

Consumer Protection (Definitions of Goods and Services) Bill

Government Bill

As reported from the Commerce Committee

Commentary

Recommendation

The Commerce Committee has examined the Consumer Protection (Definitions of Goods and Services) Bill and recommends that it be passed with the amendments shown.

Summary

We support the principle behind the Consumer Protection (Definitions of Goods and Services) Bill (the bill), which is to amend the definitions of goods and services in various consumer and commercial legislation to ensure that computer software, electricity, gas, telecommunications, water, and services related to their supply, are included within the scope of the legislation. We recommend a number of changes to the bill, including:

- the removal of telecommunications signals from the definitions of goods in each of the Consumer Guarantees Act 1993 (the principal Act), the Fair Trading Act 1986, and the Commerce Act 1986
- the addition of a provision in the definition of supplier in the principal Act to specify who is intended to be a supplier of electricity as goods and of electricity line function services as a service
- an amendment to the definition of supplier in the principal Act to include a person who supplies goods to a consumer by

transferring ownership or possession of goods as directed by an insurer

- an amendment to the definition of goods in the principal Act to clarify that parts of whole buildings, such as flats or apartments forming part of a block, are not goods for the purposes of that Act
- an amendment to clause 9 of the bill to enable non-contracting suppliers to have the benefit of any exclusions provided for in a contract between a contracting supplier and a business consumer.

Telecommunications signals as goods

We recommend that the bill be amended by removing telecommunications signals from the definitions of goods in each of the principal Act, the Fair Trading Act 1986, and the Commerce Act 1986.

We received submissions that the definition of telecommunications signals in the bill is wide enough to cover the content of telecommunications. It is argued that this may mean, for example, that under the principal Act, an internet service provider may be liable for the consequential losses of a consumer who relies on incorrect information on a web page.

It was not intended that suppliers of telecommunications signals would be liable for the content of the telecommunications. However, there is a possibility that on the basis of the definition of telecommunications signals used in the bill, liability for the content of telecommunications could arise under consumer protection legislation.

Therefore, we recommend removing telecommunications signals from the definition of goods, and leaving the supply of telecommunications to be regulated as a service. While this recommendation will mean that consumers of telecommunications services have more limited rights under consumer protection legislation than consumers of other utilities, we consider that this difference is justified given the particular nature of telecommunications services.

Electricity as goods

There is concern among submitters about the inclusion of electricity and gas in the principal Act as goods. Electricity and gas are already expressly included in the Fair Trading Act 1986 and the Commerce Act 1986 as goods. The bill inserts electricity into the definition of

goods in the principal Act, and also adds the supply of electricity line function services into the definitions of services in all three Acts.

We consider adding electricity and gas into the definition of goods in the principal Act will mean that the guarantees applying to goods will apply to electricity. In this instance, the most relevant guarantee is that the electricity is of acceptable quality. The principal Act contains general guidance to the meaning of acceptable quality in section 7. It is an objective test, based on the reasonable consumer. We were advised that, in the case of electricity, this is likely to be a consumer who understands that electricity is subject to momentary fluctuations, prone to interference by environmental factors and the actions of third parties, and may not be supplied at all due to planned shutdowns or emergencies.

We do not consider the guarantee of acceptable quality amounts to a guarantee of 'gold plated' supply. We understand the intended effects of the inclusion of electricity as goods in the principal Act are that:

- electricity retail companies should be responsible as suppliers of electricity to consumers
- electricity generators, Transpower New Zealand Limited (Transpower), and lines companies will potentially be responsible as manufacturers of electricity (Transpower and lines companies can be liable as manufacturers because they 'process' electricity received from generators, in that they convert its voltage and frequency)
- manufacturers will not be responsible for failures that result from the acts of third parties or events beyond human control, provided that the manufacturer manages the risk of the occurrence adequately.

Effect of including supply of electricity as services only

A number of submitters suggested that the supply of electricity should be included in the principal Act as services only. We note the submitters' concerns, but consider that the requirement to show a lack of reasonable care and skill on the part of the supplier would be onerous for consumers. In addition, we do not believe that consumers would be adequately protected if electricity were included as a service only. If lines companies can be solely responsible for supply

failures, then there will be no incentive for electricity companies to determine who has caused a particular fault. For instance, if a fault is caused by a particular manufacturer, the lines company will not be liable, and there will be no reason to investigate further, because the manufacturer would not be liable under the principal Act. This could mean that consumers are unable to obtain effective redress from anyone.

Including electricity as goods as well as services in the principal Act will create incentives for all suppliers and manufacturers to take reasonable steps to avoid failures of supply, and to provide accurate information to consumers.

Including computer software as goods

Some submitters proposed that computer software should be removed from the definition of goods because the consumer receives only a licence to use the software. These submitters believe that it is more appropriate, and more technically correct, for computer software to be considered to be a service for the purposes of the principal Act, the Commerce Act 1986, and the Fair Trading Act 1986.

We do not accept this proposal. The interest in the software the consumer receives does not differ significantly from other goods involving the transfer of an interest in intellectual property, and for which the guarantees and remedies relating to goods are more relevant and applicable than the guarantees and remedies relating to services. We recommend that computer software be added to the definition of goods for the avoidance of doubt.

Including water as goods and services

Several submitters would like water to be removed from the definition of goods and the supply of water to be removed from the definition of services. It is commonly accepted that potable water is goods for the purposes of the Sale of Goods Act 1908. However, the *ESANZ case (Electricity Supply Association of NZ Inc v Commerce Commission (1998) 6 NZBLC 102,555)* creates doubt about whether other trade practices legislation covers water. We are advised that water is added into the definition of goods and the supply of water to the definition of services for the avoidance of doubt only.

Supply of electricity as services

The bill adds the supply of electricity to the definition of services under the principal Act, the Fair Trading Act 1986, and the Commerce Act 1986. In relation to the principal Act, it is intended that electricity lines companies will be responsible as suppliers of electricity line function services to consumers. This will also mean that the providers of services ancillary to the supply of electricity as goods will be responsible to consumers. The supplier in these cases may be either a retailer, a lines company, or a third party, depending on who provides the service.

The responsibility of lines companies and retailers will be to perform the services with reasonable care and skill. Suppliers will not be responsible for failures that result from the acts of third parties, or events beyond human control, where the supplier manages the risk of that occurrence with reasonable care and skill.

Definition of supplier in principal Act

Submitters are concerned that the removal of the requirement for a direct contractual link between consumers and suppliers of services would mean that any supplier of electricity lines function services could be liable under the principal Act. For instance, Transpower, which operates the national grid, might be considered to supply lines function services to consumers.

As noted above, it is intended that in the case of the supply of electricity line function services, only lines companies who actually supply lines function services to consumers should be responsible under the principal Act. To clarify this we recommend that a provision be added to the bill, to specify who is a supplier of electricity as goods, and of electricity lines functions as services. This clause will be restricted to electricity, to avoid having any unintended effects in the case of other goods and services. In the case of electricity, this clause does not affect or limit the definition of manufacturer.

Liability exclusions for non-contracting suppliers

Submitters suggest that new section 43A should be deleted from the bill, to be replaced with a new provision, giving a non-contracting supplier (such as a lines company) the benefit of any liability exclusions contained in the contract of supply (such as between the retailer and the business consumer). We agree, and consider that this

suggestion would put the upstream supplier of services in the same position as a manufacturer of goods who has the benefit of any liability exclusions in the supplier's contract with the consumer.

Exceptions to the right of redress

We received submissions suggesting that section 33 of the principal Act be amended to exempt suppliers of electricity from liability in certain cases. Section 33 provides exceptions to the right of redress against suppliers in relation to services. We believe the suggested amendments are unnecessary. Section 33 already provides that a supplier is not liable for failures to comply with guarantees if the failure results only from acts or omissions of third parties or a cause independent of human control. We do not consider any further exceptions are required to deal with the addition of electricity lines services to the principal Act.

Issues outside the scope of bill

Submitters sought an amendment to section 20 of the principal Act, to provide that the reasonable time within which a consumer can reject goods be extended to account for delays caused by the supplier. While we acknowledge this suggestion, we consider that the proposed amendment is outside the scope of the bill. The bill is limited to amendments to the definitions of goods and services.

Other submitters proposed a new section be added to the principal Act, providing suppliers with a statutory indemnity against manufacturers for losses resulting from claims by consumers where the manufacturer has caused the fault. We also acknowledge this suggestion, as it mirrors similar provisions in equivalent Australian and Canadian legislation. However, we have been advised that the proposed new section is outside the scope of the bill, as the bill is limited to amendments to the definitions of goods and services.

Appendix

Committee process

The Consumer Protection (Definitions of Goods and Services) Bill was referred to the previous Commerce Committee for consideration on 10 October 2001. We would like to acknowledge the work of that committee in considering this bill. The closing date for submissions was 15 January 2002. The committee received and considered

19 submissions, of which it heard 13 submissions. Hearing evidence took 4 hours 25 minutes and consideration took 2 hours and 49 minutes. The bill was carried over prior to the 2002 general election and referred to the new Commerce Committee. We received advice from the Ministry of Consumer Affairs and the Ministry of Economic Development.

Committee membership

Mark Peck (Chairperson)

Gerry Brownlee (Deputy Chairperson)

Brent Catchpole

Darren Hughes

David Parker

Hon Richard Prebble

HV Ross Robertson

Hon Maurice Williamson

Key to symbols used in reprinted bill

As reported from a select committee

Struck out (unanimous)

Subject to this Act,

Text struck out unanimously

New (unanimous)

Subject to this Act,

Text inserted unanimously

(Subject to this Act,)

Words struck out unanimously

Subject to this Act,

Words inserted unanimously

Hon Judith Tizard

Consumer Protection (Definitions of Goods and Services) Bill

Government Bill

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The Parliament of New Zealand enacts as follows:

1 Title
This Act is the Consumer Protection (Definitions of Goods and Services) Act **2001**.

2 Commencement
This Act comes into force on the day after the date on which it receives the Royal assent. 5

Part 1 **Commerce Act 1986**

3 Commerce Act 1986 called principal Act in this Part
In this Part, the Commerce Act 1986¹ is called “the principal Act”. 10

¹ 1986 No 5

4 Interpretation

(1) Section 2(1) of the principal Act is amended by repealing the definition of the term goods, and substituting the following definition:

“goods— 5

“(a) means personal property of every kind (whether tangible or intangible); and

“(b) includes—

“(i) ships, aircraft, and vehicles:

“(ii) animals, including fish: 10

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

“(iv) gas and electricity:

Struck out (unanimous)

“(v) telecommunications signals:

“(vi) to avoid doubt, water and computer software”. 15

(2) Section 2(1) of the principal Act is amended by adding to paragraph (a) of the definition of the term services the following subparagraph:

“(iv) to avoid doubt, the supply of electricity, gas, telecommunications, or water, or the removal of waste water:”. 20

Struck out (unanimous)

(3) Section 2(1) of the principal Act is amended by inserting, in its appropriate alphabetical order, the following definition:

“telecommunications signal means any sign, signal, impulse, writing, image, sound, instruction, information, or intelligence of any nature that is conveyed by electromagnetic means from one device to another, whether for the information of any person using the device or not”. 25

Part 2
Consumer Guarantees Act 1993

**5 Consumer Guarantees Act 1993 called principal Act in
this Part**

In this Part, the Consumer Guarantees Act 1993² is called “the principal Act”.

² 1993 No 91

6 Interpretation

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

“**goods**—

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

“(b) includes—

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

“(ii) ships, aircraft, and vehicles:

“(iii) animals, including fish:

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

“(v) electricity and gas:

Struck out (unanimous)

“(vi) telecommunications signals:

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

“**services**—

“(a) includes any rights (including rights in relation to, and interests in, personal property), benefits, privileges, or facilities that are, or are to be, provided, granted, or conferred by a supplier; and

- “(b) includes (without limitation) the rights, benefits, privileges, or facilities that are, or are to be, provided, granted, or conferred by a supplier under any of the following classes of contract:
- “(i) a contract for, or in relation to, the performance of work (including work of a professional nature), whether with or without the supply of goods: 5
 - “(ii) a contract for, or in relation to, the provision in trade of facilities for accommodation, amusement, the care of persons or animals or things, entertainment, instruction, parking, or recreation: 10
 - “(iii) a contract of insurance, including life assurance and life reinsurance: 15
 - “(iv) a contract between a bank and a customer of the bank: 15
 - “(v) a contract for, or in relation to, the lending of money or granting of credit, or the making of arrangements for the lending of money or granting of credit, or the buying or discounting of a credit instrument, or the acceptance of deposits: 20
 - “(vi) a contract for, or in relation to, the supply of electricity, gas, telecommunications, or water, or the removal of waste water; but
- “(c) does not include— 25
- “(i) any rights, benefits, privileges, or facilities that are, or are to be, provided, granted, or conferred by a supplier by simply paying or crediting any money to the consumer without the performance of any other task (other than one that is merely incidental to the making of the payment or credit); and 30
 - “(ii) rights or benefits in the form of the supply of goods or the performance of work under a contract of service 35
- “**supplier**—
- “(a) means a person who, in trade,—
 - “(i) supplies goods to a consumer by—
 - “(A) transferring the ownership or the possession of the goods under a contract of sale, 40

exchange, lease, hire, or hire purchase to which that person is a party; or

“(B) transferring the ownership of the goods as the result of a gift from that person; or

New (unanimous)

“(C) transferring the ownership or possession of the goods as directed by an insurer; or 5

“(ii) supplies services to an individual consumer or a group of consumers (whether or not the consumer is a party, or the consumers are parties, to a contract with the person); and 10

“(b) includes,—

“(i) 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: 15

“(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: 20

“(iii) a person who, in trade, assigns or procures the assignment of goods to a financier within the meaning of the Credit Contracts Act 1981 to enable the financier to supply those goods, or goods of that kind, to the consumer: 25

“(iv) a person who, in trade, is acting as an agent for another, (where that other is not) whether or not that other is supplying in trade; and

New (unanimous)

“(c) for the avoidance of doubt in the following circumstances, means only,— 30

“(i) in the case of a supply of electricity as a good, the retailer of the electricity with whom the consumer has a contract; and

New (unanimous)

- “(ii) in the case of a supply of electricity line function services, the distributor who owns or operates the line that is connected to the consumer’s premises; and
- “(iii) in the case of other services relating to electricity, the person who provides that service to the consumer”.

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Struck out (unanimous)

- (2) Section 2(1) of the principal Act is amended by inserting, in its appropriate alphabetical order, the following definition:
“**telecommunications signal** means any sign, signal, impulse, writing, image, sound, instruction, information, or intelligence of any nature that is conveyed by electromagnetic means from one device to another, whether for the information of any person using the device or not”.

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7 Options of consumers where services do not comply with guarantees

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Section 32(b) of the principal Act is amended by repealing subparagraph (i), and substituting the following subparagraph:

- “(i) subject to section 35, if there is a contract between the supplier and the consumer for the supply of the service, cancel that contract in accordance with section 37; or”.

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8 No contracting out except for business transactions

- (1) Section 43(1) of the principal Act is amended by omitting the words “40 and 41 of this Act”, and substituting the expression “40, 41, and **43A**”.

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- (2) Section 43(4) of the principal Act is amended by omitting the words “of this section”, and substituting the words “or **section 43A**”.

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9 New section 43A inserted

The principal Act is amended by inserting, after section 43, the following section:

Struck out (unanimous)

“43A Additional power to exclude Act if services supplied to business consumers other than under contract with consumer

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A supplier who supplies services to a consumer other than under a contract with the consumer may exclude the application of 1 or more provisions of this Act in respect of that supply if—

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“(a) the consumer acquires the services for the purposes of a business; and

“(b) the supplier clearly displays a notice at every place of the supplier’s business stating—

“(i) that the supplier excludes provisions of this Act under this section; and

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“(ii) the provisions of this Act that are excluded.”

New (unanimous)

“43A Exclusion of liability in favour of non-contracting supplier

“(1) An agreement of the kind referred to in section 43(2) may exclude any provision of this Act that applies to a non-contracting supplier of services to the consumer with whom the agreement is made.

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“(2) The non-contracting supplier has the benefit of the exclusion.”

Part 3

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Fair Trading Act 1986

10 Fair Trading Act 1986 called principal Act in this Part

In this Part, the Fair Trading Act 1986³ is called “the principal Act”.

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³ 1986 No 121

11 Interpretation

(1) Section 2(1) of the principal Act is amended by repealing the definition of the term goods, and substituting the following definition:

“goods— 5

“(a) means personal property of every kind (whether tangible or intangible); and

“(b) includes—

“(i) ships, aircraft, and vehicles:

“(ii) animals, including fish: 10

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

“(iv) gas and electricity:

Struck out (unanimous)

“(v) telecommunications signals:

“(vi) to avoid doubt, water and computer software”. 15

(2) Section 2(1) of the principal Act is amended by adding to paragraph (a) of the definition of the term services the following subparagraph:

“(iv) to avoid doubt, the supply of electricity, gas, telecommunications, or water, or the removal of waste water:”. 20

Struck out (unanimous)

(3) Section 2(1) of the principal Act is amended by inserting, in its appropriate alphabetical order, the following definition:
“telecommunications signal means any sign, signal, impulse, writing, image, sound, instruction, information, or intelligence of any nature that is conveyed by electromagnetic means from one device to another, whether for the information of any person using the device or not”. 25

Part 4
Sale of Goods Act 1908

- 12 Sale of Goods Act 1908 called principal Act in this Part**
In this Part, the Sale of Goods Act 1908⁴ is called “the principal Act”. 5
⁴ 1908 No 168
- 13 Interpretation**
Section 2(1) of the principal Act is amended by repealing the definition of the term **goods**, and substituting the following definition:
- “**goods** includes— 10
- “(a) all chattels personal other than money or *(things)* choses in action; and
- “(b) emblements, growing crops, and things attached to or forming part of the land that are agreed to be severed before sale or under the contract of sale; and 15
- “(c) to avoid doubt, computer software”.

Legislative history

30 August 2001	Introduction (Bill 154–1)
10 October 2001	First reading and referral to Commerce Committee
