



DRAFT CONSUMER PROTECTION BILL - OVERVIEW

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The Draft Consumer Protection Bill is based on the Model CARICOM Consumer Protection Legislation prepared by a Consultant, some time ago. It seeks to give effect to the Community's competition policy, articulated in Part Two of Chapter Eight of the Revised Treaty, specifically Articles 184 and 185. Article 185 provides that the following policy objectives should be addressed:

- (a) the fundamental terms of a contract and the implied obligations of parties to a contract for the supply of goods or services;
- (b) the prohibition of the inclusion of unconscionable terms in contracts for the sale and supply of goods or services to consumers;
- (c) the prohibition of unfair trading practices, particularly such practices relating to misleading or deceptive or fraudulent conduct;
- (d) the prohibition of production and supply of harmful and defective goods and for the adoption of measures to prevent the supply or sale of such goods including measures requiring the removal of defective goods from the market;
- (e) that the provision of services is in compliance with the applicable regulations, standards, codes and licensing requirements;
- (f) that goods supplied to consumers are labelled in accordance with standards and specifications prescribed by the competent authorities;
- (g) that hazardous or other goods whose distribution and consumption are regulated by law are sold or supplied in accordance with applicable regulations;

(h) that goods or materials, the production or use of which is likely to result in potentially harmful environmental effects, are labelled and supplied in accordance with applicable standards and regulations;

(i) that producers and suppliers are liable for defects in goods and for violation of product standards and consumer safety standards which occasion loss or damage to consumers; and

(j) that violations of consumer safety standards by producers or suppliers are appropriately sanctioned and relevant civil or criminal defences to such violations are available to defendants.

In preparing the Bill, consideration was also given to the basic consumer protection guidelines outlined in the UN resolution No. 39/243/85 based on proposals from the CSME Unit First and Second Meetings on Consumer Affairs.

PART I PRELIMINARY

As the Long Title states, the purpose of the Bill is to provide for the promotion and protection of consumer interests, in relation to the supply of goods and services to ensure the protection of life, health and safety of consumers. More detailed provisions respecting the purpose of the Bill are contained in **Clause 3(1)**. The intention was to ‘flesh out’ the Long Title and a broad view of “consumer interests” is taken.

The Bill also provides for the establishment of a Consumer Protection Commission. Member States which already have such a Commission would necessarily omit the relevant provisions.

Part I of the Bill sets out, as is customary, preliminary matters. **Clause 2** contains the interpretation section in which words used throughout the Bill such as “consumer”, “supplier” and “consumer agreement”, are defined.

The meaning of “consumer agreement” hinges on the meaning of the “consumer”, “supplier”, “goods” and “services”.

The definition of “goods” covers all personal or movable property and expressly excludes real or immovable property.

The term “services” is not exhaustively defined in the Bill. In fact it is negatively defined. Based on the scope of the Bill, it includes a service offered or provided that involves the addition to or maintenance, repair or alteration of goods.

Clause 3(2) provides the Bill is made applicable to all persons involved in trade and commerce whether through purchasing or supplying of goods or services. In determining whether this Legislation applies to an entity or transaction, a court or tribunal is required to consider the real substance of the entity or transaction and in so doing may disregard the outward form.

Clause 3(4) empowers the Minister to exempt categories of trade or business from the application of the Act. The sub-clause is optional.

PART II

ESTABLISHMENT AND FUNCTIONS OF THE COMMISSION

PART II of the Bill provides for the establishment the Consumer Protection Commission, which is designed to be the watchdog of consumer protection issues and the first port of call for the lodging of complaints. It must be noted, however, that recourse to a court of law is not restricted.

The functions of the Commission include the conducting of investigations on behalf of consumers adversely affected in relation to the supply of goods or services in order to determine whether they were supplied in contravention of the Act, reporting on investigations and making recommendations to the Minister, promoting the development of consumer organizations and resolving disagreements between consumers and suppliers. Particular attention is also to be given to the interests of minors and the elderly who are considered to be vulnerable.

It is also within the mandate of the Commission to report to the competent Minister on consumer affairs in general and to give advice concerning consumer protection policy as well.

PART III COMPLAINTS

Part III of the Bill sets out the procedure for investigation of complaints to the Commission. Complaints of alleged infringements of consumer rights may be lodged with the Commission which will then investigate such complaints, if investigation is merited. The Commission also has the authority to initiate investigations, in its own name.

When a complaint lodged with the Commission is considered to be unfounded or frivolous, the Commission may exercise its discretion not to investigate or continue an investigation. Other grounds for refusal are specified in the Bill. See **Clause 8(2)**. Where such action is taken, the Commission is required to issue a notice to that effect to the complainant.

The Commission has considerable investigative powers and can order the production of any book or document or that any person must appear before the Commission to be interrogated in respect of a matter under its investigation. In practical terms these functions should be undertaken by a separate arm of the Commission so as to ensure a separation of functions.

PART IV CONSUMER RIGHTS

PART IV deals with a core of consumer rights. First, **Clause 13** expressly provides that the Bill does not affect any other right or remedy that the consumer may have. The consumer may still exercise those other rights and remedies. Thus a consumer may, in addition to or instead of exercising rights conferred by the Bill, enforce any rights he may have under a contract with the supplier or he may make a claim in tort.

Clause 14 prevents a supplier from inducing a consumer to contract out of his rights conferred by the Bill. Any term in a contract will be void to the extent that it is inconsistent with any provision of the Bill. There is, however, no bar on the consumer and supplier agreeing to a release in settlement of a dispute.

Clause 16 reiterates the *contra proferentum* rule in the context of a consumer agreement. Ambiguities are to be interpreted to benefit the consumer.

Clause 18 of the Bill provides that if a consumer receives unsolicited goods from a supplier, the consumer may retain the goods without having to pay for the goods or return them to the supplier in certain circumstances. Loss or damage to the goods while in the possession of the consumer are to be borne by the supplier, unless the supplier notifies the consumer within a specified period after receipt that they were delivered in error and arranges to recover the goods, at its own expense. Where the supplier fails to take these steps, ownership in the goods will pass unconditionally to the consumer.

One concern about this clause is whether it undermines the right granted to the owner of goods to institute action for the return of goods under circumstances where there was no intention to transfer ownership due to fraud, theft or mistake. However, sub-clause (4) limits the application of the protection.

Clause 23 provides that a consumer is deemed to have accepted goods when -

- the consumer expressly or implicitly communicates to the supplier that the consumer has accepted them;
- the goods have been delivered to the consumer and the consumer does any act in relation to them that is inconsistent with the supplier's ownership of the goods, or;
- after the lapse of a reasonable time the consumer retains the goods without intimating to the supplier that the consumer has rejected them.

PART V

DUTIES OF SUPPLIERS

Clauses 29 and 30 impose obligations on suppliers in relation to goods or services supplied. A supplier is under an obligation to provide information as to the origin, price, care, terms etc of goods being sold.

Clause 33 imposes an obligation to disclose certain environmental facts affecting goods, particularly, the presence of any genetically modified ingredients or components or components that present a chemical or biological hazard to humans. One consideration here is whether this should be dealt with here or left to the Standards Bureau.

Clause 35 imposes an obligation on the supplier to provide a written record of each transaction to the consumer. That record shall be adequate proof of purchase of the goods or services and can be used for refund purposes.

Part V also provides that consumers are entitled to receive goods which will be useable and durable for a reasonable period of time and that are free of any product failure, defect or hazard that would render the utility, practicability or safety of the goods to be less than persons are generally entitled to expect. One consideration is whether this alteration of established principles in respect of liability for patent and latent defects is desirable in that once the goods are defective in a material particular, the consumer may return the goods. See **clauses 40 and 41**.

Clause 45 places an onerous burden on suppliers who commit to supply goods or services on a specified date. Where a supplier fails to supply goods and services on a committed delivery date, the supplier will be liable to refund to the consumer any amount paid together with interest at the prescribed interest rate.

PART VI

UNFAIR PRACTICES

Part VI prohibits a supplier from committing a number of unfair practices which include misleading or deceptive representations and misleading the public as to the nature etc of goods.

Generally, a commercial practice will contravene this Part where it is contrary to the requirements of professional diligence and would be likely to cause appreciable impairment of the average consumer's ability to make an informed choice in relation to a product and to cause him or her to make a transactional decision that they would not otherwise make.

Clause 48 prohibits suppliers from engaging in commercial practices that mislead or deceive consumers. A commercial practice is misleading if it includes false information or in any way deceives or misleads the average consumer in relation to any matter specified in sub-clause (3).

One notable feature is that clause 48 is objectively worded. Therefore a deceptive or misleading representation may occur notwithstanding the absence of an intention on the part of a supplier to deceive or mislead a consumer.

Under this Part it will be an unfair practice in a consumer transaction or proposed consumer transaction to -

- (a) do or say anything, or fail to do or say anything, if as a result a consumer might reasonably be deceived or misled;
- (b) make a false claim;
- (c) take advantage of a consumer if the person knows or should reasonably be expected to know that the consumer -
 - (i) is not in a position to protect his or her own interests; or
 - (ii) is not reasonably able to understand the character, nature, language or effect of the transaction or proposed transaction or any matter related to the transaction.

Excessively one-sided transactions not in favour of the consumer are also caught. In addition, a number of specific unfair practices covered by the Bill are listed in sub-clause (3).

Clause 51 deals with taking advantage of consumer. Sub-clause (4) incorporates a mental component on the part of the supplier. It requires that the supplier should reasonably be expected to know the consumer's vulnerabilities. In effect, this provision codifies the most commonly recognised situation of unconscionable conduct by a supplier in respect of a consumer. The sub-clause also deals specifically with some aspects of unconscionable conduct, namely, undue pressure or influence.

Clause 56 makes it an offence to establish, operate or promote a pyramid promotional scheme.

Clause 57 Advertisers will enjoy an exemption from liability under the Bill in respect of any statement, representation or omission in an advertisement printed, published,

distributed, broadcast or telecast on behalf of a supplier in good faith and in his ordinary course of business.

A number of other specific unfair practices are contained in this Part, including bait and switch practices, dual pricing and referral selling.

Remedies for unfair practice:

Clauses 58 and 59 A consumer agreement entered into involving or on the basis of an unfair practice is unenforceable against the consumer. In relation to certain transactions where high-pressure sales tactics are often complained of, the Bill gives consumers a right to cancel the relevant agreement. (Should there be a cancellation period?)

Some of the unfair practice, however, amount to a criminal offence and attract criminal sanctions.

PART VII UNFAIR TERMS

The Bill impacts upon notices or agreements which limit the liability of a supplier. The application of this Part or the exercise of a right conferred by this Part cannot be limited.

PART VIII PRODUCT LIABILITY

Product safety and product information is provided for in Part IV of the Bill under the responsibility of the Director of Consumer Affairs who is given power to publish warning notices in the Gazette relating to product safety, product standards, product information and recall of goods.

**PART IX
CONSUMER SAFETY**

This Part addresses Consumer Safety. The supply of goods which fail to comply with the general safety requirement is prohibited

**PART X
RECALL OF GOODS**

This Part sets out the procedure for conferences between the Commission and the supplier for goods banned or recalled and makes provision for the Commission to be able to obtain information, documents and evidence.

**PART XI
RECALL OF GOODS**

Among the provisions contained in this Part are provisions regulating promotional competitions, over-selling and over-booking and lay-aways.