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The Consumer Protection And Guarantees Bill, 2017



**A Presentation given to the
Cayman Islands Chamber
of Commerce**

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- The Cayman Islands Law Reform Commission (the “**LRC**”) published a very comprehensive discussion paper titled, “Consumer Protection – Entrenching Consumer Supremacy in Cayman Islands Legislation” on 27 November 2015.
- In that report it was noted that there are very few consumer protections in the Cayman Islands. Those that exist are (largely) to be found in:

The Sale of Goods Law (1997 Revision), which the LRC pointed out has its limitations, and

The Price Gouging (Emergency Circumstances) Law, implemented after Hurricane Ivan)

Amongst the LRC's Conclusions were the following:

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- 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.
- 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.
- 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.

- 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.
- 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.

The Governments response?

On 20 October 2017 The Cayman Islands Government released:

“A BILL FOR A LAW TO PROVIDE FOR THE PROTECTION OF CONSUMER INTERESTS IN RELATION TO THE SUPPLY OF GOODS AND THE PROVISION OF SERVICES; THE IDENTIFICATION OF CONSUMER GURANTEES, THE PROTECTION OF LIFE, HEALTH AND SAFETY OF CONSUMERS; THE ESTABLISHMENT OF A CONSUMER AFFAIRS COMMISSION; AND FOR INCIDENTAL AND CONNECTED PURPOSES.”

Whilst the window for public consultation was originally due to close in January of 2018 the LRC has opened up the window until the end of March 2018.

Why the delay in debating and passing the Bill?

Apparently there has been little response to the proposed legislation and the Government will not push forward until they have received more feedback.

In a statement released in early February by the LRC:

“These legislative proposals aim to safeguard the interests of the consumer in matters relating to the supply of goods and services while providing mechanisms to seek appropriate redress when certain consumer standards are breached”

The Bill aims to cover procedures on how to make a consumer complaint, the rights of consumers, guarantees in relation to the supply of goods, or services, remedies when those guarantees are breached, the duty of suppliers, unfair trade practices or contracts terms, goods recalls and distance selling.

The Bill itself...

The Bill of made up of 15 parts and 3 schedules.

Part 1

Part one of the Law deals with (in part)

- Definitions
- Objects of the Law
- Application of the Law
- Consumer Organisations

Part 2

Part two deals with the establishment and functions of the Commission.

Definitions

Whilst there are many defined terms in the Bill some key definitions are:

“Advertisement” means any form of communication made to the public or a section of the public for the purpose of promoting goods or services

“Consumer” in relation to –

(a) goods, means-

(i) any person who acquires or wishes to acquire goods for his own private use or consumption; or

(ii) a commercial undertaking that purchases consumer goods;

(b) services or facilities, means any person who employs or wishes to be provided with the services or facilities; and

(c) accommodation, means any person who occupies or wishes to occupy the accommodation

“Commission” means the Consumer Affairs Commission

Definitions continued...

“**Consumer Agreement**” means any written, oral or implied agreement between a supplier and a consumer in which the supplier agrees to supply goods or services for consideration and the word ‘agreement’ shall be construed accordingly

“**defect**” means any fault, imperfection or shortcoming in the quality, quantity, potency, purity or standard which is required to be maintained by or under any law or contract, express or implied or as claimed by the supplier in any manner in relation to any goods”

“**Manufacturer**” means a person who –

- (a) carries on the business of assembling, producing or processing goods:
- (b) holds himself out to the public as the person who assembled, produced or processed the goods;
- (c) attached his brand or mark, or causes or permits his brand or mark to be attached to the goods; or

Definitions continued...

(d) imports or distributes goods where those goods are manufactured outside of the islands and the manufacturer of the goods does not have an ordinary place of business in the Islands;

“**services**” means an activity of any description which is made available to users and includes the provision of facilities in connection with banking, financing, insurance, transport, processing, supply of electrical or other energy, lodging, housing construction, entertainment, amusement or the purveying of news or other information.

Objects of the Law

The objects of this Law are to promote and advance the social and economic welfare of consumers by -

- (a) establishing a legal framework for the achievement and maintenance of a consumer market that is fair, efficient and responsible;
- (b) promoting fair business practices;
- (c) protecting consumers from -
 - (i) unfair, unconscionable or otherwise improper trade practices; and
 - (ii) deceptive, misleading, unfair or fraudulent conduct;
- (d) promoting social, economic and environmental responsibility in consumer markets;

Objects continued...

- (e) improving consumer awareness and information;
- (f) encouraging responsible and informed consumer choice and behavior; and
- (b) providing for an accessible, effective and efficient system of redress for consumers.

Application of the Law

This Law applies to all persons engaged in a trade or business

Consumer Organisations

An organisation purporting to provide services for the protection of consumers shall register as a non-profit organisation if its includes -

- (a) promoting and protecting consumer rights;
- (b) representing the collective interests of consumers before judicial or administrative bodies;
- (c) representing consumers' interests to government and persons engaged in the business of producing, supplying or distributing goods or providing services; and
- (d) collecting, processing and disseminating objective information for the benefit of consumers.

(Part 2) Establishment and Functions of the Commission

The Bill provides for the establishment of the Commission

Per Schedule 1 of the Bill the Commission shall be made of 5 members appointed by Cabinet including a person who has professional experience or qualifications in consumer affairs, law or business

Functions of the Commission include:

- 5 (a) investigating a complaint made by a consumer in relation to the sale of goods or the provision of services;
- (b) initiating other investigations in relation to the provision of goods and services of any class or description;
- (c) representing a complainant who the Commission thinks has a justifiable claim against a supplier;

Functions continued...

- (d) imposing appropriate orders and prescribed penalties against persons who the Commission determines have acted in contravention of this Law;
- (e) promoting the development of organizations formed for the protection of the consumer and ensuring that they fulfill the criteria listed in section 5;
- (f) providing information to consumers on their rights as consumers and any other form of consumer education;
- (g) implementing education programmes for the benefit of consumers, suppliers and service providers;
- (h) seeking, in a mediatory capacity, to resolve disagreements between consumers and suppliers;

Functions continued...

- (i) referring a complaint to any other relevant body that may be considered appropriate to address an issue; and
- (j) carrying out such other functions as the Minister may assign to the Commission.

The Bill itself...

Parts 3, 4 & 5

Part 3 of the Law deals with Consumer Complaints;

Part 4 deals with Consumer Rights; and

Part 5 deals with Consumer Guarantees in relation to the supply of Goods.

Consumer Complaints (Part 3)

A Consumer who alleges that a Supplier has breached any provision of the Law may make a complaint to the Commission orally, in writing or in any other prescribed form.

The Commission may determine whether to undertake or continue an investigation if it is of the opinion that –

- (a) the subject matter of the complaint is trivial;
- (b) the complaint is frivolous, vexatious or not made in good faith;
- (c) the complainant has delayed the making of the complaint for an inordinately long period;
- (d) the complainant does not have a sufficient interest in the subject matter of the complaint;
- (c) the subject matter of the complaint should more appropriately be dealt with by another authority or another forum; or
- (f) having regard to all the circumstances of the case -
 - (i) further investigation is unnecessary; or
 - (ii) no investigation is possible or necessary.

Complaints continued...

An action commenced in court in connection with a matter under investigation by the Commission shall not, unless the court otherwise directs, preclude such an investigation

The Commission has power to summon any person to attend before the Commission in relation to an investigation being conducted by it and to give evidence or to produce any document which is a) in the possession or under the control of such person and b) relevant to the matter under investigation.

Summons to Witness

SCHEDULE 2 (Section 11(2)(a))

SUMMONS TO WITNESS

To: (name of person summoned and his calling and address, if known)

You are hereby summoned to appear before the Consumer Affairs Commission at (place) upon the day of at 0' clock and to give evidence respecting (state the matter). (If the person summoned is to produce any documents, add):

And you are required to bring with you (specify the papers, books, records and documents required).

IF YOU FAIL TO APPEAR in response to this Summons, a warrant for your arrest may be issued.

Given under hand of (Chairman or other member of the Commission)
this day of 20.

Complaints Cont...

A person who is summoned to attend and give evidence or to produce a Document before the Commission is entitled, in respect of such evidence or the disclosure of any communication or the production of any such documents, to the same rights and privilege as before a court.

A person who –

- (a) without sufficient cause, fails or refuses to attend before the Commission in compliance with a summons or fails or refuses to produce any document which he was required by such summons to produce;
- (b) being a witness, leaves a hearing of the Commission without the permission of the Commission;
- (c) being a witness, refuses, without sufficient cause, to answer any question put to him by or with the permission of the Commission; or
- (d) willfully obstructs or interrupts the proceedings of the Commission,

commits an offence and is liable on summary conviction to a fine of three thousand dollars or to imprisonment for a term of one year, or to both.

If the Commission is satisfied that -

- (a) the goods which are the subject of a complaint suffer from any of the defects specified in the complaint;
- (b) any of the allegations contained in the complaint about the services are proved; or
- (c) there is irrefutable evidence to substantiate conduct in breach of this Law,

the orders that Commission may issue to the supplier include, where applicable:

- (i) providing the goods or services that were the subject of the agreement;
- (ii) removing the defect from the goods in question or the deficiency in the service;
- (iii) replacing the goods with goods of a similar or identical description and free from any defect;
- (iv) recalling unsafe goods or discontinue the provision of unsafe services;
- (v) discontinuing the unfair trade practice;
- (vi) desisting from offering the hazardous goods for sale;

Complaints Cont...

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- (vii) ceasing the manufacture or importation of unsafe goods;
- (viii) returning to the complainant the amount paid for the goods or service;
- (ix) payment of any penalty imposed for a breach of any provision of this Law;
- (x) paying specified amounts as compensation to the consumer for any loss or injury suffered by the consumer due to the negligence of the supplier;
- (xi) paying such sum as may be determined by it if it is of the opinion that loss or injury has been suffered by a large number of consumers who are not identifiable;
- (xii) providing adequate costs to the complainant in addition to the fees to pursue a claim against the supplier and to cover any incidental expenses including expert costs for analysis or testing of goods and services;
- (xiii) issuing a corrective advertisement to minimize the effect of misleading advertisement; and
- (xiv) providing such other remedies or corrective measures as the Commission deems fit or as may be prescribed.

A supplier who fails to comply with an order of the Commission, commits an offence and is liable on summary conviction to a fine of five thousand dollars or to imprisonment for a term of one year, or to both.

Rights of the Consumer (Part 4)

Unsolicited Goods or Services

- A Consumer is not required to pay a supplier for any goods or services supplied to the Consumer under a consumer agreement unless –
 - (a) the consumer has implicitly requested the supplier to supply those goods or services by -
 - (i) tendering payment for them; or
 - (ii) engaging in conduct that could reasonably lead the supplier to believe that the consumer has requested the supplier to supply those goods or services;
 - (b) the consumer has expressly requested the supplier to supply those particular goods or services; or
 - (c) the supplier has undertaken to supply those goods or services from time to time to the consumer without further approval or specific request.

Rights of the Consumer Cont...

- A supplier is not entitled to demand payment or make any representation that suggests a consumer is required to make payment in respect of any unsolicited goods or services, despite their subsequent use, receipt, misuse, loss, damage or theft.
- A supplier may have to pay the recipient of unsolicited goods such costs as are incurred in respect of the storage of the goods.
- (4) The above will not apply if the recipient has unreasonably refused to permit the supplier or owner of the goods to take possession of the goods; or
- The goods were received in circumstances in which the recipient knew or might reasonably be expected to have known, that the goods were not intended for him.
- Where a supplier has received payment from or on behalf of a consumer in respect of unsolicited goods or services, the consumer may demand a refund of the payment within 3 months after having made the payment.
- A supplier who received a demand for a refund shall refund the payment within 3 days of the request for payment

Rights of the Consumer Cont...

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Where a consumer receives any unsolicited goods from a supplier, the Consumer may -

- (i) subject to paragraph (b)(ii), retain the goods without payment; or
 - (ii) return the goods to the supplier at the supplier's risk and expense;
- (b) subject to subsection (4), is not liable for any -
- (i) loss or damage to those goods while they are in transit, or at any time after they are received by the consumer, whether or not they remain in the consumer's possession; or
 - (ii) use or depletion of, or damage to those goods at any time one day after receipt by the consumer, unless during that time, the supplier has notified the consumer that the goods were delivered in error and has arranged to recover them, at the supplier's risk and expense.

Goods or services are unsolicited if they are supplied to a consumer who did not request them.

Goods or services will not be regarded as unsolicited if -

- (a) the goods or services were intended for another person and the recipient knew or ought to have known that the goods or services were intended for another person; or
- (b) the goods or services are supplied under a written future performance agreement that provides for the periodic supply of those goods to the recipient without further solicitation.

Right to select suppliers and products

A Supplier shall not require, as a condition of offering to supply, or supplying any goods or services, or as a condition of entering into a consumer agreement, that the Consumer –

- Purchase any other goods or services from that supplier;
- Enter into an additional agreement or transaction with the same or another supplier; or
- Agree to purchase any goods or services from a designated third party.

In relation to repair or maintenance services

A Supplier shall not charge a Consumer for the supply of any goods or services unless –

- 2 (a) the supplier has given the consumer a detailed estimate that informs the consumer and the consumer has subsequently authorised the work; or
- (b) the consumer has, in writing -
 - (i) declined the offer of an estimate, and authorised the work;
 - or
 - (ii) pre-authorised any charges up to a specified amount and the amount charged does not exceed that maximum.

Rights of the Consumer Cont...

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A supplier shall not charge a consumer for -

(a) an estimate required under subsection 2(a), unless the supplier has disclosed the price for preparing that estimate, and the consumer has approved its preparation; or

(b) any diagnostic work, disassembly or re-assembly required in order to prepare an estimate, or for any damage to or loss of material or parts in the course of preparing an estimate, in addition to any estimate charge imposed under paragraph (a).

Rights with respect to delivery:

It will be an implied condition of every transaction for the supply of goods or services that:

- (a) the supplier is responsible for the delivery of the goods or service to the consumer -
 - (i) within a reasonable time;
 - (ii) subject to subsection 2 (a), at the consumer' s place of business, if the consumer has one or the consumer's place of residence; and

- (iii) at the cost and risk of the supplier; and
 - (b) the goods remain at the supplier' s risk until the consumer has accepted delivery.
- (2) Unless otherwise expressly provided, a consumer has the right to require -
 - (a) delivery of any goods at the -
 - (i) date and time agreed; and
 - (ii) place of the consumer' s choice; or
 - (b) performance of any service at the time agreed with the supplier.

Acceptance of good or services

A consumer is deemed to have accepted goods when -

- (a) the consumer expressly or implicitly communicates to the supplier that the consumer has accepted the goods;
- (b) the goods have been delivered to the consumer, and the consumer does any act in relation to the goods that is inconsistent with the supplier's ownership of the goods; or
- (c) after the lapse of a reasonable time required for examining the goods to ascertain their conformity with the transaction, the consumer retains the goods without indicating to the supplier that the consumer has rejected them.

Rights of the Consumer Cont...

Right to rescind or cancel and agreement

In addition to (and not in substitution of any right to return goods and receive a refund which otherwise might exist between Consumer and Supplier a Consumer may rescind an agreement within 15 days after delivery of goods or provision of services to be supplied within terms of the agreement if the agreement arises as a result of –

- 2 (a) direct, distance or electronic marketing by the supplier and contemplates the delivery of goods or a service to the consumer; or
- (b) any other marketing in circumstances in which the consumer is unable to choose or examine goods.

A consumer may rescind a consumer agreement referred to in subsection (2) within three months after the agreement, if the supplier -

- (a) was required to be licensed or registered under any law and was not so licensed or registered; or
- (b) contravened any provision of this Law in respect of the transaction.

Penalty...

A supplier who without reasonable excuse, acts in contravention of the rights of a consumer under this Part is liable to such penalties as may be prescribed

Consumer Guarantees in relation to the Supply of Goods

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Guarantee as to title

Where goods are supplied to a consumer it is guaranteed that:

- The Supplier has a right to sell the goods
- Goods are free from any undisclosed security; and
- Consumer has the right to undisturbed possession of the goods.

Guarantee as to acceptable quality

Where goods are supplied to a consumer, there is a guarantee that the goods are of acceptable quality. Goods will be deemed to be of acceptable quality if 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 defects;
- (d) safe; and
- (e) durable,

in a manner in which a reasonable consumer, fully acquainted with the state and condition of the goods, including any hidden defects, would regard as acceptable,

having regard to -

- (i) the nature of the goods;
- (ii) the price, where relevant;
- (iii) any statements made about the goods on any packaging or label on the goods;
- (iv) any representation made about the goods by the supplier or the manufacturer; and
- (v) all other relevant circumstances of the supply of the goods.

- (3) Where any defects in goods have been specifically drawn to the consumer's attention before the consumer 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 any guarantee in this section by reason only of those defects.

- Where goods are displayed for sale or hire, defects disclosed on a written notice displayed with the goods are to be treated as having been specifically drawn to the consumer's attention for the purposes of subsection (3)

Consumer Guarantees in relation to the Supply of Goods cont...

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Guarantee as to fitness

Where goods are supplied to a consumer it is guaranteed that:

- (a) the goods are reasonably fit for any particular purpose that the consumer makes known, expressly or by implication, to the supplier as the purpose for which the goods are being acquired by the consumer; and
- (b) the goods are reasonably fit for any particular purpose for which the supplier represents that they are fit or will be fit.

The guarantees set out above do not apply where the circumstances show that -

- (a) the consumer does not rely on the supplier's skill or judgment; or
- (b) it is unreasonable for the consumer to rely on the supplier's skill or judgment.

Guarantee as to prior use

Where goods are supplied to a consumer it is guaranteed that the goods are unused, unless before the consumer agrees to the supply a) the supplier discloses to the consumer that the goods are not unused; or (b) the consumer knows or ought to know that the goods are not unused or are likely not to be unused.

Guarantee as to price

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 in any case where the price for the goods is not -

- (a) determined by the contract;
- (b) left to be determined in a manner agreed by the contract; or
- (c) left to be determined by the course of dealing between the parties.

Guarantee as to repairs and spare parts

Where goods are supplied to a consumer in the Islands there is a guarantee that the supplier will take reasonable action to ensure that facilities for repair of the goods and supply of parts for the goods are available for a reasonable period after the goods are so supplied.

Consumer Guarantees in relation to the Supply of Goods cont...

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Express Guarantees – Liability of Supplier

(1) Where an express guarantee is stated on a label or packaging attached to or accompanying goods supplied by a supplier to a customer, the supplier is bound by the express guarantee unless he made clear to the consumer before the supply that he does not accept the guarantee.

(2) Subject to subsection (3), a supplier of goods is bound by an express guarantee contained in an advertisement originating from or carried out by the manufacturer of the goods if the supplier expressly or impliedly adopts the express guarantee.

(3) Notwithstanding that a supplier may not be bound by an express guarantee by virtue of subsection (1) or (2), any descriptive statement that appears on a label or on packaging attached to or accompanying goods or in an advertisement mentioned in subsection (2) shall form part of the description of the goods.

Express Guarantees – Liability of Manufacturer

An express guarantee made by a manufacturer in a document relating to goods binds the manufacturer if, in connection with the supply of the goods to a consumer, the document is given by the supplier to the consumer with the actual or apparent authority of the manufacturer.

An express guarantee which -

- (a) is included in a document relating to goods;
 - (b) purports to have been made by the manufacturer of the goods; and
 - (c) is given to a consumer by a supplier of the goods in connection with the supply of the goods,
- shall be presumed to have been made by the manufacturer, unless that presumption is rebutted by evidence to the contrary.

Penalty

A supplier who, without reasonable excuse, acts in contravention of the guarantees under this Part is liable to such penalties as may be prescribed.

The Bill itself...

Parts 6, 7 & 8

Part 6 deals with Consumer remedies when Supplier guarantee is Breached

Part 7 deals with Consumer remedies when Manufacturer guarantee is Breached

Part 8 deals with Consumer guarantees in respect of Services.

Consumer remedies when Supplier guarantee is breached (Part 6)

A Consumer has a right of redress against a Supplier of goods where the goods fail to comply with any guarantee that is binding on a supplier under part 5

Where a Consumer has a right of redress against the Supplier in respect of the failure of any goods to comply with a guarantee provided under part 5 the Consumer may exercise the following remedies:

- (a) have the failure remedied elsewhere and obtain from the supplier all reasonable costs incurred in having the failure remedied; or
- (b) where a supplier who has been required to remedy a failure refuses or neglects to do so, or does not succeed in doing so within a reasonable time the consumer may -
 - (i) require the supplier to remedy the failure within a reasonable time; or
 - (ii) reject the goods.

Consumer remedies when Supplier guarantee is breached (continued)...

(2) Where the failure cannot be remedied or is of a substantial character the consumer may -

- a) Reject the goods; or
- b) obtain from the supplier damages in compensation for any reduction in value of the goods below the price paid or payable by the consumer for the goods.

(3) A consumer may, in addition to the remedies set out in subsections (2) and (3), obtain from the supplier damages for any loss or damage to the consumer resulting from the failure which was reasonably foreseeable as being likely to result from the failure.

(4) The damages referred to in subsection (3) may include a sum in respect of any personal injury, distress, inconvenience, disappointment or vexation suffered as a direct result of the failure.

Consumer remedies when Supplier guarantee is breached (continued)...

Options of Supplier who has been required to provide remedy

(1) A supplier shall comply with a requirement to remedy a failure of any goods to comply with a guarantee by -

- (a) repairing the goods, in a case where the failure does not relate to title;
- (b) curing any defect in title, in a case where the failure relates to title;
- (c) by replacing the goods with goods of an identical type; or
- (d) where the supplier cannot reasonably be expected to repair the goods, providing a refund of any money paid or other consideration provided by the consumer in respect of the goods.

(2) Where a consumer obtains goods to replace defective goods pursuant to subsection (1), the replacement goods shall, for the purposes of this Law, be deemed to be supplied by the supplier and the guarantees and obligations arising under this Law consequent upon a supply of goods to a consumer shall apply to the replacement goods.

(3) A refund referred to in subsection (1)(c) means a refund in cash of the money paid or the value of any other consideration provided, or both, as the case may require.

Consumer remedies when Supplier guarantee is breached (continued)...

Loss of right to reject goods

The right to reject goods conferred by this Law shall not apply if –

- (a) the right is not exercised within a reasonable time
- (b) the goods have been disposed of by the consumer, or have been lost or destroyed while in the possession of a person other than the supplier or an agent of the supplier;
- (c) the goods were substantially damaged after delivery to the consumer for reasons not related to their state or condition at the time of supply; or
- (d) the goods have been attached to or incorporated in any real or personal property and they cannot be detached or isolated without damaging them.

“reasonable time” means a period from the time of supply of the goods in which it would be reasonable to expect the defect to become apparent having regard to -

- (a) the type of goods;
- (b) the use to which a consumer is likely to put the goods;
- (c) the length of time for which it is reasonable for the goods to be used; and
- (d) the amount of use to which it is reasonable for the goods to be put before the defect becomes apparent.

Consumer remedies when Supplier guarantee is breached (continued)...

Options of consumer who rejects goods

Where the consumer exercises the right to reject goods, he may choose to have either -

- (a) a refund of any money paid or other consideration provided by him in respect of the rejected goods; or
- (b) goods of the same type and of similar value to replace the rejected goods, where such goods are reasonably available to the supplier as part of the stock of the supplier.

“refund” means a refund in cash of the money paid or the value of any other consideration provided, or both, as the case may require.

Unless the consumer agrees, the obligation to refund cannot be satisfied by permitting the consumer to acquire other goods from the supplier.

Consumer remedies when Supplier guarantee is breached (continued)...

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Rights of recipients of gifts from consumers

Where a consumer acquires goods from a supplier and gives them to another person as a gift, that other person may, subject to any defence which would be available to the supplier against the consumer, exercise any rights or remedies under this Part which would be available to that other person if he had acquired

Penalty

A supplier who, without reasonable excuse, fails to provide a consumer with the remedies required under this Part for breach of a guarantee is liable to such penalties as may be prescribed.

(Part 7) Consumer Remedies when Manufacturer Guarantee is Breached.

A Consumer has a right of redress against a manufacturer of goods where the goods fail to comply with -

- a) the guarantee as to acceptable quality;
- b) the guarantee as to correspondence with description;
- c) the guarantee as to repairs and spare parts; or
- d) an express guarantee of the manufacturer.

Remedies against manufacturer where goods do not comply with guarantees

Where a consumer has a right of redress against a manufacturer under this Part, the consumer, or any person who acquires the goods from or through the consumer, may obtain damages from the manufacturer -

- (1)(a) subject to (2)(b), for a reduction in the value of the goods -
 - (i) below the price paid or payable by the consumer for the goods; or
 - (ii) below the average retail price of the goods at the time of supply, whichever price is lower;

Consumer Remedies when Manufacturer Guarantee is Breached cont...

(b) for any loss or damage including personal injury, distress, inconvenience, disappointment or vexation to the consumer or that other person resulting from the failure which was reasonably foreseeable as being liable to result from the failure.

Where the consumer, or any person who acquires the goods from or through the consumer, is entitled by an express guarantee given by the manufacturer to require the manufacturer to remedy the failure by -

- (a) repairing the goods; or
- (2)(b) replacing the goods with goods of an identical type,

no action shall be commenced under subsection (1)(a) unless the consumer or that other person has required the manufacturer to remedy the failure and the manufacturer has -

- (i) refused or neglected to remedy the failure; or
- (ii) not succeeded in remedying the failure within a reasonable time.

Consumer Remedies when Manufacturer Guarantee is Breached cont...

Penalty

A manufacturer who, without reasonable excuse, fails to provide a consumer with the remedies required under this Part is liable to such penalties as may be prescribed.

(Part 8) Consumer Guarantees in respect of Services

Where a service is supplied to a consumer there is a guarantee that the service will be carried out with reasonable care and skill

Consumer Guarantees in respect of Services continued...

Guarantee as to fitness

Where a service is supplied to a consumer there is a guarantee that the service, and any product resulting from the service, will be -

- (a) reasonably fit for the purpose for which it was intended; and
- (b) of such a nature and quality that it can reasonably be expected to achieve the expressed or implied purpose.

The Guarantee referred to above does not apply where -

- (a) the consumer does not rely on the supplier's skill or judgment; or
- (b) it is unreasonable for the consumer to rely on the supplier's skill or judgment.

Consumer Guarantees in respect of Services continued...

Guarantee as to time of completion

Where a service is supplied to a consumer there is a guarantee that the service will be completed within a reasonable time in any case where the time for the service to be carried out is not -

- (a) determined by the contract;
- (b) left to be determined in a manner agreed by the contract; or
- (c) left to be determined by the course of dealing between the parties.

Guarantee as to price

Where a service is 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 service in any case where the price for the service is not -

- (a) determined by the contract;
- (b) left to be determined in a manner agreed by the contract; or
- (c) left to be determined by the course of dealing between the parties.

Consumer Guarantees in respect of Services continued...

Penalty

A supplier who, without reasonable excuse, acts in contravention of the service guarantees under this Part is liable to such penalties as may be prescribed.

The Bill itself...

Parts 9 -12

Part 9 deals with consumer remedies for breach of Service Guarantee;

Part 10 deals with the duties of a supplier;

Part 11 deals with unfair trade practices;

Part 12 deals with unfair contract terms;

Consumer Remedies for Breach of Service Guarantee (Part 9)

The Bill provides a right of remedy where the service does not comply with the guarantee .

Consumer may:

- a) Refuse to pay more than a reasonable price;
- b) Claim a rebate/refund for period without the agreed service;
- c) If failure can be remedied it is to be done in a reasonable time. If supplier fails/refuses/neglects to do so the consumer may:
 - i. have the failure remedied elsewhere and recover reasonable costs from the supplier or
 - ii. cancel the contract without penalty.
- d) If the failure cannot be remedied or is of substantial character the consumer may cancel the contract without penalty and obtain damages in compensation for the reduction of value of the product of the service below the charge paid or payable by the consumer for the service.
- e) Obtain damages from the supplier for loss or damage, which was reasonably foreseeable as being liable to result from the failure.

What does failure of a substantial character mean?

- a) Service not acquired by a reasonable consumer having knowledge of the failure;
- b) Product of the service is unfit for a purpose and cannot be remedied within a reasonable time;
- c) Product of the service is unfit for a particular purpose or expected to achieve a particular, made known to supplier and cannot easily or within a reasonable time be remedied;
- d) Product of service is unsafe.

When cancellation of a contract by a consumer will not take effect?

- a) Before the time at which the cancellation is made known to the supplier; or
- b) Where it is not reasonably practicable to communicate with supplier, before the time the consumer indicates by reasonable means his intention to cancel.
- c) The Bill provides that the cancellation may be made known orally, by conduct indicating intention to cancel or both subject to any provision in the contract for supply of a service requiring notice of cancellation in writing.

What happens when a consumer cancels a contract for supply of a service?

- a) The consumer is entitled to recover a refund of money paid unless otherwise directed by the Commission or a court order;
- b) To the extent that the contract has been performed at the time of the cancellation, no party is, rid of any property transferred or money paid pursuant to the contract; and
- c) As long as contract remains unperformed at the time of cancellation, no party is obligated or entitled to perform it further.

Duties of a Supplier (Part 10)

Pricing

A supplier MUST:

- a) Provide the consumer information relating to packaging, labeling, description of goods, the origin, care terms, components, etc. ([see section 63(2)(a)]. Otherwise may be held liable for any damage done to the goods.
- b) Display pricing when displaying goods for sale or offering to supply services UNLESS:
 - i. designed and intended as a form of advertisement; or
 - ii. goods are within the area of a supplier's premises which public does not have access.

A price is displayed if it is (1) appended, annexed or affixed, (2) published in a publically available catalogue or (3) any method it could be reasonably inferred that the price presented is in fact the price of the good.
- c) Not exceed a price estimate unless the consumer is informed of additional charges or the consumer agrees to continue.

Duties of a Supplier cont....

Product Labelling and Trade Descriptions

A supplier must not display, offer to supply or supply any goods unless the trade description is:

- a. Applied/attached to the packaging of the goods;
- b. Displayed together with the goods; or
- c. Contained in any commercial communication allowing the consumer to request or order the goods.

Supplier must not offer to supply , display or supply any goods if he knows, reasonably determines or suspects that the trade description is likely to mislead the consumer or has been altered. Supplier must take any reasonable steps to prevent such actions with respect to goods within his control.

Duties of a Supplier cont....

What is a trade description?

- a) Any description, standard, statement or other direct or indirect indication as to:
 - i. Size, number, quantity, measurement or weight of goods;
 - ii. Name of producer of any goods;
 - iii. Ingredients of goods or material made of;
 - iv. Place or country of origin;
 - v. Mode of manufacturing or producing goods; and
 - vi. Goods being subject of any patent, privilege or copyright.

Disclosure of environmental facts

A notice must be displayed on or in association with the goods disclosing:

- a) The presence, nature and extent of (i) genetically modified ingredients or components or (ii) ingredients or components determined to present a chemical or biological hazard to humans;
- b) The estimated energy requirements per hour of use;
- c) Nature and intensity of any potentially harmful energy radiation;
- d) Need for special handling or waste disposal of the goods if required under any law or in the interests of personal or public health or safety,

Supplier must not offer to supply, display or supply any goods if he knows/reasonably determines or suspects that the notice applied to those goods is likely to mislead the consumer or has been altered. Supplier must take any reasonable steps to prevent such actions with respect to goods within his control.

Duties of a Supplier cont....

Reconditioned goods

Must have a visible notice stating clearly that they have been reconditioned, re-built or re-made.

Sales Records

A written permanent record of each transaction to the consumer must be kept including:

- a) Supplier's name or registered business name;
- b) Address of premises at which or from which the goods or services were supplied;
- c) Date transaction occurred;
- d) Name or description of goods or services;
- e) Unit price for goods or services;
- f) Quantity of each the goods or services
- g) Total price of transactions before fees;
- h) Amount of any fees;
- i) Total price of transaction including fees; and
- j) Such other information as required under this or any other law.

Measurement of goods

Consumer entitled to check weight, volume or other measurement of the good that he intends on purchasing where they materially affect or determines the price of the goods.

If goods are sold on the basis of its measurements the appropriate measurement standards in accordance with the Measures Law (1997 Revision) must be provided to the consumer at the time of purchase.

Duties of a Supplier cont....

HSM

Warranties

- Supplier must issue explicit warranties in relation to good and services whether new or used.
- Where the warranty given by manufacturer is attached to goods sold, the supplier must be deemed to have issued the manufacturer's warranty to the customer as an explicit warrant by the supplier and is liable to the consumer under the same as if the supplier were the manufacturer.
- Where the repair or replacement of defective goods is provided there is an implied warranty that the repair/replacement shall be carried out within a reasonable time.
- Where supplier is liable only for the free replacement of parts, the supplier must not require the consumer to use the supplier in effecting the repairs as a condition of this replacement.
- If no expressed warranty (subject to standard conditions) an implied warranty of 6 months on parts and labour must be attached to the transaction.

Penalty for breach of warranty include repairs, replacement, partial or full refund and the award of damages.

Damaged goods

A supplier must be responsible for replacement or repair of goods, at no additional cost to the consumer where, within warranty period, goods supplied to the consumer fail to provide the benefit for the purpose intended and the failure is not due to the consumer's negligence [see section 71].

Returns, refunds, repairs and exchange policy

The Bill provides that a supplier must formulate a policy which meets the prescribed requirements with respect to returns, refunds and exchange of goods and services.

Duties of a Supplier cont....

Defective goods

The Bill provides if the declaration and description of goods are different in a material particular from that intended to be acquired:

- a) Consumer may return goods;
- b) Supplier must be given a reasonable opportunity to inspect the goods;
- c) Supplier must give the consumer money compensation in exchange for returned goods, if defect not fixed in reasonable time; and
- d) No restocking fee (or any other fee) to be charged for returned goods.

The Bill provides that this only applies if goods returned in condition purchased or with minimal damage.

Approved and Unapproved Services

A supplier must provide services which are approved by the consumer and the consumer is not required to commit to pay for services which the supplier views as necessary or appropriate.

Repair Services

Supplier offering such services should keep, and make available to the consumer, a record of the consumer's personal contact details, description of goods repaired, estimate of replacement value and labour costs and the date goods are received and ready for delivery.

The Bill provides that the advertised delivery date must form part of the contract between the supplier and consumer and if goods are not delivered by date agreed consumer is entitled to (i) refund of deposit plus interest or (2) goods delivered within another period on terms agreed with consumer.

Demanding or accepting payment

A supplier must not demand or accept payment for goods if he:

- a) Does not intend to supply goods or services;
- b) Intends to supply goods or service that are materially different from good services which payments was demanded or accepted; or
- c) No reasonable grounds to believe that goods or services will be supplied in time specified or a reasonable time.

Standards for the promotion of goods and services

- a) Must not be misleading, fraudulent or deceptive;
- b) Must not imply a false or misleading representation;
- c) Supply, purchase sale or possession must not be unlawful;
- d) Must not be supplied in a manner that is inconsistent with any law of the island; or
- e) Must not degrade the dignity of any person or implies/expresses preference for any particular group of consumers.

Penalties as may be prescribed are applicable for contravening supplier's duty.

Section 78

Unfair Trade Practices (Part 11)

The Bill provides that a supplier must not:

- a) Falsely represent the goods or services are of a particular standard or quality;
- b) Falsely represent that the goods are new;
- c) Falsely represent that a particular person has agreed to acquire the goods or services;
- d) Represent that the goods or services have sponsorship, approval, performance characteristics, accessories uses or benefits that they don't have;
- e) Represent that he (as the supplier) has sponsorship, approval or affiliation he does not have;
- f) Make misleading representations as to
 - price,
 - the need for any goods or services,
 - the place or origin of goods or
 - the existence, exclusion or effect of any conditions, warranty or guarantee, right or remedy in relation to goods or services.
- g) Offer a gift, prize or other free item with no intention to provide the same;
- h) Mislead the public as to nature, characteristics, suitability for a purpose or quantity of services.

Unfair Trade Practices cont...

Dual Pricing

A supplier must not supply goods to which more than one price is attached at a higher price than to lowest one in question [section 81].

Bait Advertising

A supplier must not in trade or business advertise for supply at a special price goods or services he does not intend to offer/has no reasonable grounds to believe he can supply [section 82].

Referral Selling

A supplier must not induce a consumer to acquire goods or services under a contract by representing that the consumer will received a rebate/commission or other benefit in return for giving names of prospective customers [section 83].

Falsely accepting payment

A supplier must not accept payment or other consideration for goods or services where he does not intend to supply or intends to supply goods or services materially different from what consumer made payment [section 84].

Penalties as may be prescribed are applicable for engaging in any unfair practice.

Unfair Contract Terms (Part 12)

General Points

A term is unfair if it so detrimental to the consumer it causes an imbalance in the rights of the supplier and consumer.

An unfair term is unenforceable against the consumer, onus on the supplier to show term is not unfair.

What circumstances must be taken into consideration to determine if term unfair?

- a) Bargaining strengths - availability of equivalent goods or services and suitable sources of supply;
- b) Consumer induced to agree to term or had alternative option without such a term;
- c) Consumer knew or should have reasonably known of the term – custom trade or previous dealing between parties;
- d) If goods were manufactured, processed or adapted to the special order of the buyer;
- e) Nature of the goods or services;
- f) Interests of the supplier;
- g) Terms of the agreement or another which it is dependent;
- h) Interests of particular class of consumers; and
- i) Circumstances attending the conclusion of the agreement at the end of it.

Unfair Contract Terms cont...

Consequences of Commission or court finding a term unfair

- a) Term or Agreement may be rescinded or amended; or
- b) Make any other order to prevent the effect of the agreement being unfair or unreasonable to any of the parties.

Schedule 3 sets out terms which are considered unfair if not individually negotiated.

- Written terms in a consumer agreement are to be in plain and intelligible language. If any uncertainty the interpretation most favourable to the consumer will prevail.
- Any term which attempt to exclude, restrict or modify the application or exercising a right discussed in this Part is void.
- A consumer cannot be made to indemnify another person in respect of liability that be incurred by them for negligence or breach of contract unless it is reasonable [reasonableness defined by section 90].
- In restricting liability regard must be given to (1) resources had to meet liability (2) the extent to which it was open to that person to cover himself by insurance.

The Bill itself...

Parts 13 - 15

Part 13 deals with the recall of goods

Part 14 deals with distance selling

Part 15 deals with miscellaneous aspects

Voluntary Recall

Supplier must take immediate action to recall goods by (consumer to chose the preferred option):

- a) removing from public distribution and issuing a notice to inform the public of the recall; or
- b) refunding money or other consideration to the consumer, replacing the goods with goods of equal value or repairing the goods.

Compulsory Recall

The Commission will take action to prevent the goods from causing injury, loss or damage when supplier has not taken satisfactory action by ordering the supplier to:

- a) recall goods in a specified period; or
- b) disclose in a public notice the nature of the defect, circumstance in which use of the goods is dangerous or refund a person to whom the goods were supplied within a specified period.

Recall of Goods cont...

What actions must the supplier take if goods are recalled?

- a) Repair – any defect must be remedied or
- b) Replace – goods must be replaced with like goods

The Bill provides that the cost of repairs or replacement must be borne by the supplier.

Supplier who is in breach of this Part commits an offence and is liable on summary conviction to a fine of CI\$3,000, imprisonment for 1 year or both.

What is a distant contract?

The Bill defines a distance contract as one concerning goods or services concluded under an organized distance sales or service scheme run by the supplier who makes exclusive use of one or more means of distance communication.

What is distant communication?

This relates to a contract involving communication by means of electronic mail, video conferencing, letters, catalogues, fax, telephone and television.

Distance Selling cont...

Information requirements to be provided to the consumer prior to contract concluding:

- a) Identity and address of supplier if payment required in advance;
- b) Description and price (plus any tax) of goods and services provided;
- c) Delivery costs (if appropriate);
- d) Arrangements for payment, delivery or performance;
- e) The existence of the right of cancellation – if this exists;
- f) Cost of using distance communication if not at the basic rate;
- g) Period for which the offer or price remains valid; and
- h) Minimum duration of a consumer agreement if meant to be performed permanently or recurrently.

Supplier must provide consumer with an express authority to accept or decline an internet consumer agreement before entering into it.

General Points

Payment by card

Consumer may request cancellation of payment where fraudulent use if made of his credit card and consumer is to be re-credited.

Performance

Unless agreed otherwise between parties a supplier must execute a consumer's order within 3 days from day following the day the consumer forwarded his order to the supplier.

If goods are unavailable, supplier must inform the consumer and refund sums received within 2 days.

Burden of proof is on the supplier if there is a dispute as to proof concerning information confirmation and time limits.

Supplier who is in breach of this Part is liable to penalties as may be prescribed.

If supplier provides consumer with goods over an extended period of time and receives periodic payments they are entitled to:

- a) Present a claim for the exact amount of good actually received by the consumer; and
- a) Terminate the consumer agreement if payment in full is not made within a reasonable time after presentation of claim or a date as specified in the agreement in such circumstance.

Miscellaneous (Part 15)

If supplier is unable to present claim he may:

- a) Present estimated claim; and
- b) If estimate is reasonably accurate request that it is paid on the following conditions:
 - i. Amount paid credited to amount owing at the next time an accurate claim presented; and
 - ii. Supplier cannot terminate agreement or impose penalty on the ground that consumer has not paid the estimated amount.
- c) Where estimated claim presented the supplier must provide an accurate claim within 7 days.

Only applicable if consumer does not pay the estimated amount or pays it in full or part.

Trade coupons and similar promotions

Supplier must not offer any prize with the intention of not providing it or providing it other than offered. Offer must set out:

- a) Nature of prize offered;
- b) Good or services to which the offer relates;
- c) Steps required for a prospective consumer to accept or receive benefit of offer; and
- d) Details as to how to claim the prize.

Miscellaneous cont...

Over-selling and over-booking

Supplier must not accept payment for goods or service (1) it has no reasonable basis to assert he intends to supply or (2) goods or services he intends on supplying are materially different from what was paid for.

If supplier accepts payment and fails due to insufficient stock or capacity to supply good or services the supplier must

- i. refund money paid plus interest and
- ii. Compensate consumer for breach of contract and consequential damage.

Section 104(2)

Lay-aways

If a supplier agrees to sell particular goods by lay-away amount paid by the consumer is held in trust for the benefit of the consumer and the goods remain at the risk of the supplier until consumer takes possession. If supplier unable to deliver possession to the consumer once they have paid full provide the supplier must (at the consumer's option):

- a. Supply consumer with comparable goods in the equivalent quantity; or
- b. Refund money paid with interest or double the amount paid by the consumer as compensation for breach of contract.

If consumer terminates agreement before fully paying, supplier may charge a cancellation penalty before refunding amount paid.

If consumer fails to complete payment within 30 days after date of completion supplier may regard agreement rescinded and charge cancellation penalty before refunding amount paid.

Cancellation Penalty can only be charged if consumer knew of the same before entering law-away agreement.

Defence where offence committed

The Bill provides the following defences if the defendant can prove:

- a. Contravention was due to mistake, to reliance on information supplied by another person, to the default of another person, to an accident or any action beyond his control.
- b. Reasonable precautions were taken and due diligence to avoid contravention.

NOTE: If relying on defence that contravention was due to the actions of another person a notice will need to be provided to the opposing party identifying or assisting to identify the person.

Regulations

If this proposed legislation is passed, Cabinet may need to make regulations in order to determine:

- The functions and powers of the Commission; and
- All matters necessary to be prescribed for giving effect to the penalty system under the Law and penalties for acting in contravention of the Law.

- 1) Read the Bill and provide the LRC with any comments/concerns before 31 March.
- 2) If you are a Supplier or Manufacturer ensure you have (or will have) compliant Consumer Agreements and terms and conditions. (see Schedule 3 as a starting point). (HSM would be glad to be instructed...)
- 3) Review your current processes and procedures to ensure that issues are minimized (such as in the case of delivery of goods and services, unsolicited goods or services etc.

HSM

Questions?



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Thank you for
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Consumer Protection
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