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Consumer Policy
Ministry of Consumer Affairs
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Consumer Law Reform Additional Papers: Good Faith, Unconscionability

The New Zealand Law Society (Society) welcomes the opportunity to comment on the Consumer Law Reform October 2010 Additional Papers, on *Referencing Good Faith in a Fair Trading Act Purpose Clause* and *Unconscionability*. The comments below supplement the Society's earlier submission on the Ministry's principal discussion paper on consumer law reform.¹

Good Faith

The Society supports the conclusion reached in this paper, that a reference to good faith should not be included in a purpose clause relating to the Fair Trading Act 1986 (Act).

In particular, the Society supports the concern that a reference to good faith does not sit well with the Act's strict liability provisions: a trader may well be acting in good faith (which we note is a very subjective notion) but still breach the Act.

We refer to the two questions posed on page 5 of the paper:

- Whether contracting out of the Fair Trading Act in form or substance should be prohibited, or
- Whether the Fair Trading Act should provide that knowingly withholding material information is a misrepresentation.

The Society's view is that there is no need for these provisions.

In relation to the first question, rights under the Act are statutory and operate in parallel to contractual or other rights. A contract cannot exclude statutory rights unless the statute makes provision for the rights to be excluded. In this case, the Act makes no such provision.

In relation to the second question, the Courts have recognised that there may be circumstances where silence constitutes a misrepresentation. What is proposed appears

¹ New Zealand Law Society submission dated 6.8.10 on the Ministry of Consumer Affairs' *Consumer Law Reform – A Discussion Paper*, June 2010.

to go further and would effectively require suppliers to provide all material information. This would place a much greater burden on suppliers (including the burden of anticipating which information is material to all consumers), increase transaction costs and potentially result in information overload for consumers. It should not be undertaken without very careful consideration and clear justification.

Unconscionability

Thank you for your comprehensive paper on the Australian Competition and Consumer Commission's (ACCC) view of the Australian experience of adding unconscionability provisions to consumer legislation.

The Society reiterates its view that including unconscionability provisions in the Fair Trading Act 1986 similar to those in the Australian Trade Practices Act would not materially enhance the protections that already exist for consumers (or, for that matter, for businesses) in New Zealand.

The Society notes the cases listed in the paper. It has also carried out some research into civil cases under the Trade Practices Act provisions. From a high level assessment of the cases, the Society's view is that most of those cases would have succeeded in New Zealand under the Fair Trading Act or in contract law. Further, in the Society's view, the law relating to unconscionability in New Zealand would have protected consumers under a disability (for example, *Lux Pty Ltd*, *Rana System* and *Craftmatic Australia*). We disagree with the statement in paragraph 8 of the paper that "... the Courts need more explicit direction in the legislation requiring them to deliver fair outcomes through applying the principles of unconscionability in deserving cases", even in the Australian context. We also disagree with the statement in paragraph 9 that the case law principle does not involve an assessment of the outcome of the contract. In our view, an assessment of the outcome of a contract is necessarily required for a finding of unconscionability.

The Society notes that the New Zealand Disputes Tribunal regime is able to address these issues through its jurisdiction to make decisions according to the overall merits and justice of the case.

Transaction costs

It is also important to consider the effect an emotive and semantically vague (to the public) word like "unconscionability" is likely to have, in terms of the volume of complaints to traders and also to the Commerce Commission. As stated above, it is the Society's view that most of the cases cited would likely have succeeded under New Zealand law. Fair Trading Act unconscionability provisions would add another parallel cause of action and another layer of complexity, not only for Disputes Tribunals and Courts in evaluating cases, but for good traders who face claims from consumers. With complexity comes additional cost.

The paper asks whether there should be special provisions protecting small businesses. We note the large number of Australian cases involving franchises. We are unaware of a similar problem in New Zealand. We also understand (from anecdotal evidence given by an ACCC manager) that franchisors who operate in both countries almost always treat their New Zealand franchisees more fairly than they do their Australian franchisees. We suspect that this is due to the size of New Zealand and the consequential ease of communication in New Zealand: a franchisor who treats

franchisees badly will not attract new franchisees. The effect of these extra-legal sanctions that arise outside the legal system should not be underestimated. It is the Society's view that existing law is sufficient to protect small businesses.

In summary, the Society does not consider that there is a need for additional protection in New Zealand of the kind contemplated by the paper, which cannot be satisfactorily addressed by existing law.

This submission has been prepared by the Society's Commercial and Business Law Committee. If you have any queries regarding this submission please contact Vicky Stanbridge, the Committee Secretary, by telephone (04) 463 2912 or email (vicky.stanbridge@lawsociety.org.nz).

Yours sincerely

A handwritten signature in black ink, appearing to read 'Jonathan Temm', written in a cursive style.

Jonathan Temm
President