



NEW ZEALAND  
LAW SOCIETY

NZLS EST 1869

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# Consumer Guarantees (Removal of Unrelated Party Lender Responsibility) Amendment Bill

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# Consumer Guarantees (Removal of Unrelated Party Lender Responsibility) Amendment Bill

## 1 Introduction and summary

- 1.1 The New Zealand Law Society (Law Society) welcomes the opportunity to comment on the Consumer Guarantees (Removal of Unrelated Party Lender Responsibility) Amendment Bill (Bill).
- 1.2 The Law Society has reservations regarding the Bill. In summary:
  - 1.2.1 The Bill is based on the incorrect premise that the application of the Consumer Guarantees Act 1993 (CGA) to certain creditors who lend money on the security of goods supplied to consumers constitutes an anomaly introduced by the Credit Contracts and Consumer Finance Act 2003. In fact, equivalent provisions have existed since the introduction of the CGA.
  - 1.2.2 The Law Society considers that there are plausible purposes for treating certain creditors as suppliers under the CGA, including the purpose of ensuring that consumers have effective remedies if the trader is insolvent.
  - 1.2.3 The Bill reallocates the risk of the insolvency of traders between consumers and creditors. There is a policy judgement to be made by Parliament regarding the optimal allocation of risks as between consumers and creditors. However, the Law Society does not agree that the existing legislative and policy settings are merely unreasoned anomalies.

## 2 Purpose of the Bill

- 2.1 The general policy statement in the explanatory note to the Bill states that the purpose of the Bill is “to amend the definition of supplier in the CGA to exclude a lender who is an unrelated party from the definition of a supplier” (page 1). An unrelated party is a lender (creditor) who is separate and at arms-length from the trader.<sup>1</sup> The rationale for this amendment is that consumers should not have recourse to an unrelated lender because the lender has little or no influence on a sale and so should have no direct responsibilities under the CGA.
- 2.2 The explanatory note states that the Bill is intended to address an “anomaly” highlighted by the New Zealand Initiative. The New Zealand Initiative recommended that this change be considered in its 2015 report *Reducing Unnecessary Regulatory Costs: Responding to the Prime Minister's challenge* (Report).<sup>2</sup> Section A4 of the Report (which discusses the CGA) states:

In some cases, the effect of that legislation may have unintended consequences. One example is as follows:

The definition of “supplier” has been broadened to capture not only the seller of the relevant goods, but also the lender financing them.

- 2.3 This is not correct. The substantive effect of the definition of “supplier” has not materially changed since the CGA's enactment in 1993. The principal change made to the definition of “supplier” by the amendment in 2003 (to which the report refers), was to update the name of “financiers” to

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<sup>1</sup> “Related party” is defined in paragraph 9 of NZ IAS 24: Related Party Disclosures. It is noted that this is different from the concept of “interconnected bodies corporate” in section 2(7) of the Commerce Act 1986.

<sup>2</sup> The New Zealand Initiative *Reducing Unnecessary Regulatory Costs: Responding to the Prime Minister's challenge*, 2015, p 16.

“creditors”, for consistency, following the enactment of the Credit Contracts and Consumer Finance Act 2003.<sup>3</sup>

- 2.4 The application of the CGA to unrelated creditors is intentional and not an anomaly – consumers have always had recourse to creditors who lend money on the security of goods supplied under the CGA in circumstances where the trader arranges the loan and the purchase price for the goods is paid (at least in part) out of the proceeds of the loan.

### **3 Responsibilities of creditors under the CGA**

- 3.1 The responsibilities of creditors as suppliers are that if goods are defective, creditors are liable to consumers jointly and severally with the person who actually supplies the goods (the trader). However, the liability of creditors is limited by section 46(2), which provides that their maximum liability is capped at the amount owing to the creditor. The creditor is entitled to be indemnified by the trader under section 46(3) and the trader cannot assign its obligations to remedy the consumer or to indemnify the creditor under section 46(4).
- 3.2 Only creditors who have a loan arranged by the trader are “suppliers” under the CGA and will be liable. If, for example, the consumer arranges the finance directly without the assistance of the trader, that independent creditor will not be liable.
- 3.3 In addition, section 23A provides that where a consumer has exercised his or her right to reject goods under the CGA for a breach of guarantee which is of substantial character, a court or a Disputes Tribunal may order that any collateral credit contract arranged by the supplier vests in the supplier, i.e. the trader. This relieves the consumer from a continuing obligation under the credit contract, should the consumer be entitled to reject the goods.
- 3.4 This means that liable creditors are those who agree to enter into an arrangement with the trader that they will finance the supply of goods to the trader’s consumer customers. Those creditors will make payments to the trader (typically a discounted upfront payment), and will require the consumer to repay the loan amount under a credit contract to the creditor, who has a security over the goods.
- 3.5 This is consistent with the purposes of the CGA, which is not merely to provide protection for consumers:<sup>4</sup>
- (1) *The purpose of this Act is to contribute to a trading environment in which—*
    - (a) *the interests of consumers are protected; and*
    - (b) *businesses compete effectively; and*
    - (c) *consumers and businesses participate confidently.*
- 3.6 A potential rationale for the joint and several limited liability of traders and creditors (who fall within the definition of a supplier) is that the consumer generally is not well-placed to assess the financial status of the trader. On the other hand, it is in the interests of a creditor that enters into a financing arrangement with the trader to monitor that financial status, to avoid the risk of liability if the trader becomes insolvent. The existing provisions of the CGA appear to reflect a presumption that creditors are generally better placed than consumers to manage this risk, and that treating creditors as suppliers in some circumstances is likely to underpin confident participation in the consumer market.

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<sup>3</sup> The original and amended definitions of “supplier” are provided at Appendix 1.

<sup>4</sup> Section 1A(1).

## 4 Consequences of the proposed amendment

### *Consequences to consumers*

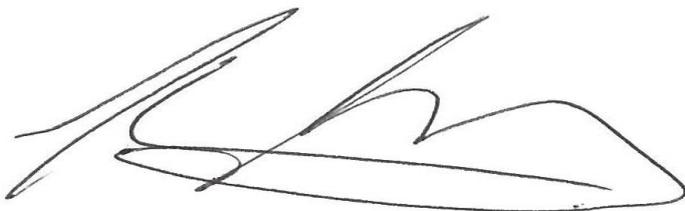
- 4.1 The primary consequence to consumers of the proposed amendment is that arms-length, unrelated creditors would not be required to provide remedies to consumers where there are breaches of the statutory guarantees for goods financed by the creditors (and for which the creditors have security over those goods).
- 4.2 This is of particular significance to consumers when a trader becomes insolvent, as the consumer at present has at least the ability to have ongoing debts to the credit company cancelled.
- 4.3 If the Bill were to be enacted, consumers would still be liable to unrelated creditors for the full balance outstanding in respect of defective goods, even though the loan had been arranged by the insolvent trader. There would be no actual supplier in which to re-vest the credit contract (if the consumer is entitled to reject the goods) and no indemnity for the creditor. To this extent, the Bill would increase risks to consumers.

### *Other potential consequences*

- 4.4 The removal of consumer recourse against independent creditors who finance goods that do not comply with statutory guarantees may reduce the incentive of those creditors to monitor the status and credit-worthiness of traders. This is because creditors would be able to require consumers to pay monies secured over defective goods notwithstanding that the trader had become insolvent. The Bill may also reduce the regulatory burden of the CGA on creditors which may have flow-on benefits for creditors or reduce the cost of credit to consumers.

## 5 Conclusion

- 5.1 In the Law Society's view, it is unclear that the existing provisions have anomalous or unintended consequences. For the reasons set out in this submission:
  - 5.1.1 The aspect of the definition of "supplier" on which the Bill focuses is not new. Equivalent language has existed since the introduction of the CGA.
  - 5.1.2 There are plausible policy rationales for treating creditors as suppliers in the circumstances stipulated by the CGA.
  - 5.1.3 The Bill would reallocate risks between consumers and creditors. The net costs and benefits of doing so are a matter for policy judgement.
- 5.2 The Law Society does not wish to be heard, but is available to meet with the officials advising on the Bill if the Committee considers that this would be of assistance.



Kathryn Beck  
**President**  
13 October 2016

## Appendix 1

The original definition of “supplier”, as enacted in 1993, includes at section 2(1), paragraph (d):

*A financier within the meaning of the Credit Contracts Act 1981 who has lent money on the security of goods supplied to a consumer, if the whole or part of the price of the goods is to be paid out of the proceeds of the loan and if the loan was arranged by a person who in trade supplied the goods:*

The relevant part of the definition of “supplier” was renumbered as paragraph (b)(ii) in section 2(1) by the Consumer Guarantees Amendment Act 2003 (with effect from 8 July 2003). The relevant text read as follows:

*(ii) a financier, within the meaning of the Credit Contracts Act 1981, who has lent money on the security of goods supplied to a consumer if the whole or part of the price of the goods is to be paid out of the proceeds of the loan and if the loan was arranged by a person who, in trade, supplied the goods:*

The Credit Contracts and Consumer Finance Act 2003 amended the relevant part of the definition of “supplier” (from 1 April 2005). This change introduced the current definition at section 2(1), paragraph (b)(ii) of the definition:

*(ii) a creditor within the meaning of the Credit Contracts and Consumer Finance Act 2003 who has lent money on the security of goods supplied to a consumer, if the whole or part of the price of the goods is to be paid out of the proceeds of the loan and if the loan was arranged by a person who, in trade, supplied the goods:*