interest of the public the following factors have to be considered-

- (a) material inequality of the parties;
- (b) statements made by the parties or their agents;
- (c) terms that are unreasonable to comply with and which do not assist any of the parties;
- (d) the individual idiosyncrasies of the parties;
- (e) the physical form of the document and the language used; and
- (f) undue influence and unfair pressure.

(ii) *Barbados Approach*

221. Section 7 of the Barbados Consumer Protection Act, 2003 provides that a contract term in a consumer transaction is unfair if, to the detriment of the consumer, it causes a significant imbalance in the rights of the supplier and the consumer.

222. In determining whether a contract term is unfair, consideration is to be given to the following-

- (a) the nature of the goods or services for which the contract was concluded;
- (b) all the other terms of the contract or of another contract on which it is dependent;
- (c) the interests of the supplier;
- (d) the interests of the particular class of consumers who are likely to adhere to the contract;
- and (e) all the circumstances attending the conclusion of the contract at the time of its conclusion.

(iii) *European Union Approach*

223. In the European Union, Standard Contracts and abusive terms are regulated by the Directive on Unfair Terms in Consumer Contracts. Article 3 of the Directive stipulates that an unfair term is a term that has not been negotiated which causes a significant imbalance on the rights and responsibilities of the parties. The imbalance of power between consumers and suppliers makes it difficult for consumers to genuinely negotiate terms of a contract.

224. Article 3 further stipulates that a contract should not be contrary to good faith. Article 4(1) of the Directive stipulates that when determining whether a particular term is unfair the following have to be considered: the nature of the goods and services, the time of the conclusion of the contract, all other circumstances attendant to the conclusion of the contract.

225. Article 4(2) of the Directive is to the effect that the assessment of unfairness should not relate to the definition of the main subject matter or the adequacy of the price or the goods that were supplied.

226. The Directive provides a list of terms that can be considered abusive, and these include the following:

- (a) limiting liability of the seller in respect of conduct that harms the consumer;
- (b) excluding the rights of consumers in the instance of non-performance or inadequate performance by the supplier;
- (c) inserting clauses that create a conditional liability only for the supplier, which depend on the will of the supplier;
- (d) requiring a consumer who fails to comply with his obligations to pay disproportionately high compensation;
- (e) allowing only the seller the right to cancel an agreement; and
- (f) allowing the seller to unilaterally change the terms of the contract.

(iv) *United Kingdom Approach*

227. In the UK, the main legislation that deals with the unfair terms is the Unfair Contract Terms Act and its Regulations. This Act provides comprehensive provisions, which closely follows the EU Directive. The Act is limited to standard or adhesion contracts. The test for unfair terms has three requirements-

- (a) it should be contrary to good faith requirements;
- (b) it must create a significant imbalance with respect to the rights and obligations of the parties; and
- (c) it must be to the detriment of the consumer.

228. In applying the fairness test, the following should be considered: the nature of the contract at the time that it was concluded, and all the circumstances attending to conclusion of the contract.

229. Schedule 2 of the Unfair Contract Terms in Contracts Regulations provide a non-exhaustive list of clauses that can be considered unfair and these include clauses that allow the unilateral alteration of the terms of a contract, exempt the seller from liability cases where the consumer is killed or injured, that compel the consumer to comply with the obligations of a contract where the seller or supplier fails to do the same.

(v) *South Africa Approach*

230. Section 48(1) of the South African Consumer Protection Act provides that a supplier must not-

- (a) offer to supply, supply, or enter into an agreement to supply, any goods or services at a price that is unfair, unreasonable or unjust, or on terms that are unfair, unreasonable or unjust;
- (b) market any goods or services, or negotiate, enter into or administer a transaction or an agreement for the supply of any goods or services, in a manner that is unfair, unreasonable or unjust; or
- (c) require a consumer, or other person to whom any goods or services are supplied at the direction of the consumer to waive any rights, or assume any obligation, or waive any liability of the supplier, on terms that are unfair, unreasonable or unjust, or impose any such terms as a condition of entering into a transaction.

231. Section 48(2) of the Act is to the effect that a transaction or agreement, a term or condition of a transaction or agreement, or a notice to which a term or condition is purportedly subject, is unfair, unreasonable or unjust if-

- (a) it is excessively one-sided in favour of any person other than the consumer or other person to whom goods or services are to be supplied;
- (b) the terms of the transaction or agreement are so adverse to the consumer as to be inequitable; or
- (c) the consumer relied upon a false, misleading or deceptive representation or a statement of opinion provided by or on behalf of the supplier, to the detriment of the consumer.

232. Under section 49(1) of the Act, any notice to consumers or provision of a consumer agreement that purports to-

- (a) limit in any way the risk or liability of the supplier or any other person;
- (b) constitute an assumption of risk or liability by the consumer;
- (c) impose an obligation on the consumer to indemnify the supplier or any other person for any cause; or
- (d) be an acknowledgement of any fact by the consumer, must be drawn to the attention of the consumer.

(f) Provision for Disclosure & Labelling

233. Disclosure creates competition between suppliers which results in a more efficient market and improves the quality of products. It also lessens the need for state intervention in the market in order to protect consumers. In most jurisdictions, the market has failed to provide proper disclosures to consumers and this has resulted in the promulgation of statutes that are intended to ensure that there is proper disclosure.

234. Disclosures can be general in nature in that they apply to all consumer contracts. They can also apply to contracts that relate to specific industries or specific types of contracts.

235. Disclosure in the form of the labelling of goods is important for various reasons because-
- (a) it identifies the product by name and description;
 - (b) it presents goods to consumers to ensure that they are not deceived;
 - (c) it allows for the comparison of products;
 - (d) it provides information to consumers concerning the uses of the product; and
 - (e) it provides consumers with necessary information concerning the product to assist them in deciding whether the goods are appropriate for their needs.

(i) *Canada Approach*

236. In Canada, the Consumer Protection Act of the province of Manitoba prescribes legislative disclosure requirements for credit agreements,⁶⁵ direct sales,⁶⁶ and prepaid contract.⁶⁷ Direct sales have to comply with disclosure requirements that are prescribed in Regulations.

237. With regard to pre-paid services contracts, section 123 provides for the disclosure of the names and addresses of the seller and the buyer, a description of the services to be provided under the contract, the total fee to be paid, date of performance of the service, statement pertaining to the cooling-off period and the schedule of payments.

238. The Consumer Protection Act of British Columbia generally requires the Minister to prescribe regulations that provide disclosure requirements for direct sale agreements and executor contracts. Section 56 of the Act requires that a supplier, who provides an unsolicited service to a consumer, should provide the consumer within sixty days of the transaction a disclosure notice that states the following-

- (a) the description of the service;
- (b) the price of the service;
- (c) the timing of the payments for the service;
- (d) information on the cancellation of the transaction; and
- (e) a statement that a person is not bound to pay for services unless he has specifically consented and may within 2 years demand a refund.

(ii) *New Zealand Approach*

239. Sections 27 and 28 of the New Zealand Fair Trading Act, 1986 provide for regulations creating consumer information standards for goods and services. The regulations can relate to all or any of the following matters-

⁶⁵Section 4(1).

⁶⁶Section 59(1) refers to retail sales and retail hire purchase agreements. It excludes contracts like sales of water, gas petroleum, farm produce etc.

⁶⁷Section 121.

- (a) the disclosure of information relating to the kind, grade, quantity, origin, performance, care, composition, contents, design, construction, use, price, finish, packaging, promotion, or supply of the goods or services; and
- (b) the form and manner in which that information must be disclosed on or in relation to, or in connection with, the supply or resupply, or possible supply or resupply, or promotion of the supply of the goods or services.

240. Some of the consumer information standards cover-

- (a) country of origin clothing and footwear;
- (b) fibre content labelling;
- (c) care labelling; and
- (d) customer information notices for used vehicles.

241. Given the growing awareness of the need for sustainable patterns of consumption and production the use of labels with a logo that identifies environmentally sound products has been implemented in various countries. The information on green labels is often based on life-cycle analyses, which track the environmental impacts of products through production, distribution, consumption and disposal. Independent certification or verification of manufacturers' environmental claims is generally required for eco-labelling.⁶⁸

242. Eco-labelling has become a useful tool for governments in encouraging sound environmental practices, and for businesses in identifying and establishing markets (i.e. domestic and sometimes international) for their environmentally preferable products.⁶⁹

243. Many countries now have some form of eco-labelling in place. Three core objectives are generally pursued: (a) protecting the environment; (b) encouraging environmentally sound innovation and leadership; and (c) building consumer awareness of consumer issues. In Mauritius, the Mauritius Standards Bureau has adopted those standards. A trader is required to affix a trade label on any good and no trader may sell any good at a price which is higher than the price shown on the label affixed. The commodity should also bear a conspicuous label indicating the country of origin.

244. In the case of any pre-packaged food that is intended for sale, packed or canned, the container should bear a conspicuous label which is in conformity with Standard for the Labelling of Pre-Packaged Food and Food Regulations enacted under the Food Act.⁷⁰

⁶⁸T. Rotherdam, *Selling Sustainable Development: Environmental Labelling and Certification Programs* [The Dante B. Fascell North-South Center, University of Miami, 1999]. See also Global Eco-Labelling Network (GEN), *Information Paper: Introduction to Eco-Labelling* [2004]

⁶⁹W. Williams, *Eco-labelling: A Socio-economic Analysis* [Doctoral thesis, WU Vienna University of Economics and Business, 2004].

⁷⁰Pre-packaged Food Regulations, 1989 and Food Regulations, 1999.

(iii) *South Africa Approach*

245. Section 23(3) of the South African Consumer Protection Act, 2008 provides that a retailer must not display any goods for sale without displaying to the consumer a price in relation to those goods. A supplier is under the obligation not to require a consumer to pay a price for any goods or services that is higher than the displayed price for those goods or services.

246. Under section 24(2)(a) of the Act, a person must not knowingly apply to any goods a trade description that is likely to mislead the consumer as to any matter implied or expressed in that trade description.

247. A retailer of goods must not offer to supply, display or supply any particular goods if the retailer knows, reasonably could determine or has reason to suspect that a trade description applied to those goods is likely to mislead the consumer as to any matter implied or expressed in that trade description, or a trade description or trade mark applied to those goods has been altered.

(g) Safety of Goods and Services

248. Safety standards are generally laid down in respect of goods and services. Provision is also made regarding product liability. Product liability generally refers to any liability that is placed on a manufacturer, distributor, retailer or an importer in respect of harm that is occasioned by the use of a product. A product can be considered defective for various reasons, for example, it may have a harmful ingredient, or it may have deteriorated before it was sold or as a result of poor preparation, or lack of proper instructions as to its use.

(i) *Australia Approach*

249. Under the Australian Trade Practices Act, 1974, section 65B includes provisions for issuing warning notices to the public, where the Minister may publish in the Gazette a notice outlining when a good is under investigation in order to determine whether it will or may cause injury and/or the possible risks involved in the use of the specified good.

250. The Australian Consumer Law, 2011, empowers the Commonwealth Minister to declare safety standards for consumer goods and product related services. It is an offence to supply goods or product related services which do not comply with safety standards. There can be bans – interim or permanent – if it appears that a consumer good will or may cause injury to any person, or a reasonably foreseeable use (including a misuse) of the consumer good will or may cause injury to any person.⁷¹ Provision is also made for recall – compulsory or voluntary – of consumer goods or product related services.⁷²

251. Under section 67(1) of the Act, there is a defect in a product if the safety of the product is not such as a person is generally entitled to expect. In determining what a person is generally

⁷¹Sections 109 to 121.

⁷²Sections 122 to 128.

entitled to expect in relation to a product, all relevant circumstances shall be taken into account including-

- (a) the manner in which, and the purposes for which, the product has been marketed;
- (b) the get-up of the product;
- (c) the use of any mark in relation to the product; and
- (d) instructions for or warnings with respect to doing or refraining from doing anything with or in relation to the product;
- (e) what may reasonably be expected to be done with, or in relation to, the product; and
- (f) the time when the product was supplied by its producer to another person.

(ii) *Barbados Approach*

252. Under the Barbados Consumer Protection Act, 2003, it is an offence to supply any consumer goods which fail to comply with the general safety requirement. Section 37(2) of the Act provides that consumer goods fail to comply with the general safety requirement if they are not reasonably safe having regard to all the circumstances, including-

- (a) the manner in which, and purposes for which, the goods are being or would be marketed, the get-up of the goods, the use of any mark in relation to the goods and any instructions or warnings which are given or would be given with respect to the keeping, use or consumption of the goods; (b) any standards of safety published by any person or authority, and having legal effect as published, either for goods of a description which applies to the goods in question or for matters relating to goods of that description; and
- (b) the existence of any means by which it would have been reasonable for the goods to have been made safer. Provision is also made for compulsory recall of goods of a kind which will or may cause injury to any person.⁷³

253. Section 29 of the Act provides that where any damage is caused wholly or partly by a defect in a product, the following persons shall be held liable for the damage-

- (a) the producer of the product;
- (b) any person who, by putting his name on the product or using a trade mark or other distinguishing mark in relation to the product, has held himself out to be the producer of the product; and
- (c) any person who has imported the product into Barbados in order, in the course of any business of his, to supply it to another.

⁷³Section 40 of the Act.

254. Where any damage is caused wholly or partly by a defect in a product, any person who supplied the product, whether to the person who suffered the damage, to the producer of any product in which the product in question is comprised or to any other person, is liable for the damage if –

- (a) the person who suffered the damage requests the supplier to identify the producer or the person who imported the product into Barbados;
- (b) that request is made within a reasonable time after the damage occurs; and
- (c) the supplier fails, within a reasonable time after receiving the request, either to comply with the request or to identify the person who supplied the product to him.

255. Under section 30 of the Act, there is a defect in a product if the safety of the product is not such as persons generally are entitled to expect; and for those purposes "safety", in relation to a product, includes safety with respect to products comprised in that product and safety in the context of risks of damage to property as well as in the context of risks of death or personal injury. In determining what persons generally are entitled to expect in relation to a product, all the circumstances shall be taken into account, including-

- (a) the manner in which and purposes for which the product has been marketed, its get-up, the use of any mark in relation to the product and any instructions for, or warnings with respect to, doing or refraining from doing anything with or in relation to the product;
- (b) what might reasonably be expected to be done with or in relation to the product; and
- (c) the time when the product was supplied by its producer to another.

256. By virtue of section 33 of the Act, the liability to a person who has suffered damage caused wholly or partly by a defect in a product, or to a dependant or relative of such a person, shall not be limited or excluded by any contract term, by any notice or by any other provision.

257. It is to be noted, however, that in respect of a defect in a product it is a defence, under section 34 of the Act, to show-

- (a) that the defect is attributable to compliance with a requirement imposed by or under any enactment;
- (b) that the person proceeded against did not at any time supply the product to another;
- (c) that the only supply of the product to another by the supplier was otherwise than in the course of a business of the supplier;
- (d) that the defect did not exist in the product at the relevant time;
- (e) that the state of scientific and technical knowledge at the relevant time was not such that a producer of products of the same description as the product in question might be expected to have discovered the defect if it had existed in his products while they were under his control; or (f) that the defect constituted a defect in a product in which the product in question has been comprised (subsequent defect) and it was wholly

attributable to the design of the subsequent product or to compliance by the producer of the product in question with instructions given by the producer of the subsequent product.

(iii) *New Zealand Approach*

258. Under section 29 of the New Zealand Fair Trading Act, 1986, regulations may be made in respect of goods of any description or any class or classes of goods, prescribing for the purpose of preventing or reducing the risk of injury to any person, product safety standards relating to all or any of the following matters-

- (a) the performance, composition, contents, manufacture, processing, design, construction, finish or packaging of the goods;
- (b) the testing of the goods during or after manufacture or processing;
- (c) the form and content of markings, warnings, or instructions to accompany the goods.

259. It is an offence under the Act to supply, or offer to supply, or advertise to supply any goods that do not comply with the requirements set out in the Product Safety Standard.

260. Under section 31, the Minister can declare goods to be unsafe if the good may cause injury to any person. Such notices are effective for 18 months and can be extended for a specified period or indefinitely. If goods do not comply with product safety standards, or may cause injury to any person and the trader has not recalled the goods, the Minister may compulsorily require the goods to be recalled.

(iv) *United Kingdom Approach*

261. In the United Kingdom, the Consumer Protection Act, 1987 provides for regulations for the purpose of securing-

- (a) that goods are safe;
- (b) that goods which are unsafe, or would be unsafe in the hands of persons of a particular description, are not made available to persons generally or, as the case may be, to persons of that description; and
- (c) that appropriate information is, and inappropriate information is not, provided in relation to goods.

262. The General Product Safety Regulations introduced an obligation on businesses to only place safe product on the market. The Regulations also require businesses to provide consumers with relevant information to assist them in assessing the risks of using the product, and manufacturers must adopt measures so that they are informed of risks and can take action if necessary.

(h) Guarantees, Warranties and Conditions

263. In most jurisdictions the terms of a consumer agreement are generally subjected to conditions and warranties. Conditions refer to clauses in a contract that are fundamental and whose non-fulfillment either terminates the contract or prevents the coming into being of the contract. Warranties often refer to terms of a contract that are not so fundamental and their breach does not necessarily result in the nullification of the contract but may result in the payment of damages. In a few jurisdictions, the guarantees that are available to consumers upon the supply of goods and services are expressly laid down in statute.

(i) Barbados Approach

264. The Barbados Consumer Guarantees Act, 2003 provides for guarantees in respect of goods guarantees as to title, guarantee as to acceptable quality, guarantees as to fitness, guarantee as to correspondence with description, guarantees as to compliance with sample, guarantee as to prior use, guarantee as to price, and guarantees as to repairs and spare parts⁷⁴ as well in respect of services guarantee as to reasonable care and skill, guarantee as to fitness, guarantee as to time of completion, and guarantee as to price.⁷⁵

265. Part II of the Act deals with guarantees in respect of goods, Part III of the Act relates to redress against suppliers, and Part IV deals with redress against manufacturers, where goods do not comply with guarantees. The consumer is afforded a right of redress against a supplier or manufacturer where goods do not comply with guarantees. A right of redress is also available where service does not comply with guarantees.

(ii) Canada Approach

266. Section 9(1) of the Consumer Protection Act of Ontario provides that a supplier is deemed to warrant that the services supplied under a consumer contract are of a reasonably acceptable quality.

267. Section 9(2) of the Act states that the warranties and conditions that apply to the terms of the Sales of Goods Act also apply to the necessary modifications to goods that are traded, leased or otherwise supplied in terms of a consumer contract.

268. Under section 9(3) clauses in a contract that attempt to negate or vary any implied condition are invalid.

(iii) New Zealand Approach

269. Under section 5 of the New Zealand Consumer Guarantees Act, 1993 it is provided that the following guarantees apply where goods are supplied to a consumer-

- (a) the supplier has a right to sell the goods;

⁷⁴ Part II of the Act deals with guarantees in respect of goods.

⁷⁵ Sections 29 to 32

- (b) the goods are free from any undisclosed security;
- (c) the consumer has the right to undisturbed possession of the goods, except in so far as that right is varied pursuant to a term of the agreement for supply in any case where that agreement is a hire purchase agreement.

270. Section 6 of the Act is to the effect that where goods are supplied to a consumer there is a guarantee that the goods are of acceptable quality and where the goods fail to comply with this guarantee, the consumer has a right of redress against the supplier and against the manufacturer.

271. Section 7(1) of the Act provides that goods are of acceptable quality if – having regard to the nature of the goods, the price (where relevant), any statements made about the goods on any packaging or label on the goods, any representation made about the goods by the supplier or the manufacturer, and all other relevant circumstances of the supply of the goods they are-

- (a) fit for all the purposes for which goods of the type in question are commonly supplied;
- (b) acceptable in appearance and finish;
- (c) free from minor defects;
- (d) safe; and
- (e) durable, as a reasonable consumer fully acquainted with the state and condition of the goods, including any hidden defects, would regard as acceptable.

272. Section 7(2) of the Act provides that where any defects in goods have been specifically drawn to the consumer's attention before he or she agreed to the supply, then notwithstanding that a reasonable consumer may not have regarded the goods as acceptable with those defects, the goods will not fail to comply with the guarantee as to acceptable quality by reason only of those defects.

273. Section 7(4) of the Act also provides that goods will not fail to comply with the guarantee of acceptable quality if-

- (a) the goods have been used in a manner, or to an extent which is inconsistent with the manner or extent of use that a reasonable consumer would expect to obtain from the goods; and
- (b) the goods would have complied with the guarantee of acceptable quality if they had not been used in that manner or to that extent.

274. According to section 8 of the New Zealand Act, where goods are supplied by description to a consumer, there is a guarantee that the goods correspond with the description.

275. Section 11 of the Act provides that where goods are supplied to a consumer there is a guarantee that the consumer is not liable to pay to the supplier more than a reasonable price for the goods.

276. By virtue of section 12 of the Act, there is the guarantee that the manufacturer shall take reasonable action to ensure that facilities for repair of the goods and supply of parts for the goods are reasonably available for a reasonable period after the goods are so supplied.

277. Where goods do not comply with guarantees, the consumer has a right of redress against the supplier, as well as the manufacturer, such as having the good repaired or replaced or a refund of price paid or still being compensated for any reduction in value of the goods below the price paid or payable by the consumer for the goods. The right to reject goods which are not of an acceptable quality would be lost if not exercised within a reasonable time.

278. Section 28 of the Act is to the effect that where services are supplied to a consumer there is a guarantee that the service will be carried out with reasonable care and skill, and completed within a reasonable time.

279. Section 31(1) provides the consumer with the guarantee that he is not liable to pay to the supplier more than a reasonable price for the service.

(iv) European Union Approach

280. The European Union Directive on Certain Aspects of the Sale of Consumer Goods sets out the requirements with regard to compliance with contractual obligations. Consumer goods are presumed to be in conformity with the contract if the following conditions are met-

- (a) they comply with the description given by the seller and possess the qualities that have been represented by the seller;
- (b) they are fit for any particular purpose for which the consumer made known to the supplier at the point of the conclusion of the contract;
- (c) they are fit for the purpose for which goods of the same type are normally used; and
- (d) they show the quality and performance that is reasonably expected of goods of the same type and which the consumer can reasonably expect, taking into account any public statements on the specific characteristics of the goods made by a producer or his representative in labelling and advertising.

(i) Provision for Advertising

281. Advertising and marketing are usually one the first means of communication between suppliers and consumers. Misleading advertising and representations, as well as other forms of commercial practices are therefore potentially devastating to both the consumers and the competitors of the supplier. A commercial practice is an activity linked to the promotion, sale or supply of a product to consumers. It covers any act, omission, course of conduct, representation or commercial communication – including advertising and marketing – which is carried out by a trader.

(i) *Australia Approach*

282. The Australian Consumer Law, 2011 provides protections to consumers in respect of misleading or deceptive conduct, and unconscionable conduct as well as specific protections against unfair practices false or misleading representations, unsolicited supplies, pyramid schemes, referral selling, harassment and coercion.

283. Further, the Australian Trade Practices Act, 1974, the Australian Securities and Investments Commission Act, 2001 (in relation to financial services) and state and territory fair trading legislation require that businesses-

- (a) not engage in conduct that is misleading or deceptive or is likely to mislead or deceive;
- (b) not make false or misleading representations about the goods or services they supply;
- (c) not harass or coerce consumers either when seeking to sell goods and services or when seeking to obtain payment; and
- (d) not engage in unconscionable conduct, including ensuring that contractual terms are reasonably necessary to protect the supplier's legitimate interests.

(ii) *Barbados Approach*

284. Part III of the Barbados Consumer Protection Act, 2003⁷⁶, which deals with unfair trade practices, provides that-

- (1) a person shall not, in trade or commerce as a supplier, advertise for supply at a special price goods or services that he does not intend to offer for supply, or that he has no reasonable grounds for believing that he can supply, at that price, for a period that is, and in quantities that are, reasonable having regard to the nature of the market in which the supplier carries on business and the nature of the advertisement;
- (2) a person shall not, in trade or commerce as a supplier, induce a consumer to acquire goods or services under a contract by representing that the consumer will, after the contract is made, receive a rebate, commission or other benefit in return for giving the first-mentioned person the names of prospective customers or otherwise assisting that person to supply goods or services to other consumers, if receipt of the rebate, commission or other benefit is contingent on an event occurring after the contract is made; and
- (3) a person shall not promote or operate a pyramid selling scheme.

(iii) *European Union Approach*

285. The EU has various Directives that target misleading advertising, the most comprehensive of which pertain to the advertising and marketing of foodstuffs.⁷⁷ The main

⁷⁶ Sections 20 and 23(1).

Directive on advertising, with regard to consumer protection, is the Directive on Misleading and Comparative Advertising. Comparative advertising is defined as any advertising which explicitly or by implication identifies a competitor or goods or services offered by a competitor. The aim of the directive is to control misleading advertising in the interests of consumers, competitors and the general public.

286. Misleading advertising is advertising which, potentially or actually misleads or affects the judgment of the consumer or which, for these reasons, is detrimental to a competitor. In order to determine whether advertising is misleading in nature, the following factors are taken into account- the characteristics of the goods or services; the price; the conditions governing the supply of the goods or the provision of services; the nature, qualities and rights of the advertiser.

287. In addition, the Directive also set out the conditions under which comparative advertising is permitted. These include circumstances in which -

- (a) it objectively compares one or more material, relevant, verifiable and representative features of those goods or services, which may include price;
- (b) it does not create confusion in the market place between the advertiser and a competitor;
- (c) (c) it does not discredit or denigrate the trademarks, trade names or other distinguishing signs of a competitor;
- (d) for products with designation of origin, it relates to products with the same designation;
- (e) it does not take unfair advantage of the trademark or other distinguishing sign of a competitor; and
- (f) it does not present goods or services as imitations or replicas of goods or services bearing a protected trade mark or trade name.

(iv) *Jamaica Approach*

288. Part V of the Jamaican Consumer Protection Act, 2005 deals with Misleading and Deceptive Conduct, False Representations and Unfair Practices. Section 28(1) of the Act provides that no person shall, in the course of trade or business, engage in conduct that is misleading or deceptive or is likely to mislead or deceive.

289. Section 29(1) further provides that no person shall, in the course of trade or business, engage in conduct that is likely to mislead the public as to the nature, manufacturing process, characteristics, suitability for a purpose or quantity of goods or services, as the case may be.

⁷⁷ These include the following Directives: Council Directive 79/112/EEC that deals with labeling presentations and advertising of foodstuffs, Council Directive 90/496/EEC which deals with nutrition labelling for foodstuff, Council Regulation 2081/92 which deals with the geographical indications and designations on the origins of agricultural products and foodstuff and Council Directive 79/581/EEC that deals with consumer protection in the indication of prices of foodstuff.

290. Section 30 of the Act is to the effect that no person shall, in the course of trade or business, in connection with the supply or possible supply of goods or services or with the promotion by any means of the supply or use of goods or services-

(a) falsely represent that-

- (i) the goods or services are of a particular kind, standard, quality, grade, quantity, composition, style, or model, or have had a particular history or particular previous use;
- (ii) services are of a particular kind, standard, quality, or quantity, or that they are supplied by any particular person or by any person of a particular trade or business, qualification, or skill;
- (iii) a particular person has agreed to acquire goods or services;
- (iv) goods are new, reconditioned, or that they were manufactured, produced, processed, or reconditioned at a particular time;
- (v) goods or services have any sponsorship, approval, endorsement, performance characteristics, accessories, uses or benefits; or
- (vi) a person has any sponsorship, approval, endorsement, or affiliation;

(b) make a false or misleading representation-

- (i) with respect to the price of any goods or services;
- (ii) concerning the need for any goods or services;
- (iii) concerning the existence, exclusion, or effect of a condition, warranty, guarantee, right or remedy; or
- (iv) concerning the place of origin of goods.

Section 31(1) of the Act provides that where it can be proven that a provider-

- (a) has contracted to provide goods or services;
- (b) pursuant to that contract, has received a deposit in cash or kind; and
- (c) on the contracted delivery date, has failed without reasonable cause to deliver such goods or services or demonstrate that such goods or services are in a reasonably advanced state of production, that provider shall be deemed to have acted in a fraudulent manner and is liable to be prosecuted in relation thereto.

291. Section 32 of the Act provides that no person shall in the course of trade or business, advertise for supply at a specified price, goods or services which-

- (a) he does not intend to offer for supply; or
- (b) he does not have reasonable grounds for believing can be supplied by him at that price for a period that is, and in quantities that are, reasonable having regard to the nature of the market in which he carries on business and the nature of the

advertisement. Furthermore, it is a requirement that any person who has advertised goods or services for supply at a specified price shall offer such goods or services for supply at that price for a period that is, and in quantities that are, reasonable having regard to the nature of the market in which he carries on business and the nature of the advertisement.

292. Section 34(1) of the Act requires that no person shall demand or accept payment or other consideration for goods or services, if at the time of the demand or acceptance, that person-

- (a) does not intend to supply the goods or services;
- (b) intends to supply goods or services which are materially different from the goods or services in respect of which the payment or other consideration is demanded or accepted; or
- (c) does not have reasonable grounds to believe that the goods or services will be supplied within any specified period, or if no period is specified, within a reasonable time.

293. By virtue of section 33 of the Act, where a provider fails without reasonable cause to meet the advertised delivery date the provider shall refund to the consumer all moneys paid, plus interest on any amount not refunded, as respects the period beginning with the date of deposit of the amount and ending on the date of its refund, at an annual rate ten percentage points above the Treasury Bill rate applicable at the former date.

294. Any provider who has advertised a completion or delivery date, and has obtained from the consumer a deposit in cash or kind or both, against the provision of the goods or service, may elect to terminate the contract within seven days after the receipt of the deposit and in such case, shall refund the full value of the deposit.

(v) *New Zealand Approach*

295. The New Zealand fair Trading Act, 1986 protects consumers and businesses from unfair business practices. It covers prohibitions against-

- (a) misleading and deceptive conduct generally;
- (b) false or misleading representations;
- (c) offering gifts and prizes (and not providing them);
- (d) bait advertising;
- (e) referral selling;
- (f) demanding or accepting payment without intending to supply as ordered;
- (g) misleading representations about certain business activities;
- (h) harassment and coercion;
- (i) pyramid selling schemes; and
- (j) importation of goods bearing false trade description.

296. The Door to Door Sales Act, 1967 regulates agreements for the sale of goods and services on credit entered into at places other than appropriate trade premises. The Act only covers sales initiated by the seller. It applies to sales in the home that result from uninvited traders calling with goods or services for sale. It provides consumers faced with this type of selling method with legal protection in the form of a cooling-off period.

297. The Act allows the consumer seven days after the making of an agreement to cancel the contract by notice in writing. The Act also provides that the seller must disclose to the consumer the rights of cancellation in a written statement and that the contract is unenforceable if the disclosure requirement is not met.

298. The Unsolicited Goods and Services Act, 1975 afford protection to consumers who receive unsolicited goods or invoices for unordered goods or services. The Act establishes that unsolicited goods sent to a person remain the property of the sender until the consumer accepts them, does something contrary to the sender's ownership (i.e. disposes of them), or the sender recovers them. If the sender does not recover the goods within times specified in the Act, the goods become an unconditional gift to the consumer.

299. The Act also prohibits senders from demanding or using threats to elicit payment for unsolicited goods unless they have reasonable cause to believe they have a right to payment, for example, senders cannot threaten or take legal action or debt collection processes for payment for unsolicited goods. The Act also enables certain services to be specified by regulations so prior written consent must be obtained by the service provider before the service can be charged.

(j) Electronic Commerce

300. The Internet has provided consumers with a powerful tool for searching for and buying goods and services. Benefits have included increased competition and lower prices, more choice in products and services, and the convenience of shopping for goods and services from vendors located around the world, from anywhere and at any time.

301. As discussed earlier, the internet has also given rise to the challenge of protecting customers against unsolicited goods and communication; illegal or harmful goods, services and content; dangers resulting from the ease and convenience of buying on-line; insufficient information about goods or about their supplier; the buyer not being in a position to inspect the goods; invasion of privacy; inadequate or conflicting foreign laws; and cyber fraud.

302. The international community has thus laid down standards for businesses and for the empowerment of consumers by providing what information they need to have on the practices that businesses should adopt when engaging in business to consumer electronic commerce. In many jurisdictions e-commerce is regulated.

(i) *Canada Approach*

303. The Canadian Code of Practice for Consumer Protection in Electronic Commerce,⁷⁸ establishes benchmarks for traders conducting commercial activities with consumers on-line. It leaves rights, remedies and other obligations that already exist as a result of consumer protection, privacy or other laws and regulations, or other general or sector-specific voluntary codes to which traders may subscribe. The Code bases its policies on eight principles-

- (a) internet vendors should provide accurate and sufficient information to consumers seeking to transact with them;
- (b) all disclosures should be provided in any language in which goods and services are also proffered;
- (c) a consumer's consent to an Internet contract must be fully formed and intentional, with a meaningful opportunity to cancel or correct orders;
- (d) internet vendors should adhere to generally accepted standards for protection of their customers' privacy and personal information;
- (e) internet vendors should use security mechanisms adequate to protect storage of customers' personal information;
- (f) consumers should be provided with access to a process for complaints and dispute resolution;
- (g) consent should be given by customers for any unsolicited marketing e-mails;
- (h) internet communications and transactions with children should be subject to strict and careful standards, including a requirement that no monetary transactions or collection of personal information be conducted without the consent of a parent or a guardian.

(ii) *OECD Approach*

304. The OECD in 1999 established a set of guidelines for Consumer Protection in the context of Electronic Commerce. These Guidelines define the characteristics of effective consumer protection in electronic commerce. They provide a framework that informs consumers of the kind of information they can expect from online vendors. Since their adoption, numerous countries have used them as a primary source while at the same time developing their own specific regulations.

305. In 2003, the OECD issued a new set of Guidelines for Protecting Consumers from Fraudulent and Deceptive Commercial Practices across Borders, which aim to establish a common framework to combat online and offline cross-border fraud through closer, faster, and efficient co-operation between consumer protection enforcement agencies.

⁷⁸ Consumer Measures Committee, Canadian Code of Practice for Consumer Protection in Electronic Commerce (2004).

306. In 2006, the OECD issued a Recommendation on Cross-border Co-operation in the Enforcement of Laws against Spam, which aimed to enhance cross-border enforcement co-operation in the fight against spam.

307. In 2007, the OECD issued a Recommendation on Electronic Authentication, which encourages member countries to establish compatible, technology-neutral approaches for effective domestic and cross-border electronic authentication of persons and entities. The Recommendation re-affirms the important role of electronic authentication in fostering online trust and the continued development of the digital economy. Recognizing identity theft as a serious threat to consumer confidence in e-commerce, the 2008 Policy Guidance on Online Identity Theft contains principles aimed at preventing consumers from being victimized online through stakeholder education about the problem.

308. The 2008 Policy Guidance for Addressing Emerging Consumer Protection and Empowerment Issues in Mobile Commerce identifies new challenges faced by consumers in the marketplace and ways for governments to address them in co-operation with the private sector. Further, the Policy Guidance for Protecting and Empowering Consumers in Communication Services aims to ensure adequate protection of consumer interests in communication services while maintaining an environment that provides incentives to develop new communication services.

(iii) South Africa Approach

309. In South Africa, the Electronic Communications and Transactions Act, 2002 deals specifically with consumer protection in the era of e-commerce. The protection provided to consumers applies irrespective of the legal system applicable to the agreement in question. Any provision in an agreement which excludes any rights provided for in the Act is null and void.

310. Section 43(1) of the Act provides that a supplier offering goods or services for sale, for hire or for exchange by way of an electronic transaction must make the following information available to consumers on the web site where such goods or services are offered-

- (a) its full name and legal status;
- (b) its physical address and telephone number;
- (c) its web site address and e-mail address;
- (d) membership of any self-regulatory or accreditation bodies to which that supplier belongs or subscribes and the contact details of that body;
- (e) any code of conduct to which that supplier subscribes and how that code of conduct may be accessed electronically by the consumer;
- (f) in the case of a legal person, its registration number, the names of its officer bearers and its place of registration;
- (g) the physical address where that supplier will receive legal service of documents;
- (h) a sufficient description of the main characteristics of the goods or services offered by that supplier to enable a consumer to make an informed decision on the proposed electronic transaction;

- (i) the full price of the goods or services, including transport costs, taxes and any other fees or costs;
- (j) the manner of payment;
- (k) any terms of agreement, including any guarantees, that will apply to the transaction and how those terms may be accessed, stored and reproduced electronically by consumers;
- (l) the time within which the goods will be dispatched or delivered or within which the services will be rendered;
- (m) the manner and period within which consumers can access and maintain a full record of the transaction;
- (n) the return, exchange and refund policy of that supplier;
- (o) any alternative dispute resolution code to which that supplier subscribes and how the wording of that code may be accessed electronically by the consumer;
- (p) the security procedures and privacy policy of that supplier in respect of payment, payment information and personal information;
- (q) where appropriate, the minimum duration of the agreement in the case of agreements for the supply of products or services to be performed on an ongoing basis or recurrently; and
- (r) the rights of consumers.

311. According to section 43(2) of the Act, the supplier must provide a consumer with an opportunity to review the entire electronic transaction, to correct any mistakes, and to withdraw from the transaction, before finally placing any order. A consumer may cancel the transaction within 14 days of receiving the goods or services if a supplier fails to comply with the provisions in section 43(1) and (2) of the Act. By virtue of section 44 of the Act, a consumer is entitled to cancel without reason and without penalty any transaction and any related credit agreement for the supply-

- (a) of goods within seven days after the date of the receipt of the goods; or
- (b) of services within seven days after the date of the conclusion of the agreement.

312. The only charge that may be levied on the consumer is the direct cost of returning the goods. If payment for the goods or services has been effected prior to a consumer exercising his right to cancel the agreement, the consumer is entitled to a full refund of such payment, which refund must be made within 30 days of the date of cancellation.

313. Section 45(1) of the Act provides that any person who sends unsolicited commercial communications to consumers must provide the consumer with-

- (a) the option to cancel his or her subscription to the mailing list of that person; and
- (b) with the identifying particulars of the source from which that person obtained the consumer's personal information, on the request of the consumer.

314. Section 46 of the Act requires the supplier to execute the order within 30 days after the day on which an order has been received, unless the parties have agreed otherwise. Where a supplier has failed to execute the order within 30 days or within the agreed period, the consumer may cancel the agreement with seven days' written notice. If a supplier is unable to perform in terms of the agreement on the grounds that the goods or services ordered are unavailable, the supplier must immediately notify the consumer of this fact and refund any payments within 30 days after the date of such notification.

(iv) *UNCITRAL Approach*

315. The United Nations Commission on International Trade Law (UNCITRAL) developed rules for raising confidence in e-commerce⁷⁹ in the form of the 1996 Model Law on Electronic Commerce⁸⁰ and the 2001 Model Law on Electronic Signatures.⁸¹ The UNCITRAL Model Laws establish rules and accepted practices that define the characteristics of a valid electronic contract, provide guidelines for the acceptable use of digital signatures for legal and commercial purposes, and support the use of computer evidence in legal disputes over the validity of a contract.

(v) *United Kingdom Approach*

316. The UK, has also enacted e-commerce regulations based on the European Commission's E-commerce Directive.⁸² The Directive covers all services conducted over the Internet. Online businesses must make available basic information concerning their activities including their name, address, e-mail address and Value Added Tax number.

317. The Consumer Protection (Distance Selling) Regulations, 2000 provides further protection for consumers. The Regulations apply to any supplier (whether or not based in the UK) that sells goods or services to consumers in the UK. They are intended to be broad enough to cover the full range of mediums for commerce, including the Internet.

318. A distance contract will not be enforceable against a consumer unless the supplier has provided to the consumer, in good time prior to the conclusion of the contract, the following information-

- the identity of the supplier and, where the contract requires payment in advance, the supplier's address;
- a description of the main characteristics of the goods or services;
- the price of the goods or services including all taxes;

⁷⁹ UNCITRAL, Promoting confidence in electronic commerce: Legal issues on international use of electronic authentication and signature methods (2009).

⁸⁰ UNCITRAL Model Law on Electronic Signatures with Guide to Enactment 2001 (United Nations publication, Sales No. E.02.V.8), available at http://www.uncitral.org/uncitral/en/uncitral_texts/electronic_commerce.html

⁸¹ UNCITRAL Model Law on Electronic Commerce with Guide to Enactment 1996.

⁸² The Directive requires all Member States to ensure that their legal system allows contracts to be concluded online and to ensure that it does not deprive contracts of validity just because they are electronic. There are a few exceptions, such as property sales and guarantees. Report on E-commerce: Formal Requirements in Commercial Transactions by the Law Commission for England and Wales in December 2001.

- delivery costs, where appropriate;
- the arrangements for payment, delivery or performance (e.g. when the customer can expect delivery of the goods or performance of the services);
- the existence of a right to cancel;
- if the consumer is to use a premium rate phone number, the cost of the call must be specified before charges are incurred for the telephone call;
- the period for which the offer or the price remains valid;
- where appropriate, the minimum duration of the contract, in the case of a contract to supply goods or services permanently (e.g. in a contract for a mobile phone or for cable TV services), or recurrently (e.g. in a contract with a monthly book club);
- whether or not substitute goods or services may be provided in the event of those ordered by the customer being unavailable; and
- notification that the supplier will meet the costs of the consumer of returning any such substitute goods he or she does not want. This prior information must be provided in a clear and comprehensible manner which is appropriate to the means of distance communication used. For example, if the customer has contacted the supplier by email, it may be reasonable for the supplier to provide the prior information by email.

319. If a business “cold calls” consumers by phone, there are special rules regarding any distance contract concluded during the course of the conversation. The contract will not be enforceable unless, at the beginning of the conversation, the supplier has made its identity and the commercial purpose of the telephone call explicitly clear. In the case of a dispute about cold calling contracts, the supplier must prove that the information was provided in accordance with the Regulations.

320. Suppliers must provide the consumer with confirmation of the prior information otherwise they will not be able to enforce the distance contract. This confirmation must be in writing. The supplier is required to confirm most of the prior information in writing and provide certain additional information. Consumers are entitled to:

- (a) receive clear information about the supplier, the goods or services and the sale before deciding to buy;
- (b) confirmation of this information in writing and certain additional information;
- (c) “a cooling off” period during which an order can be cancelled; in both contracts for the sale of goods and contracts for the supply of services, the cancellation period begins on conclusion of the contract; and
- (d) a full refund if the goods or services are not provided by the date agreed.

(k) Consumer Credit Provisions

321. In many jurisdictions, the need has been felt to protect the interests of consumers in connection with credit contracts and consumer leases as the terms of credit may be disadvantageous to the consumer and also with a view to avoid problems linked with over-indebtedness.

(i) Australia Approach

322. The Australia National Consumer Credit Act, 2009 makes it a requirement for responsible lending conduct. The key obligation on licensees is to ensure they do not provide a credit contract or lease to a consumer or suggest or assist a consumer to enter into a credit contract or lease that is unsuitable for them. This obligation requires licensees to assess that the credit contract or lease is not unsuitable for the consumer's requirements and that the consumer has the capacity to meet the financial obligations under the credit contract or lease.⁸³

(ii) European Approach

323. The European Council Directive 87/102/EEC of 22 December 1986, as amended in 1990 and 1998 provides inter alia that-

- (a) Any credit-related advertising that indicates some aspect of the cost of the credit must also include a statement of the annual percentage rate of charge.
- (b) The consumer should receive adequate information on the conditions and cost of credit and on his obligations. Credit agreements are to be made in writing. An agreement must state the annual percentage rate of charge and the conditions under which it may be amended.
- (c) In the case of credit granted for the acquisition of goods, Member States must lay down the conditions under which the goods may be repossessed and are to ensure that neither of the parties gains any unjustified enrichment.
- (d) The existence of a credit agreement does not affect the rights of the consumer vis-à-vis the supplier of goods or services purchased by means of such an agreement in cases where the goods or services are not supplied or are not in conformity with the contract;
- (e) The consumer may seek redress against the grantor of credit when the following conditions are fulfilled;
- (f) the consumer has entered into a credit agreement with a person other than the supplier of the goods or services purchased;

⁸³Sections 115 to 120 of the Act. The lender is defined in section 2 of the Act as a lending institution which grants a credit facility. A lending institution is defined as (a) a body specified in the Second Schedule [a bank under the Banking Act, 2004, the Development Bank of Mauritius Ltd, the Employees' Welfare Fund, an insurance company under the Insurance Act, the Mauritius Housing Company Ltd, the National Housing Development Company Ltd]; and (b) includes a moneylender under the Moneylenders Act.

- (g) the grantor of the credit and the supplier of the goods or services have a pre-existing agreement under which credit is made available exclusively by the former;
- (h) the consumer obtains his or her credit pursuant to that pre-existing agreement;
- (i) the goods or services covered by the credit agreement are not supplied or are not in conformity with the contract;
- (j) the consumer has sought redress against the supplier but has failed to obtain satisfaction.

(iii) *New Zealand Approach*

324. The New Zealand Credit Contracts and Consumer Finance Act, 2003 provides for-

- (a) the disclosure of adequate information to consumers under consumer credit contracts and consumer leases to enable consumers to distinguish between competing credit arrangements or competing lease arrangements, to become informed of the terms of consumer credit contracts or consumer leases before they become irrevocably committed to them, and to monitor the performance of consumer credit contracts or consumer leases; and
- (b) rules about interest charges, fees, and payments in relation to consumer credit contracts.

325. The Act enables consumers to seek reasonable changes to consumer credit contracts on the grounds of unforeseen hardship and prevents oppressive credit contracts, consumer leases, or oppressive conduct by creditors under credit contracts, lessors under consumer leases.

(l) Redress Mechanisms

326. Consumer empowerment relies upon consumers having the confidence that they will have access to redress should things go wrong. In most jurisdictions, it has been recognized there are a number of formidable barriers to a consumer obtaining relief in the face of a supplier who is unwilling to fulfil its commitments, in particular when the claim is relatively of small value compared with potential litigation costs.

327. A number of different ways have been devised in Consumer protection regimes to assist consumers in asserting their rights. These include-

- (a) provision of simple, low-cost Alternative Dispute Resolution (ADR) mechanisms;
- (b) simplification of court processes - flexible and expedited small claims procedures - to reduce the costs, risk and time involved in making a claim; and
- (c) provision of collective action claims involving a large number of consumers.

(i) *Australia Approach*

328. In Australia, the Banking and Financial Services Ombudsman provides for a free and independent dispute resolution service. It can consider a dispute which relates to any act or omission by a financial services provider, in relation to financial services in Australia, or any act or omission by a financial services provider relating to confidentiality, and, in the case of an individual disputant, privacy.

(ii) *South Africa Approach*

In South Africa, section 70(1) of the Consumer Protection Act provides that a consumer may seek to resolve any dispute in respect of a transaction or agreement with a supplier by referring the matter to an alternative dispute resolution agent.

329. An alternative dispute resolution agent⁴⁴ is defined as (a) an ombudsman with jurisdiction; (b) an industry ombudsman accredited in terms of section 82(6) (where there exists an industry code providing for alternative dispute resolution between a person conducting business within an industry and consumers); or (c) a person or entity providing conciliation, mediation or arbitration services to assist in the resolution of consumer disputes, other than an ombudsman with jurisdiction, or an accredited industry ombudsman.

(m) Small Claims

330. In many jurisdictions given the relatively small monetary value associated with consumer claims and the need for flexible and expedited small claims procedures for consumers - a small claims procedure has been devised. The aim of the small claims procedure has been to provide a flexible, cheaper, faster and less formal procedure than ordinary civil court procedures. In consequence, consumers have better access to justice to resolve small disputes and obtain redress at a cost and burden which is not disproportionate to the value of their claim.

331. These procedures represent a trade-off between efficiency concerns, on the one hand, and the need for due process, on the other hand. The flexibility of such procedures varies between jurisdictions, and the provision of such mechanisms is sometimes obviated by the provision of consumer specific arbitration and mediation schemes, which can therefore be viewed as close substitutes. Indeed, in many jurisdictions such procedures often involve the judge engaging in conciliation of the parties.

332. However, small claims procedures may not be appropriate for very small claims affecting a large number of consumers, and so mechanisms for group litigation have been regarded as more appropriate in such instances.

333. There are two main justifications for facilitating group litigation-

- (a) providing compensation for those harmed by infringements of the consumer protection laws (but who would not have an incentive to litigate individually);

- (b) deterring infringement (which is particularly important if there are insufficient resources available for public enforcement).

334. In the US, class actions are available for consumers. The US class action is an action brought by a person, on behalf of a class of persons, who are not individually represented by the acting party but are deemed to be represented by it, unless they opt-out.

(n) Public Enforcement of Consumer Laws

335. Where there is a consumer interest that should be protected by law, policy-makers need to consider whether that interest should be protected through public enforcement and sanctions or through private claims and redress.

(i) Australia Approach

336. Under the Australian Consumer Law, 2011 provision is made for enhanced enforcement powers and redress mechanisms. The law provides accessible and timely redress where consumer detriment has occurred; and promotes proportionate, risk-based enforcement. Regulators are empowered to take representative actions on behalf of consumers, whether or not they are parties to the proceedings.

337. Provision is made for civil pecuniary penalties (including recovery of profits from an unlawful activity), banning orders, substantiation notices for questionable claims made to consumers, public warning notices, adverse publicity orders, and an order disqualifying a person from managing corporations.

(ii) Barbados Approach

338. Under the Barbados Consumer Protection Act, 2003, the Fair Trading Commission may-

- (a) serve on any person a "prohibition notice", prohibiting that person from supplying, or from offering to supply, agreeing to supply, exposing for supply or possessing for supply, any relevant goods which the Commission considers are unsafe;
- (b) serve a notice on any person requiring that person to furnish such information as is so specified or to produce such records as are specified; and
- (c) accept a written undertaking given by a person in connection with a matter in relation to which the Commission has a function under the Act and enforce such undertaking by the High Court;
- (d) apply to the High Court for an injunction restraining a person from engaging in conduct that constitutes or would constitute a breach of the provisions of the Act.

(iii) *OECD Approach*

339. The 2006 OECD Report on Best Practices for Consumer Policy: Report on Effectiveness of Enforcement Regimes⁶, which considered what enforcement regimes are cost-effective in securing a high level of compliance with consumer protection legislation, observed that:

(1) The monitoring of traders' behaviour by public authorities, enhanced by a system of risk-assessment, is likely to be cost-effective where there is not within the jurisdiction a significant culture of pro-active complaints by consumers and consumer associations or where the contravention is unlikely to be easily detected by consumers themselves.

(2) Enforcement agencies dealing with alleged contraventions should have the power to choose between dismissing a case (with or without a warning) and initiating procedures for penalties.

(3) While there are strong cost-effectiveness arguments for allowing administrative agencies themselves to impose some form of financial penalty, there are also significant risks associated with such a regime, particularly the risk of regulatory error. Detailed analysis of any administrative penalties regime would need to be undertaken with respect to each jurisdiction bearing in mind its judicial and administrative framework. If administrative penalties are introduced, it seems preferable that the language typically associated with the criminal process (for example fine or penalty) should be avoided. It is also considered that fixed penalties should be used only for very minor offences. For others, the agency should have a discretion, up to a limit.

(4) A civil injunction or enforcement order is justified where continuing or further contraventions will lead to such a level of social harm that prevention of the continuing unlawful activity is regarded, in the individual case, as essential;

(5) In general criminal prosecutions should be reserved for repeat offenders who cannot be deterred by other instruments, as well as for those whose conduct is regarded as so repugnant morally as to justify such proceedings being taken, irrespective of deterrence considerations;

(6) Consideration ought to be given to cost-effective possibilities for using public law determinations that a trader has contravened consumer protection regulation to facilitate the enforcement of private rights.

(7) It is preferable for the right (if any) of third parties to initiate public enforcement proceedings for the imposition of sanctions to be subject to approval by a relevant public agency.

(iv) *United Kingdom Approach*

340. In the UK, the Office of Fair Trading (OFT) is responsible for enforcement at the administrative level together with Local Authority Trading Standards Services (TSSs) and, in certain respects, other designated bodies, for example, the National Consumer Council (NCC).

341. In respect of civil orders, under the Enterprise Act, 2002, Enforcement Orders can be obtained from the court to stop infringements which harm the collective interests of consumers. The Regulatory Enforcement and Sanctions Act, 2008 has increased significantly the enforcement powers of the OFT and the TSSs in respect of criminal infringements of consumer law by allowing them to seek to impose administrative penalties.

342. OFT and TSSs have the power to issue fixed and variable penalties to firms who break the law as an alternative to prosecution. There is no involvement of the court, save for the right of an appeal against a penalty. In terms of criminal powers, Local Authority TSSs (and the Department of Trade and Investment in Northern Ireland) can investigate and prosecute criminal offences, and the OFT has the power to prosecute in relation to unfair commercial practices.

343. Arguably, a marketplace which is competitive serves to offer protection to consumers. However, due to the imbalance of power between the consumer and the trader it may need to be addressed by regulation and other means.

344. The enactment of the various laws discussed demonstrate that it is not sufficient to rely on market forces alone to deal with consumer protection issues. Consumer protection laws play a very important role in laying down and enforcing rights of consumers. As seen, laws on consumer protection prohibit unfair or misleading trade practices such as use of false weighing or measuring equipment and mislabeling. They also set standards for the quality, safety and reliability of many goods so that failure to comply with those standards can result in legal action against the seller. A marketplace which is competitive serves to offer protection to consumers. However, due to the imbalance of power between the consumer and the trader it may need to be addressed by regulation.

PART F

POSSIBLE LEGISLATIVE PROVISIONS TO ADDRESS CONSUMER PROTECTION ISSUES IN THE CAYMAN ISLANDS

345. Against the background of all the issues discussed, the question arises as to what legislative regime (if any) do we wish for the Cayman Islands? To assist in responding to this question the LRC is putting forward for consideration consumer protection proposals in the form of questions which reflect international developments and draw upon “best practices” and models developed in several countries.

346. It is intended that any proposed legislation will be developed with an awareness of reforms in other common law countries. While there are differences in the application of general principles and the institutional support given to consumer protection regimes, there seems to be

widespread agreement on the basic principles of how to deal with current problems while preparing for problems that are likely to emerge.

347. One important consideration is how the implementation of best practices would be carried out in the specific circumstances of Cayman. The relevant circumstances include the need to use resources efficiently, the need to develop or improve the institutions that will support an effective regime of consumer protection, and the marketplace conditions. The intention is to create an effective regime that is practical and realistic.

348. The LRC recognises that in the implementation of any form of consumer protection legislation there will be a cost to be borne by all stakeholders involved. The Government will have to bear the costs associated with establishing and enforcing the regime. A cost will have to be borne by the supplier to ensure that he has mechanisms and systems in place to comply with the legislation. Arguably, though the legislation is for the benefit of the consumer, there may well be a cost to be borne by the consumer himself. This particular cost may take the form of an increase in the cost of goods and services that may be passed on by the supplier who seeks to employ means of insurance to protect himself against liability associated with breaches under the legislation. It may even mean that the supplier is unable to absorb any additional costs and as such that specific type of economic activity is contracted or discontinued. It is in this regard that the cost/benefit question is relevant. Is it possible to say conclusively whether the benefits associated with introducing consumer protection legislation outweigh the costs? Is this something that is measurable?

349. The Searle Civil Justice Institute succinctly states⁸⁴ that *“As a matter of economic theory, Consumer Protection Act (CPA) liability could force sellers to internalize social costs associated with deceptive selling or marketing practices and thereby enhance efficiency. For example, CPA liability could increase economic efficiency and consumer welfare by granting recourse to consumers who would otherwise bear the cost of a producer’s deceptive statements. Proponents also claim that CPAs can correct problems that arise in markets in which sellers uniquely possess information on the quality of the products sold to consumers.*

350. However, economic theory also identifies potential social harms associated with such liability expansion. Specifically, if CPAs sufficiently increase expected liability for business activities associated with the production, marketing, and sale of consumer goods and services, consumers can be harmed in the form of higher prices. CPA liability, like excise taxes, can raise the marginal costs of production for the firm and result in reduced competition and output as well as higher product prices.

351. Consumers may benefit initially from being afforded both more consumer protection rights and greater recourse to assert those rights, but they may ultimately suffer from overdeterrence of business activity that is economically efficient and socially beneficial.

⁸⁴ State Consumer Protection Acts and Costs To Consumers, The Impact Of State Consumer Protection Acts On Automobile Insurance Premiums, Preliminary Policy Report, September 2011, at p .7.

352. *Whether consumers actually benefit, on balance, from the expanded rights and increased litigation associated with CPAs frames an important policy debate. To date there has been no reliable empirical data available to facilitate that debate.”*

353. Neither has the LRC come across any data to comprehensively and conclusively evaluate the effects of consumer protection legislation. What we do know is that globally, legislation exists to protect consumer welfare.

354. Accordingly, this Part sets out the broad principles and approaches to be considered in the provision of a policy framework for a new consumer protection legislation. Stakeholders are requested to consider these proposals with a view to determining whether the Cayman consumer and by extension the business market will benefit.

355. APPLICATION OF THE LEGISLATION AND CONSUMER TERMINOLOGY

(i) Should the legislation apply to both goods and services offered to a consumer?

It is proposed that the new legislation will be a law of general application and will deal with the provision of goods and services to all consumers in Cayman.

(ii) Should we define who will be regarded as a “consumer”?

A consumer will be an individual or business who buys goods or services for his own use from a supplier who regularly supplies the goods or services. A person selling or supplying goods or services must be in business of doing so.

(iii) Should we define what will constitute “goods”?

Goods will include personal property but will not include money or the right to recover money in court. It will include items such as electronics, clothing, vehicles, animals, plants. A house will not be goods. A building on land will not be considered to be goods unless it is easily removable and not designed to be used as a residence.

(iv) Should we define what will constitute “services”?

Generally, services will include carrying out work, providing utilities, providing accommodation or entertainment, providing care of people, animals or things and offering credit. One exception will be employment contracts. Labour legislation and the laws dealing with employment contracts govern employment relationships. However, employment agencies who find employment for people will be considered a service.

(v) Should we define who will be a “supplier or manufacturer”?

A supplier will be a person who carries out an activity for gain or reward as a matter of course. A supplier will be regularly paid for supplying goods or services. If someone who does not cut hair

for a living gives a free haircut to a friend, he will not be a supplier. A barber, however, is a supplier. A supplier will not have to be incorporated or registered or licensed under a statute. If someone offers a regular supply of goods or services whether part-time or from a home, he will be a supplier.

(vi) Should we indicate what will constitute the supply of goods or services?

A business will be considered to supply goods and be considered a supplier of goods when it sells or leases the goods or provides them to the consumer through a purchase agreement or exchange of goods. A business will supply services when they are provided to the consumer.

(vii) Should we indicate the circumstances under which an importer of goods will be regarded as a manufacturer?

The person who imports or distributes the goods will be considered to be the manufacturer where goods are manufactured outside of the Islands and the manufacturer does not have an ordinary place of business in the Islands. An obligation will be placed on the importer to ensure that adequate spare parts and repair facilities are available for the goods imported.

356. CONSUMERS AFFAIRS COMMISSION AND AUTHORISED OFFICERS

(i) Should we establish a Consumer Affairs Commission as the body having oversight of all consumer protection issues?

The proposed legislation will call for the establishment of a Cayman Islands Consumer Affairs Commission headed by a Director. The Director will prepare an annual report on the operation of the new legislation. The report should be made within three months after the end of the financial year. The Minister will be responsible for laying the report of the Director before the Legislative Assembly and making the report public.

(ii) What specific functions should be assigned to the Consumer Affairs Commission or any other entity established to monitor consumer protection issues?

The functions will include-

- Promotion of compliance and enforcement of the legislation
- Advocacy
- Promotion of industry codes of practice
- Handling complaints
- Mediation
- Education of consumers and suppliers
- Monitoring trends and emerging issues
- Conducting research

- Publication of information relevant to consumers
- Representing the interest of consumers
- Representing groups of consumers

(iii) Should there be provision for monitoring, inspection and investigation powers?

Inspections provide a “presence” that alerts the public to the importance of consumer protection and reminds suppliers that obeying the law is important. Monitoring may take the form of routine inspections and may also include gathering information from complaints, learning from market trends, and experiences in other jurisdictions. Monitoring may be market-wide or specific to one supplier.

In terms of investigating it will be provided that an authorised officer who has reason to believe that a supplier is not obeying the law should conduct a targeted investigation. During the course of an investigation, documents or samples of goods may be seized and analysed and demands may be made for information or other documents. Investigators may interview various individuals, including consumers who have had dealings with the supplier being investigated

The Director may issue an order demanding that a promotional claim be substantiated.

(iv) Should an authorized officer be permitted to enter a store or other business premises to inspect?

An authorised officer will be able to enter a place of business, such as a store or office, and inspect it at any reasonable time for the purposes of the proposed legislation.

(v) In reasonable circumstances should an authorised officer be empowered to use force for entry to facilitate an investigation?

An authorised officer will not be allowed to use force to enter either a place of business or a home unless the use of force has been specifically authorised in the warrant issued by the Court. The Court will have to be satisfied that there is a good reason to issue the warrant and that force is necessary. The Court may also authorise police officers or other persons to accompany the authorised officer to assist in entry or in carrying out other actions specified in the warrant.

(vi) What documents should an authorised officer be permitted to inspect?

The authorised officer making a routine inspection will be able to inspect the goods offered for sale or sold by the supplier and will be able to take samples for the purposes of expert appraisal or analysis. The authorised officer will also be able to examine and make copies of business records such as registers, books, accounts, vouchers and other documents relating to the business.

(vii) Should the authorised officer be able to seize goods or records?

An authorised officer with a warrant will be able to seize any goods or documents that are specified in the warrant. Where there is urgency, such as potential harm to the public or a

reasonable belief that evidence will disappear, the authorised officer will be able to seize and detain goods or records.

(viii) How should goods or records seized by an authorised officer be treated?

If an authorised officer seizes any goods or records, he will have to take reasonable care to preserve them until they are returned to the person from whom they were seized or until they are needed in an enforcement proceeding. If seized goods or records that would otherwise have been returned to the supplier are damaged, the supplier will be able to seek compensation.

(ix) What should be the disclosure responsibilities of authorised officers who are examining books, records and other commercial information?

Authorised officers will be prohibited from disclosing information that they receive in the course of their official duties except to authorised persons or in the course of a legal proceeding.

357. CONSUMER TRIBUNAL

A quick, inexpensive, and binding means of settling disputes between consumers and suppliers is critical. Consumers must be able to settle smaller disputes that cannot be handled easily by the courts.

(i) As an alternative should a Consumer Tribunal be established to enable consumers to settle their disputes with suppliers?

A Consumer Tribunal will be established. It will provide expert and final settlement of disputes between consumers and suppliers that have not been settled through discussion or mediation.

(ii) How should the members of the Consumer Tribunal be appointed?

The Members of the Consumer Tribunal will be appointed by Cabinet. One Member will be appointed as Chairman and another as Vice-Chairman. To be eligible for appointment, Members will have to have knowledge of law, commercial practices, consumer issues or other specialised knowledge that is relevant to their duties on the Tribunal.

(iii) How should the Tribunal operate?

The Consumer Tribunal will develop Rules of Procedure to guide the Tribunal and parties who appear before it. The rules will deal with how appeals are to be filed, whether mediation may be required prior to a hearing, how evidence is to be presented and who may represent consumers and suppliers. One objective will be to establish a quick and effective process. The Tribunal will be able to refuse to hear applications that it reasonably considers to be frivolous or vexatious.

(iv) *What jurisdiction should the Tribunal have when seeking to help consumers who have disputes with suppliers?*

The Tribunal will have the jurisdiction to hear disputes between consumers and suppliers regarding goods and services. The Consumer Tribunal will deal with the rights and obligations that are established under the proposed legislation. Either the consumer or the supplier will be able to request a hearing by the Tribunal, ideally after having gone through mediation.

(v) *What kinds of orders should the Tribunal be able to make when settling consumer supplier disputes?*

The Tribunal will be able to make several different orders, depending on the nature of the dispute. It may –

- cancel a contract or declare particular provisions of a contract to be void;
- award damages to either party;
- order a repair to be made or payment for repairs;
- order payment for completion of a service by another business;
- order a supplier to accept returned goods;
- order goods to be replaced;
- order reimbursement or payment to either party; and
- make any other such orders as it sees fit in the circumstances.

(vi) *What role should the Director play in dealing with matters that may be the subject of consumer and supplier disputes?*

The Director will be able to ask the Tribunal for certain declarations. For example, he may ask the Tribunal to declare that a term in a standard form contract is clearly unfair.

(vii) *What decisions of the Director should a supplier be able to appeal to the Tribunal?*

A supplier can appeal an issued by the Director to the Consumer Tribunal.

(viii) *What should the Tribunal be able to decide after it hears an appeal of a Consumer Protection Compliance Order?*

The Tribunal will have several choices. It may confirm or cancel the Order. Or it may change the Order by amending, suspending or deleting part of the Order.

(ix) *In what manner should the Tribunal be held accountable for its actions?*

The Tribunal will prepare an annual report that will be presented to Cabinet. The report will be expected to deal with the workings of the Tribunal, its caseload, significant cases, its budget, organisational arrangements and its Members.

The Tribunal will also be open and transparent in its activities. In general, its hearings will be open (with exceptions for personally or commercially sensitive information) and its decisions will be public. There will be no appeal from the decisions of the Tribunal to the courts but the Tribunal actions and decisions will be subject to judicial review by the courts.

358. OBLIGATIONS OF SUPPLIERS

(i) Should suppliers be required to be fair to consumers when trading?

Suppliers will have a general duty to trade fairly. This provision will require suppliers to use honest business practices. A supplier must not mislead or deceive the consumer.

(ii) What should constitute “misleading or deceptive” conduct on the part of a supplier?

“Misleading or deceptive” will be based on what the average reasonable consumer might believe. If the supplier is aiming his advertising at a particular group, however, the characteristics of the group will be considered. For example, if advertising is aimed at children, their vulnerabilities, such as a willingness to easily believe what they hear or be easily influenced, will be taken into account.

(iii) Should the supplier be required to trade fairly if he is supplying a service?

The prohibitions against deceptive or unfair business practices will apply to both goods and services. A supplier will not be able to mislead a potential consumer about such matters as whether a car is new or second-hand or whether repairman is experienced or has special training when this is known to be untrue.

(iv) Should the following business practices be prohibited?

Certain practices will be prohibited. It will be irrelevant whether the potential consumer is familiar with the product or service, well educated, knowledgeable and able to protect his own interests. These prohibited practices will include-

Misrepresentations:

A supplier cannot make false statements to a consumer. At the same time however, the consumer must not be misled because he is not given information that he needs to know to decide whether or not to purchase an item or a service.

A supplier also cannot give false information about the quality of services or who will perform the services. A supplier will need to provide clear and accurate information to consumers before they commit to purchasing the goods or services. False statements about sponsorship, endorsement, testing, price, place of origin or that goods have accessories they do not have would be prohibited. Sports stars will really have to endorse the protein bar and the Cayman rum Cake really has to come from Cayman.

Misleading conduct:

Conduct which misleads the public will be prohibited. A person will not be permitted to engage in conduct that is likely to mislead the public as to the nature, manufacturing process, characteristics, suitability for purpose or quantity of goods, or the nature, characteristics, suitability for purpose or quality of services.

Misleading conduct in relation to employment:

Anyone who offers employment will be prohibited from misleading a prospective employee by saying, for example, that he or she can make “\$5,000 per month” when payment is a commission that is unlikely to ever be that high. The prohibition will include “work at home” schemes so that such statements as “you can work at home only a few hours a day to make \$7,000 a month” will be prohibited.

No intention to supply:

It is often necessary to arrange to buy a good or service that will be delivered at a later time. The store might be waiting for a new shipment of goods or the technician has a list of customers who must be served first. Many people will put down a deposit or pre-pay in order to guarantee that they will have the good or service when it is available. Under the proposed legislation, anyone who accepts a deposit or pre-payment must intend to supply the good or service and must not supply a good or service that is materially different from the one ordered.

Gifts and prizes:

People are often attracted to a product or service because a gift or prize is being offered. A supplier might offer a free MP3 player or an appliance to entice future customers to sign up for a long-term service. A store might advertise that purchasers of a phone or gas will be eligible for a draw for a free television or car. Anyone making such offers, however, will be required to provide the gift, prize or other free item.

Dual pricing:

If more than one price is attached to a good by the supplier, the supplier must charge the consumer the lower or lowest price. While a supplier should only have one price on an item, if he does leave on the lower price, he must charge that price and not the higher price that is also stuck on the item. If the price tag conflicts with the price being charged at the cash register for example, if the item has a price bar code that is not the same as the sticker price then the supplier will have to charge the consumer the lower price.

Bait advertising:

An ad offering a good or service at an attractive price will often draw people into a store or office. However, luring a consumer into a store by falsely advertising a “bargain price”

for a product will be regarded as unfair and deceptive if when he arrives, the product is not available, but the supplier offers a more expensive product in its place. This is often called “bait and switch.” A supplier should also not offer a service for example, “low cost oil change” if the service will not be available at the advertised price.

Further, the new legislation will prohibit a supplier to advertise goods or services at a specified price if he does not intend to supply them at that price or does not reasonably believe they can be supplied at that price for a reasonable period of time. What would be considered a “reasonable period” would depend on the nature of the market in which the supplier carries on business and the nature of the advertisement.

Referral Selling:

A supplier must not try to convince a consumer to buy goods or services by telling him that he will receive a discount or other benefit by providing names of other prospective buyers if the discount depends on something happening after the consumer makes his purchase, such as a purchase by the other buyers. In these cases, the consumer is being persuaded by an uncertain future event that may not happen.

Asserting right to payment without cause:

People know that if they order something, then they must pay for it. Sometimes, however, they receive a good or service they did not ask for. If it is part of an agreed arrangement, they may have to pay. In other cases, there may be no obligation to pay for a good or service that was not requested. Therefore, a person will be prohibited from demanding payment from a consumer for unsolicited goods or services unless there is reasonable belief that there is a right to payment.

Consumer harassment and coercion:

No consumer should be coerced or threatened or harassed to purchase anything. The proposed legislation will provide that a person must not use physical force, coercion or undue harassment in connection with the supply of goods or services.

(v) *What should occur if the supplier fails to deliver goods or services within a reasonable time?*

If goods or services are not delivered or performed within fourteen days after the date for which delivery or performance was promised, the consumer will be able to cancel the contract. The consumer should agree in writing to the delivery or performance date at the time of ordering. If delivery or performance is delayed more than fourteen days beyond the promised date, then the consumer will be able to either cancel the contract or agree to the later delivery or performance date.

If the delivery date or performance date is not specified in the contract, the consumer may cancel if the supplier does not deliver goods or begin performance of services within thirty days after the date of the contract.

(vi) What should occur if goods are not delivered or services supplied by a specific date?

The consumer will be able to cancel the contract if the goods or services are not delivered or performed by the date that has been specified by the consumer and made known to the supplier. The consumer will also be able to recover damages caused by non-delivery of item.

359. RESTOCKING FEES

(i) Should a supplier be entitled to charge a restocking fee for goods returned?

A restocking fee may be unfair if charged when they return defective goods. The legislative proposals will distinguish between situations when consumers are entitled to return goods because they are defective in some fashion and situations where the consumer has simply decided he does not want the goods. Where a consumer is returning an item because it is no longer wanted the supplier does not necessarily have to accept the returned goods. It will be a matter of store policy and goodwill if the store accepts returned merchandise. In these situations, a restocking fee may be acceptable since the supplier can incur real costs to deal with returned goods. The important matter will be to balance the need of the supplier to recover costs with the expectations of the consumer regarding refunds. A supplier will be prohibited from charging a restocking fee if the consumer is entitled to return goods because they are defective.

If the consumer has received a gift or other benefit with the goods, it will have to be returned at the same time the goods are returned to the supplier. If the gift was perishable, such as food, then the value of the gift may be deducted from the refund due to the consumer.

360. CONDUCT OF REPAIRS

(i) What information should the supplier have to give to the consumer when an item is being brought in for repair?

The supplier will have to make a record of the repair and give it to the consumer. The record will include the name, address and phone number of the consumer; a description of the item brought in for repair, including any serial number; an estimate of the repair costs, the date the item was brought in and the date when the repair is expected to be completed.

(ii) What should the supplier have to do if the cost of the repair will be higher than the estimate?

If the cost of the repair will be higher than the estimate, the supplier must contact the consumer and receive his agreement to continue with the repairs.

(iii) What should happen if the consumer decides not to complete the repairs?

If the consumer decides not to continue with the repairs after having been contacted by the supplier, the supplier must return the item to the consumer. The supplier will be entitled to be paid a reasonable sum for reviewing the item and determining the scope of repairs required.

361. PRICE MARKING

(i) What should be the obligation of suppliers with respect to pricing?

Suppliers will be required to provide the selling price of goods or, where appropriate, a unit price. Prices may be on the goods themselves, on a sticker or notice near the goods. The pricing will have to be clear, legible, and easily identifiable. Unit prices will be used where goods are being sold in bulk or where they are sold loose from a bin, such as fruits or vegetables. A unit price might be by number or by weight or volume.

(ii) Should the pricing provisions apply to promotional material in a store window?

The proposed legislation will not apply to auctions or promotional material in a shop window that is not intended to be removed from the window for purchase. If the display contains products that are intended to be sold, such as cakes in the window of a bakery, prices should be supplied.

362. UNFAIR TERMS IN CONTRACTS

(i) Should we stipulate the circumstances under which a term in a contract will be unfair?

A term in a contract will be “unfair” if it significantly skews the contract to the disadvantage of the consumer. While it is expected that certain terms will be to the advantage of the supplier and others would benefit the consumer, there should be a balance between the rights and obligations of the supplier and the consumer. When this balance is weighted significantly toward the supplier, the contract or its terms may be regarded as unfair.

(ii) Should we expressly identify terms in a contract that will be considered unfair?

In determining whether a term is unfair, a number of factors will be taken into account. These include - such matters as (i) the nature of the goods and services and the other terms in the contract; (ii) the relative strength of bargaining positions and the choices available to the consumer; (iii) previous dealings with the supplier and customs of the trade.

Suppliers will be prohibited from using terms that are considered to be unfair in all circumstances. These will include-

- excluding or limiting the legal responsibility of a supplier if the consumer dies or is injured because of any action or failure of the supplier;

- excluding or limiting the legal responsibility of the supplier for other loss or damage due to negligence;
- inappropriately excluding or limiting the legal rights of the consumer against the supplier or another person if the supplier totally or partially fails to fulfill any of his contractual obligations;
- requiring a consumer to use a particular arbitration arrangement rather than exercise his rights to other forms of dispute resolution such as the court or a tribunal;
- requiring the consumer to keep his part of the agreement while the supplier's obligations depend on the supplier's choice;
- permitting the supplier to keep the consumer's money if the consumer decides to cancel the contract while not allowing the consumer to be paid a similar amount if the supplier decides to cancel;
- requiring the consumer to pay a disproportionately high penalty if he does not keep his part of the agreement
- allowing the supplier the choice to cancel the contract without giving the consumer a similar choice or allowing the supplier to keep money already paid if the supplier decides to cancel the contract;
- allowing the supplier to cancel a long-standing contract without reasonable notice;
- extending a contract with a fixed end without the consumer's agreement or setting an unreasonable deadline for agreement;
- binding the consumer to terms that he had no reasonable opportunity to become familiar with before signing the contract;
- allowing the supplier to change the terms of the contract, including the characteristics of the product or service to be provided, without the consumer's knowledge or consent;
- providing for the price of goods to be determined at the time of delivery or the price to be increased without giving the consumer the right to cancel the contract if the final price is too high in relation to the original agreed price;
- giving the supplier the right to determine whether the goods or services supplied meet the requirements of the contract, or giving the supplier the exclusive right to interpret any term of the contract;
- limiting the supplier's obligation to respect commitments made by his agents or making his commitments subject to compliance with a particular formality. In general, the consumer should be able to rely on commitments made by the representative of a supplier, such as a salesperson;
- giving the supplier the possibility of transferring his rights and obligations under the contract where this may reduce the guarantees for the consumer, without the consumer's agreement;
- excluding or hindering the consumer's right to take legal action or exercise any other legal remedy.

(iii) *Should an unfair contract term be binding?*

An unfair term in a contract is not binding on the consumer, although the contract will continue if it can do so without the unfair term.

(iv) *Should the consumer be bound by a confusing contract?*

It will be required that contracts be written in plain, clear and understandable language. The contract language should take into account the characteristics of the group of consumers who are likely to use the contract. The consumer's interest will prevail if a contract term is not clear and there is doubt about the meaning of a term.

363. DISTANCE SELLING

(i) *What should be the general duty of a supplier who provides goods or services at a distance?*

Suppliers will be required to give consumers accurate, clear and easily accessible information. The information should be sufficient for the consumer to identify the supplier and to communicate promptly and easily with the supplier about the transaction.

(ii) *What information should suppliers provide when goods are being sold at a distance?*

The minimum required information that suppliers will have to provide to consumers before the consumer enters into a distance contract is the following-

- the name of the supplier;
- physical and postal address of the supplier;
- supplier's email address, if available;
- telephone number or other contact information to which the consumer can direct an inquiry;
- detailed description of the goods or services to be supplied;
- the currency in which the costs must be paid, the amount to be paid, the method of payment, and the security arrangements for payment;
- the supplier's delivery arrangements and the cost of shipping;
- the supplier's cancellation, return, exchange and refund policies, if any;
- expected date of delivery;
- privacy policy; and
- notice of other costs to the consumer that are not collected by the supplier; this may include handling and insurance and where it would be reasonably known, taxes and duties.

(iii) What should occur if the consumer makes a mistake while ordering goods or services over the Internet?

Suppliers selling online will have to provide consumers with an opportunity to correct errors in their orders. The computer screen may invite the consumer to review the order (often called the “order basket”) and make changes if desired. The consumer must be able to accept or decline the contract after reading it. Usually this is done by clicking on an “I agree” button or something similar.

(iv) Should the consumer be provided with a copy of a distance sales contract after he agrees to the contract?

If the contract is not electronic and available to the consumer at the time of ordering, the supplier will have to give the consumer a copy within seven days after the consumer agrees to the contract. The copy will have to include the disclosure information mentioned above, the date the contract was made, and the consumer’s name. The consumer will be able to cancel the distance contract if the supplier does not comply with these requirements. If the copy does not contain the necessary information, the consumer may cancel within 7 days after receiving the contract.

(v) What should occur if the consumer does not receive the goods or services agreed to after entering into a distance contract?

The consumer will be able to cancel the contract at any time before the goods or services are delivered if they are not delivered within 30 days of the supply date agreed upon in the contract or, if a supply date is not specified, are not delivered within 30 days of the date of the contract.

(vi) Should the consumer be entitled to a refund on cancellation of a distance sale contract?

If a distance sales contract is cancelled, the consumer will receive a full refund within 15 days after the notice of cancellation has been given.

(vii) What should be the obligations of the consumer when goods sold by distance are returned?

If a distance sales contract is cancelled, the consumer will have to return any goods received under the contract unused and in the same condition in which they were delivered.

(viii) What should be the obligations of the supplier when the goods are returned?

The supplier will have to accept the goods returned by the consumer who has cancelled a contract and he will be responsible for the reasonable cost of returning the goods. If, however, the consumer is returning goods according to a return and refund policy of the supplier and not because the contract was legitimately cancelled, the supplier may require the consumer to pay the cost of returning the goods.

364. CONSUMER GUARANTEES FOR GOODS

(i) *What guarantees should be provided to consumers?*

The guarantees to be provided to the consumer include-

- the goods are free from any undisclosed security, such as a lien;
- the consumer has a right to undisturbed possession of the goods; and
- the consumer is guaranteed that the goods are of merchantable quality.

(ii) *How should we define “merchantable quality” as it relates to goods?*

Goods are considered to be of merchantable quality if they are fit for the purpose for which goods of that type are usually supplied; acceptable in finish and appearance; free from minor defects; safe; and durable.

(iii) *What factors to be considered in determining the merchantability of the goods?*

We will have to take into account the nature of the goods; the price; statements made about the goods on any packaging or labeling; any representations made about the goods by the supplier or manufacturer; and all relevant circumstances surrounding the supply of the goods.

(iv) *What should occur if the consumer has knowledge of flawed or damaged goods?*

If the supplier draws a defect to the consumer’s attention and the consumer still decides to acquire the goods, then the goods will be considered to be of merchantable quality.

(v) *What obligations should be imposed on a supplier when the consumer tells the business how he wants to use the item and asks for an item that will meet his needs?*

The consumer will be guaranteed that the goods are reasonably fit for their intended purpose when the consumer has informed the supplier of the intended purpose. If the supplier states that the goods are fit for a specific purpose, then the goods are guaranteed to be fit for that purpose. The goods will not be guaranteed as fit for a purpose if it would be unreasonable to rely on the supplier or the consumer does not rely on the supplier’s skills or judgment.

(vi) *What should occur if a consumer buys from a catalogue and the item is different from the picture or description in the catalogue?*

The consumer will have a guarantee that goods will fit their description if the goods were supplied according to a description. A consumer who buys a refrigerator that is described as having “automatic defrost” should receive a refrigerator with that feature.

(vii) What should be the expectation of a consumer if he buys an item after looking at a display or demonstration model in a store?

The consumer will have a guarantee that goods will match a sample or model if the consumer chooses the goods by examining a sample or demonstration model. When goods are sold by sample or description, the consumer must be given a reasonable opportunity to determine whether they match the original sample or description. He must have enough time to unpack and examine an appliance and perhaps read the instruction booklet to compare what he received with what he was expecting.

(viii) Should the supplier guarantee that the consumer will find spare parts for his purchase?

The manufacturer guarantees to take reasonable action to make repair parts and facilities for repair reasonably available for a reasonable period of time when new or used goods are first supplied to a consumer. What is considered reasonable in terms of availability or length of time depends on the facts—the nature of the goods, the cost of the spare parts, the cost of the goods, the availability of generic parts, the life expectancy of the goods, the inconvenience to the consumer and the predictability of the need for repair.

(ix) Who should be held responsible with respect to a guarantee if there is no manufacturer in the Islands?

The person who imports or distributes the goods will be considered to be the manufacturer where goods are manufactured outside of Cayman and the manufacturer does not have an ordinary place of business in Cayman. This person must ensure that adequate spare parts and repair facilities are available.

(x) Should parts and repairs guarantees be covered for used goods?

If the goods are used but have been imported into the Islands and acquired by a consumer for use for the first time in the Islands that consumer will benefit from the guarantee with respect to spare parts.

(xi) Should consumers still have guarantees for goods that are supplied at the same time as services?

Guarantees with respect to goods will apply whether or not the goods were supplied in connection with a service. If a consumer hires a technician to replace his air conditioning unit and the technician supplied the unit, the unit will be guaranteed.

(xii) What should consumers be able to ask of suppliers when they are not satisfied with their merchandise?

Consumers will have redress against suppliers who fail to comply with any guarantee that is binding on the supplier.

(xiii) What should occur if the supplier cannot reasonably repair the goods?

The supplier will be required to refund the purchase price to the consumer where the goods cannot be repaired.

(xiv) What should properly constitute a refund?

A refund will mean a cash refund of money paid or the value of any other consideration that might have been given for the goods. No fees or other charges should be deducted from the refund (such as restocking fees or “administration” fees).

(xv) How quickly should a consumer be able to expect the supplier to remedy the failure of a damaged product?

The supplier will have to remedy the failure within a reasonable time. What can be considered a reasonable time depends on the circumstances, but such factors as the complexity or rarity of the repair and the need for replacement parts may be important in determining reasonableness.

(xvi) What should happen if the supplier does not repair the goods?

If the supplier fails to make a repair, or does not adequately repair the goods, or is taking an unreasonably long time to make the repair, the consumer will be able to take the goods elsewhere and obtain from the supplier the reasonable costs of having someone else do the repairs.

Alternatively, the consumer will be able to reject the goods if he prefers not to seek out alternative repairs when the supplier has not remedied the failure. If a repair is not made and the consumer chooses not to reject the goods, he will be able to obtain compensation from the supplier to reflect the reduction of value of the goods below purchase price because the supplier failed to comply with the guarantee.

(xvii) What should constitute failures of a “substantial” nature with respect to goods?

The consumer and supplier have different rights and obligations when the goods have failures of a substantial nature. Such goods cannot be repaired or made right. Failures will be considered to be of a substantial nature if a reasonable consumer would not have purchased the goods knowing the nature and extent of the failure.

The consumer will be able to reject goods that have a substantial failure by returning the rejected goods to the supplier unless the nature of the failure or other characteristics of the goods make it impossible to return the goods without significant cost to the consumer.

(xviii) Should the consumer be able to collect any damages after returning goods that have a substantial failure?

The consumer may collect damages to compensate for emotional distress, personal injury and inconvenience resulting from the substantial failure.

(xix) Should the consumer be able to claim for any damages when there is a failure of guarantees?

The consumer will be able to claim from the supplier any loss or damage, including personal injury, distress and inconvenience, resulting from the failure that was reasonably foreseeable as being likely to result from the failure.

(xx) How should the consumer and the supplier settle disputes about guarantees for goods?

The Consumer Tribunal, discussed below at Section W, will provide a process to settle disputes between a consumer and a supplier of goods regarding failures to comply with guarantees and remedies.

365. CONSUMER GUARANTEES FOR SERVICES

(i) Should the consumer have a guarantee that services will be delivered competently?

The consumer will have a guarantee of reasonable care and skill regarding services. The consumer will have a guarantee that the services will achieve a particular result. Where the consumer makes known the particular result he wants from the service or the purpose for which the service is required, there will be a guarantee that the service, and any product resulting from the service, will achieve that result or will be fit for that purpose.

(ii) Should the consumer guarantees help the consumer who is waiting for a service to be completed within a specific time?

The consumer will have a guarantee that the service will be completed within a reasonable time. If the completion time is not set out in the contract between the supplier and the consumer or determined by a course of dealing between them, the time will be a reasonable time. This is comparable to guarantees regarding delivery time of goods.

(iii) Should a consumer have any guarantee regarding the price of the service?

The consumer will have a guarantee that the price for services will be presumed to be reasonable if the price of the services is not set out in a contract (or by reference to a contract) or cannot be established by a course of dealing between the supplier and the consumer. The consumer may refuse to pay more than a reasonable price.

(iv) What should happen when the supplier of the service can remedy a failure?

If the failure to comply with a service guarantee can be remedied, the consumer will be able to require the supplier to do so within a reasonable time. For example, the consumer may ask the painter to repaint a streaky wall or ask the electrician to send another worker if the one doing the work doesn't appear to know what he's doing.

(v) What should the consumer be able to do if the supplier does not remedy the failure?

If the supplier refuses or neglects to remedy the failure or does not do so within a reasonable time, the consumer will be able to have the failure remedied by another supplier. In this case, the consumer may recover from the original supplier all the reasonable costs of having the failure remedied, for example, having the wall repainted. This is similar to taking goods to another supplier for repair.

(vi) What should happen if the failure cannot be remedied?

If the failure is substantial or cannot be remedied, the consumer will be able to cancel the contract for the supply of the service.

Alternatively, he may obtain from the supplier damages to compensate for any reduction of the value of the product or result of the service below the amount paid or payable by the consumer.

(vii) What should constitute a “substantial failure” in a service?

As with a substantial failure regarding goods, a substantial failure in a service is one that cannot be remedied. A failure to comply with a guarantee regarding a service will be substantial if:

- the service would not have been acquired by a reasonable consumer fully acquainted with the nature and extent of the failure;
- the product of the service is substantially unfit for a purpose for which services of the type in question are commonly supplied and the supplier cannot easily and within a reasonable time make it fit for the purpose;
- the product of the service is unfit for a particular purpose or cannot be expected to achieve a particular result made known to the supplier and cannot easily and within a reasonable time be made fit for the particular purpose or to achieve the particular result;
- or
- the product of the service is unsafe.

(viii) Should the consumer be permitted to collect any damages regarding services that have a substantial failure?

The consumer, in addition to other remedies for a substantial failure, such as cancellation and damages for reduction in value, may recover compensatory damages for any loss or damage (including personal injury, emotional distress, and inconvenience) that is reasonably foreseeable as being the result of the failure to comply with a guarantee relating to service.

(ix) At what stage will a contract be considered cancelled?

The cancellation of a contract for services will not take effect until the consumer has communicated the intent to cancel to the supplier.

366. CONSUMER CREDIT AGREEMENTS

(i) *How should a “consumer credit contract” be defined?*

A consumer credit contract will be a contract between a consumer and a lender where interest (and possibly other fees) is charged for the use of credit.

(ii) *Who should be a consumer for the purposes of the proposed credit?*

A consumer will be an individual who enters into the consumer credit contract for personal, domestic or household purposes. Investment by the consumer debtor is not a personal, domestic or household purpose. Lending to businesses raises different issues than loans to individual consumers. The proposed legislation will only deal with consumers as individuals.

(iii) *Who should be a lender?*

A lender carries on the business of providing credit or makes a practice of providing credit in the course of his business.

(iv) *Should a lease be regarded as a consumer credit contract?*

Leases will be considered as consumer credit contracts that will be subject to the legislation if the lessee is a consumer and the lessor carries on the business of leasing goods or leases goods in the course of his business. The proposed legislation will apply, for example, to a car dealer who leases cars to people for their own use.

(v) *What should a lender be required to tell the consumer before the consumer agrees to the consumer credit contract?*

The information that will have to be provided by the lender will include the following-

- full name and full address of the lender (who may not be the vendor);
- annual percentage rate of interest and all the costs and charges included in the rate; whether the rate is variable; if it will change during the lifetime of the agreement and, if so, its duration;
- amount and frequency of repayments;
- whether the loan is secured and, if so, on what;
- specific warning if the loan is secured on a consumer’s home;
- the duration of the agreement;
- the total charge for credit;
- the cost of early settlement or prepayment of the agreement; and
- information about the right to cancel.

(vi) *What should happen if the lender does not disclose all relevant information to the consumer?*

If the lender fails to disclose the required information to the consumer by the time the credit contract is made, the consumer will be able to cancel it at any time. The lender will be unable to collect the debt for the time period before the disclosure was made or enforce any security interest or recover property.

(vii) *Should the lender be required to update the disclosure information?*

The lender will be required to provide the consumer with disclosure information at least every six months.

(viii) *What information will be in the continuous disclosure statement sent to the consumer?*

The lender will update the consumer's account with such information as the opening and closing balances, the amounts paid, interest paid, annual interest rate, and any other fees charged to the consumer.

(ix) *What should the consumer be told before signing a consumer lease?*

The information that the lessor will have to disclose to the consumer will include-

- lessor's full name and address;
- the term of the lease;
- the cash price of the goods being leased;
- whether the lessee has an option to buy the goods, and if so, how much the lessee must pay to do so;
- the amount, timing and number of payments to be made under the lease;
- how much is to be paid at the start of the lease or before the lessee takes the goods;
- the total amount payable under the lease;
- a statement of how the lessee may terminate the lease, including how any amount payable on termination would be calculated;
- particulars of any services that are in substance financed by the lease; and
- any default fees, charges or enforcement costs that may be payable.

(x) *What should happen if the consumer is not given the required information about the lease?*

If the lessor does not give the consumer the required information, he will not be able to take steps to enforce the contract or recover property or a security interest under the contract until disclosure is made.

(xi) If a lender or lessor does not give the consumer the required information, should the consumer be required to pay the interest charges on the loan or lease?

A lender or lessor who fails to make initial disclosure to the consumer will have to return any interest payments and credit charges for the period from when the disclosure should have been made until the time it was actually made.

367. OFFENCES FOR BREACHES OF THE LEGISLATION

Emphasis will be placed on enforcement actions rather than prosecution. However, non-compliance is an offence and, where appropriate, the alleged offender will be subject to prosecution.

(i) Should breaches under the law attract administrative penalties to be governed by a progressive penalty system?

(ii) What should constitute criminal offences for consumer protection breaches?

It will be a criminal offence to:

- give false information to any person empowered to conduct an investigation;
- obstruct any authorized person in the performance of their duties and, in particular, fail to co-operate with an inspection or investigation or instruct others not to co-operate;
- engage in any prohibited unfair business practice;
- fail to comply with any written undertakings given to an authorized officer; and
- fail to comply with any order.

It will also be a criminal offence for any authorised officer or employee empowered under the legislation to disclose confidential business information acquired in the pursuance of his duties without legal authority or appropriate authorisation.

(iii) Should consumer protection breaches be strict liability offences?

It is proposed that most of the offences will be considered to be strict liability offences which are a form of “regulatory offence” where it is only necessary to prove on the balance of probabilities that the prohibited behaviour took place. It is not necessary to prove intent.

Suppliers, lenders or lessors will commit a strict liability offence if they-

- fail to provide required information to consumers;
- fail to comply with a mandatory code of practice or a registered code of practice to which the person promotes his adherence;
- fail to comply with an order of the Commission or Tribunal;

- fail to remove a term in a standard form contract that has been found to be unfair to consumers;
- fail to return money, exchange goods, honour the cancellation of a contract or perform any other action as required by the proposed legislation.

368. DEFENCES FOR BREACHES OF THE LEGISLATION

- (i) *Should there be a defence to a strict liability offence if the suppliers proves that there was due diligence?*

It will be a defence to a strict liability offence to show on the balance of probabilities that due diligence was exercised to avoid committing the offence.

- (ii) *Should a newspaper or magazine have a defence if it has published a misleading advertisement or otherwise aided in the commission of an offence by publishing information?*

It is a defence if a person can prove that its business is to publish or arrange publication of advertisements and it received the information for publication in the ordinary course of business and had no reason to suspect that publication might constitute an offence.

369. INJUNCTIONS AND ORDERS TO HOLD ASSETS OF A SUPPLIER

- (i) *What should the Director be able to do when faced with serious non-compliance?*

The Director will be able to apply directly to the Court for an injunction. The Court may grant the injunction when it appears to the Court that an offence has occurred or will occur.

- (ii) *What stipulations should be attached to an injunction?*

An injunction will require the person to refrain from doing any act or thing that would be an offence against the proposed legislation. Alternatively, it may order a person to do something that would prevent an offence.

- (iii) *What should the Director be able to do if he believes a supplier has committed an unfair practice and has a consumer's money?*

The Director will be able to apply to the court without notice to the supplier for an order prohibiting the business from disposing of the consumer's money or other assets.

- (iv) *Should the supplier be found guilty of contempt if he does not comply with the injunction or the order?*

The supplier would be guilty of contempt of court and may face several sanctions, including imprisonment.

370. SANCTIONS FOR BREACHING THE LEGISLATION

- (i) *What should the court be required to take into account when it fines a supplier for committing an offence?*

Criteria for the court to consider in setting fines will be set out in the proposed legislation. In addition to existing sentencing guidelines that the court is required to consider, it should take into account the harm caused, benefits received by the offender as a result of the offence, and the offender's compliance history.

- (ii) *Should the supplier be allowed to keep the money it has gained from not complying with the legislation?*

The court will be able to require convicted offenders to pay an additional fine equal to the court's estimate of the benefit they received from the commission of the offence. This will ensure that suppliers are not able to profit from their illegal activity, whether the offence is a criminal offence or a strict liability offence. This fine would be in addition to any fine imposed by the court as a sanction.

- (iii) *Should the court be permitted to make an order which publicizes the breach of the supplier?*

The court may also order a supplier to publicise its non-compliance and any corrective action it has taken. The supplier may also be required to tell consumers any information about its activities that the court believes is appropriate. If the supplier fails to do this, the Director may publicise the information and recover the costs of publication from the supplier.

- (iv) *Should the court be able to sentence people who do not comply with the new legislation?*

The court will be able to impose prison terms on individuals convicted of criminal offences. Strict liability offences will be sanctioned by fines and other actions.

CONCLUSION

371. At global and regional levels, there have been various initiatives for the protection of consumer interests. We have assessed our current laws from an international and comparative perspective. We have examined the UN Guidelines for Consumer Protection,⁸⁵ which provide a framework for Governments to use in elaborating consumer protection policies and legislation.⁸⁶ We have also examined the standards and policy strategies developed by the European Union and other regional organisations,⁸⁷ the OECD Committee on Consumer Policy,⁸⁸ Consumers International and Caricom initiatives.

⁸⁵*Supra.*

⁸⁶Manual on Consumer Protection (2004).

⁸⁷EU Green Paper on the Review of the Consumer Acquis (2007).

⁸⁸1999 Guidelines for Consumer Protection in e-commerce.

372. Changes in the nature of today's consumer marketplace will continue to inevitably reveal gaps in protection for consumers and potential barriers to new innovative business offerings.

373. Legislation is one crucial component of a strategy to increase consumer protection in the Islands. Equally, it is important to ensure that we have a system in place that can be both proactive and responsive to consumer issues as they emerge.

374. The overall objectives of new legislation should be to promote and advance the social and economic welfare of consumers by establishing a legal framework for the achievement and maintenance of a consumer market that is accessible, fair, efficient, responsible and sustainable for the benefit of consumers generally, and which provides adequate safeguards to vulnerable consumers.

375. It is the belief of the Law Reform Commission that the outcome for any consumer protection policy should have as its central purpose the creation of an environment in which consumers can transact business with confidence. If there is no deterrent, businesses are likely to breach consumer rights with impunity and this can adversely impact consumer confidence. Consumers who lack confidence, delay in entering into transactions or may choose not to purchase goods and services if it is perceived that the risks are too high. Consequently, this may have an adverse effect on competition, market efficiency and ultimately the economy.

376. Indeed, along with strong and clear rules there is equally a need to ensure that consumers and businesses are educated about their rights and responsibilities and are provided with useful and timely information.

377. For consumer protection legislation to be effective, it needs to protect both consumers and legitimate businesses in relation to quality guarantees, product safety and misleading or deceptive conduct. While compliance is best secured by the use of persuasion and negotiation techniques, it is now established legislative practice that these techniques have to be supported by a range of sanctions which can be applied or used depending upon the level of cooperation required.

SCHEDULE

CAYMAN LAWS CATEGORISED UNDER THE UN GUIDELINES ON CONSUMER PROTECTION

Physical Safety	Promotion and protection of consumers' economic interests
<p>Dangerous Substances Handling and Storage Law, 2003; Electricity Law (2008 Revision); Electricity Regulations (2011 Revision); Markets Law (1997 Revision); George Town Market Regulations (1997 Revision); Penal Code (Sale of Foodstuff) Prohibition Order (1998 Revision); Pharmacy Law, 1979 (Law 23 of 1979); Pharmacy (Poisons and Restricted Pharmaceuticals) Regulations (1999 Revision); Pharmacy Law, 1991 (Law 15 of 1991); (not in force) Public Health Law (2002 Revision); Public Health (Communicable Diseases) Regulations (1997 Revision); Public Health (Garbage and Refuse Disposal) Regulations (2011 Revision); Public Health (Infectious Waste) Regulations (2002 Revision); Public Health (Miscellaneous Fees) Regulations (2011 Revision); Public Health (Quarantine) Regulations (1997 Revision); Public Health (Quarantine) (Amendment) Regulations, 2011; Ships (Sanitation Control) Regulations, 2011; Tobacco Law, 2008; Tobacco Regulations, 2010; Traffic Law, 2011; Traffic (Public Passenger Vehicles) Regulations (2013 Revision); Traffic (Seat Belts) Regulations, 2012; Wastewater Collection and Treatment Law, 2011; Water Authority Law (2011 Revision); Water Authority Regulations (2007 Revision);</p>	<p>Bills of Exchange Law (1997 Revision); Bills of Lading Law (1997 Revision); Bills of Sale Law (2000 Revision); Contracts Law (1996 Revision); Electronic Transactions Law (2003 Revision); Health Insurance Law (2013 Revision); Health Insurance Regulations (2013 Revision); Hotel Keepers Liability Law (1997 Revision); Information and Communications Technology Authority Law (2011 Revision) (Only Part In Force); Information and Communications Technology Authority (Dispute Resolution) Regulations, 2003; Information and Communications Technology Authority (Penalties for Anti-competitive Practices) Rules, 2004; Insurance Law, 2010; Pawnbrokers Law (1998 Revision); Price Gouging Control (Emergency Circumstances) Law, 2004 (Law 24 of 2004); Sale of Goods Law (1997 Revision); Vehicle Insurance (Third Party Risks) Law (2012 Revision); Weights and Measures Law (1998 Revision); Electricity Law (2008 Revision); Electricity Regulatory Authority (2010 Revision); Insurance Law (1997 Revision); Petroleum The Merchandise Marks Law (1997 Revision); and Law (1998 Revision).</p>

<p>Water Authority (Amendment) Regulations, 2012; and Water (Production and Supply) Law, 2011.</p>	
<p>Standards for the safety and quality of consumer goods and services</p> <p>Dangerous Substances Handling and Storage Law, 2003; Sale of Goods Law (1997 Revision); Weights and Measures Law (1998 Revision); Penal Code (Sale of Foodstuff) Prohibition Order (1998 Revision); Postal Law (1997 Revision); Postal Regulations (2007 Revision); Information and Communications Technology Authority Law (2011 Revision); Electricity Law (2008 Revision); Electricity Regulatory Authority (2010 Revision); Petroleum Law (1998 Revision); and Weights and Measures Law (1998 Revision)</p>	<p>Distribution facilities for essential consumer goods and services</p> <p>Electricity Law (2008 Revision); Electricity Regulations (2011 Revision); Merchandise Marks Law (1997 Revision); Wastewater Collection and Treatment Law, 2011; Water Authority Law (2011 Revision); Water Authority Regulations (2007 Revision); and Water Authority (Amendment) Regulations, 2012</p>
<p>Measures enabling consumers to obtain redress</p> <p>Complaints Commissioner Law (2006 Revision); Information and Communications Technology Authority Law (2011 Revision) (Only Part In Force); Information and Communications Technology Authority (Dispute Resolution) Regulations, 2003 Information and Communications Technology Authority (Penalties for Anti-competitive Practices) Rules, 2004; Sale of Goods Law (1997 Revision); Pawnbrokers Law (1998 Revision); Petroleum Law (1998 Revision); Merchandise Marks Law (1997 Revision).</p>	<p>Measures enabling consumers to obtain redress (continued)</p> <p>Postal Law (1997 Revision); Postal Regulations (2007 Revision); and Standards in Public Life Law, 2014 (not in force)</p>
<p>Education and information programmes</p> <p>National conservation Law, 2013;</p>	<p>Measures relating to specific areas</p> <p><i>Food</i></p>

<p>Weights and Measures Law (1998 Revision)</p>	<p>Markets Law (1997 Revision); George Town Market Regulations (1997 Revision); Penal Code (Sale of Foodstuff) Prohibition Order (1998 Revision); Public Health Law (2002 Revision)</p> <p><i>Water</i></p> <p>Wastewater Collection and Treatment Law, 2011; Water Authority Law (2011 Revision); Water Authority Regulations (2007 Revision); Water Authority (Amendment) Regulations, 2012; Water (Production and Supply) Law, 2011; and National Conservation Law, 2013 (partially in force)</p> <p><i>Pharmaceuticals</i></p> <p>Pharmacy Law, 1979 (Law 23 of 1979); Pharmacy (Poisons and Restricted Pharmaceuticals) Regulations (1999 Revision); Pharmacy Law, 1991 (Law 15 of 1991) (not in force)</p> <p><i>Pesticides and Fertilisers</i></p> <p>Aerial Spraying Protection Law (1997 Revision)</p>
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Stakeholders and members of the general public are invited to generally comment on the issues identified in the Discussion Paper, in particular submit their comments on the questions and proposals in Part F and to make suggestions as to what areas should or should not be addressed in consumer protection legislation.

The Paper may be viewed on the following website: www.lrc.gov.ky. Unless marked to the contrary, the LRC will assume that comments received are not confidential and that respondents consent to our quoting from, or referring to, their comments and attributing their comments to them, and to the release or publication of their submissions.

Requests for confidentiality or anonymity will be respected to the extent permitted by the Freedom of Information Law, 2007.

Submissions should be forwarded in writing by post or hand no later than 29th April, 2016 to the Director of the Law Reform Commission, 4th Floor Government Administration Building, Portfolio of Legal Affairs, 133 Elgin Avenue, George Town, Grand Cayman, P.O. Box 136, Grand Cayman KY1-9000 or emailed to cilrc@gov.ky