Reforming the Consumer Guarantees Act 1993 and Its Enforcement: Time for Action

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Consumers have strong rights under the Consumer Guarantees Act 1993 ("CGA"), yet some traders ignore their obligations under it and often consumers do not attempt to enforce their rights. The Ministry of Consumer Affairs is working on a “one law, one door” project to simplify consumer law and assist consumers in obtaining redress against traders. This article argues that the “one law, one door” project as presently formulated will do little to assist consumers. Instead the Act needs to be amended to better protect consumers. Those amendments should include the ability of the Commerce Commission to bring actions under the Act, an increase in remedies and fines for breaches of the Act, the facilitation of class actions and the extension of the Act to online auctions. The Disputes Tribunal process also suffers from deficiencies, which can be rectified by implementing measures such as the publication of decisions and the ordering of immediate payment of monies awarded by Referees, as well as more mundane and practical changes including assistance with writing complaints and receiving filing fees from errant traders. In addition, a system is proposed which would see the resolution of many disputes under the CGA without recourse to the Disputes Tribunal.

1 INTRODUCTION
Consumers in New Zealand are seemingly blessed with strong legal rights. The Consumer Guarantees Act 1993 (the "CGA") provides that if a good has a minor defect the supplier must repair or replace the goods or refund the purchase price.1 Alternatively, if a good has a defect which cannot be remedied or

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* The author is also a board member of Consumer NZ. The views expressed in this article are those of the author and do not necessarily reflect those of Consumer NZ.

1 Consumer Guarantees Act 1993, s 19: the choice of which option, repair, replace or refund is the trader’s, not the consumer’s. There are also a number of other statutes, which specifically protect consumers: the Auctioneers Act 1928, Consumer Guarantees Act 1993 (CGA), Credit (Repossession) Act 1997, Credit Contracts and Consumer Finance Act 2003, Door to Door Sales Act 1967, Fair Trading Act 1986, Layby Sales Act 1971, Motor Vehicle Sales Act 2003, Unsolicited Goods and Services Act 1975,Weights and Measures Act 1987. New Zealand’s Fair Trading Act 1986, however, is out of step with comparable jurisdictions such as Australia, the United Kingdom, Canada and even the United States. This gap between New Zealand’s law and other jurisdictions — and thus the relative non-protection of consumers in New Zealand — was identified by the Ministry of Consumer Affairs in 2006 in its discussion paper, Ministry of Consumer Affairs “Review of the Redress and Enforcement Provisions of Consumer Protection Law: International Comparison Discussion Paper” (2006) (Discussion Paper) in which the Fair Trading Act 1986 was compared to its international counterparts. For example, unlike in New South Wales there is no ability for a court (or any other body) to ban recidivist traders (Fair Trading Act 1987, ss 66A and 66B (NSW), see Discussion Paper at 40-43). The Discussion Paper made a number of recommendations in respect to changes in the Fair Trading Act 1986; however, no recommendations were made in respect to the CGA. Other areas of consumer law are also urgently in need of reform, eg the cooling off period under s 7 of the Door to Door Sales Act 1967 only applies if the seller has extended credit to the consumer. This was acceptable when most people were unable to
which is of a substantial character, the consumer can choose to either reject the goods and receive the
purchase price back or obtain damages in compensation for the reduction in the value of the goods.\(^2\)
The CGA appears to match almost perfectly consumers’ expectations and needs: “most consumers
want to ‘solve the problem’ rather than assert legal rights. They want a refund, repair or replacement.”\(^3\)
Furthermore, the CGA provides that if a defective good or service causes damage to other property, the
cost of this consequential damage can be recovered from the supplier and manufacturer.\(^4\)

Yet, the presence of law on the statute books does not mean that traders’\(^5\) adhere to the law, no matter
how simple, reasonable and clear it is. If a trader refuses to repair or replace faulty goods, the ability to
enforce the CGA becomes of vital importance. The Commerce Commission is unable to take actions
under the CGA, in contrast to its ability to take actions on behalf of consumers under the Fair Trading
Act 1986 and the Credit Contracts and Consumer Finance Act 2003.\(^6\) No one but an aggrieved
consumer is able to bring an action under the CGA; thus the burden of enforcing the CGA falls entirely
upon consumers.\(^7\)

Few consumers resort to bringing actions in the courts for breaches of the CGA because of the
considerable cost, time and emotional investment to the consumer.\(^8\) Fortunately the courts are not
consumers’ sole recourse to justice when traders refuse to honour their obligations. Consumers can use
the Disputes Tribunal to hear most disputes arising under the CGA, albeit the Disputes Tribunal is
limited to hearing claims up to $15,000 or $20,000 if both parties agree.\(^9\) In addition, there are many
other bodies that deal with specific issues which arise under the CGA.\(^10\) Consumers are certainly in
need of entities such as the Disputes Tribunal. It has been estimated that one in six consumer
transactions results in a justifiable complaint\(^11\) — problems associated with substandard goods and
services are therefore not isolated and rare occurrences.

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\(^2\) Consumer Guarantees Act 1993, s 18(3).
\(^3\) Iain Ramsay “Consumer Redress and Access to Justice” in CEF Rickett and TGW Telfer (eds) International Perspectives on
\(^4\) Consumer Guarantees Act 1993, ss 18(4) and 27(1)(b).
\(^5\) The term “traders” is used to refer to both suppliers and manufacturers.
\(^6\) Fair Trading Act 1986, ss 41(1) and 43(1), and ss 90 and 112 of the Credit Contracts and Consumer Finance Act 2003.
\(^7\) Thus groups which represent consumers, such as the Citizen’s Advice Bureau and Consumer NZ are unable to take actions
on behalf of consumers. The one exception to the exclusion of the Commerce Commission from enforcing the CGA is when
a trader purports to contract out of any provision of the CGA, in which case that trader commits an offence against s 13(i) of
\(^8\) Kate Tokeley “Class Actions for New Zealand Consumers” in Christian Twigg-Flesner, Deborah Parry, Geraint Howells,
\(^9\) Disputes Tribunals Act 1988, ss 10(1A)(b) and 13(2).
\(^10\) Those bodies include the Motor Vehicle Disputes Tribunal, The Banking Ombudsmen, The Insurance and Savings
Ombudsman, and the Lawyers and Conveyancers Disciplinary Tribunal.
\(^11\) Consumer and Corporate Affairs Canada “The Marketplace in Transition: Changing Roles for Consumers, Business and
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The Ministry of Consumer Affairs is currently undertaking the ambitious project of simplifying consumer law into “one law, one door”. The project proposes to merge all consumer law into “one principle-based piece of consumer-supplier legislation”. Part of the project is to treat all transactions between buyers and sellers equally, thus online auctions, which currently fall outside the scope of the CGA, would be caught. Originally the project also aimed to replace the current myriad of “complaints and disputes tribunals, ombudsmen and so on that currently serve to confuse the applicant while adding many layers of cost to the taxpayer” with a simpler system. The concern over the complaints procedure is not new. Since 2007 the Ministry of Justice and the Law Commission have been working on a Tribunal Reform programme; one of the programme’s aims is to ensure that tribunals are accessible to all users. However, it appears that the Minister has rethought the idea of radically altering the dispute resolution bodies. Now the aim is to have the “one door” as a portal, the first place where consumers can go to get advice on “where to from here.” Thus existing structures such as the Disputes Tribunal will remain in place.

Simplification of consumer law by itself is unlikely, however, to solve many of the problems consumers face in respect to faulty goods. Currently the CGA provides law that is simple and clear (indeed, it is difficult to think of a simpler and more workable piece of legislation than the CGA) and the Disputes Tribunal operates as a low cost resolution service for many of the disputes arising under the Act. Yet, despite the simplicity and clarity of the law and ability to take complaints to the Disputes Tribunal, many consumers do not avail themselves of their legal rights.

13 Ibid. Those Acts which will be merged will be the Fair Trading Act 1986, Consumer Guarantees Act 1993, Door to Door Sales Act 1967, Lay-by Sales Act 1971, Unsolicited Goods and Services Act 1975, Auctioneers Act 1928, Weights and Measures Act 1987. The impetus for the project appears to be the Australian project of consolidating and updating Australia’s consumer law. The Trade Practices Amendment (Australian Consumer Law) Bill 2009 is the first of two bills to go before the Commonwealth Parliament, which would create a single national consumer law rather than laws which vary between states. The Ministerial Council on Consumer Affairs (MCCA) which consists of the Commonwealth, State, Territory and New Zealand ministers responsible for fair trading, consumer protection and credit laws has been involved in the Australian reform, see eg An Australian Consumer Law: Fair markets — Confident Consumers Commonwealth Copyright Administration, Attorney-General’s Department (17 February 2009) at 5-6.
14 Claire Trevett “Govt Bid to Simplify Online Auction Rules” The New Zealand Herald (New Zealand, 18 March, 2009).
16 “Tribunal Reform Programme” Office of the Minister for Courts, Cabinet Policy Committee (October 2007) at [6].
17 Ibid. The other aims are that the Ministry of Justice’s programme: “ensures government obtains value for money from its substantial investment in tribunals; ensures that tribunal users and the general public are able to have confidence in the resolution of disputes within tribunals; identifies the types of disputes (including types of issue, volumes, level and type of expertise required, and other factors) for which a tribunal should be considered; and ensures tribunals that are established operate in a consistent manner”. See also a report on users’ perceptions of tribunals in Research New Zealand Tribunal Reform Programme (prepared for the Ministry of Justice 2008).
18 Hon Heather Roy, Minister of Consumer Affairs “‘One Law — One Door’ For Consumer Transactions” (speech to the Combined Ministry of Consumer Affairs Stakeholders Meeting, Ministry of Economic Development, Bowen St, Wellington, 30 November 2009).
19 Of course, there are some grey areas in the CGA, eg in s 12(1) the spare parts and repairs guarantee provides that “[s]ubject to sections 41 and 42 of this Act, where goods are first supplied to a consumer in New Zealand (whether or not that supply is the first-ever supply of the goods), there is a guarantee that the manufacturer will take reasonable action to ensure that facilities for repair of the goods and supply of parts for the goods are reasonably available for a reasonable period after the goods are supplied.” The term “reasonable” and its variants are used on three occasions in the one sentence.
Notwithstanding the width of consumer law which is being dealt with in the “one law, one door” process, this article concentrates upon the CGA and its enforcement. This article argues that the CGA itself and the Disputes Tribunal are in need of much work to align themselves with consumer expectations.

2 THE CONSUMER GUARANTEES ACT

2.1 The Benefit of the Consumer Guarantees Act to Consumers

The rise in consumer law is of relatively recent origin. The CGA represents a vast improvement on the Sale of Goods Act 1908, which governed the sale of goods prior to the CGA. The United Kingdom’s Sale of Goods Act 1893 — upon which New Zealand’s Sale of Goods Act 1908 was modelled — provided little assistance to consumers. Services were excluded from its protection and neither manufacturers nor retailers were obliged to supply goods and services, which met minimum standards of “quality, composition, performance or durability.”

To be sure, goods had to be reasonably fit for purpose and of merchantable quality, but such standards were low. Moreover, the consumer had to satisfy a number of requirements before any benefit could be obtained under the Sale of Goods Act.

In addition, exclusion clauses were often used to prevent its operation. Even those consumers who knew enough not to agree to waive any of their rights had no choice for certain goods where exclusion clauses were universally imposed.

As the Australian Attorney-General proclaimed in 1973 when introducing the Trade Practices Bill — which became the Trade Practices Act 1974 (Cth) from which New Zealand’s Fair Trading Act 1986 was derived:

“In consumer transactions unfair practices are widespread. The existing law is still founded on the principle known as caveat emptor – meaning ‘let the buyer beware’ . . . The untrained consumer is no match for the businessman who attempts to persuade the consumer to buy goods or services on terms and conditions suitable to the vendor. The consumer needs protection by the law and this Bill will provide such protection.”

20 Great Britain, Committee on Consumer Protection Final Report of the Committee on Consumer Protection, Cmd 1781 (1962) [22]. There were, however, some limitations surrounding safety, health and hygiene.

21 The House of Lords in Hardwick Game Farm v Suffolk Agricultural and Poultry Producers Association [1968] 3 WLR 110 held that a groundnut extraction imported from Brazil that was contaminated and killed many of the plaintiff’s turkeys, was of merchantable quality as it was suitable for a range of uses. Although the groundnuts were unsuitable for poultry feed, they could be used for cattle feed and the purchasers of the groundnuts for cattle feed were willing to pay full market value for them, per Lord Reid at 124 and 126. However, as Lord Pearce observed in his dissenting judgment (at 170): “One could not say that a new carpet which happens to have a hole in it or a car with its wings buckled are of no use for their normal purposes and hence would be unsaleable under that description. They would no doubt, if their price was reduced, find a ready market. In return for a substantial abatement of price a purchaser is ready to put up with serious defects, or use part of the price reduction in having the defects remedied. In several classes of goods there is a regular retail market for ‘seconds,’ that is, goods which are not good enough in the manufacturer’s or retailer’s view to fulfill an order and are therefore sold off at a cheaper price. It would be wrong to say that ‘seconds’ are necessarily merchantable.”

22 See, for example, Great Britain, Committee on Consumer Protection Final Report of the Committee on Consumer Protection Cmnd 1781 (1962) [22].

23 Ibid, at [396].

24 Ibid, at [397].

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While the CGA was modelled directly upon the Saskatchewan Consumer Products Warranties Act 1977, rather than the Trade Practices Act 1974 (Cth), the Attorney-General’s comments apply equally to the CGA. The CGA was designed to remove the caveat emptor rule in respect of consumer transactions. Consumers’ rights cannot be contracted away: indeed, it is an offence to attempt to contract out of the CGA. The rights that the CGA grants are clear: for example, goods must be of an acceptable quality. To be of acceptable quality the goods must be acceptable in appearance and finish, free from minor defects, safe and durable. Importantly the guarantee of acceptable quality is owed by both the supplier and manufacturer: if the good has a defect the supplier cannot tell the consumer that it is the manufacturer’s problem and refuse to deal with it. The supplier must remedy the defect. The CGA applies also to services.

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26 See the comparison section in each section of the Consumer Guarantees Act 1993, eg s 7 “meaning of acceptable quality” is modeled on ss 2(a) and 34 of the Saskatchewan Consumer Products Warranties Act 1977.

27 The Sale of Goods Act 1908 is still in force and is relevant to the sale of goods which are not caught by the CGA, eg the sale of goods which are resupplied in trade, see the definition of “consumer” in s 2(1) of the Consumer Guarantees Act 1993. By contrast see the Minister of Consumer Affair’s statement made in a speech in January 2009: “If there were a strong case for comprehensive legislation to protect customers then, logically, the first enactment would have to be that of a Bill called something like the ‘Repeal of Caveat Emptor Act 2009’. ‘Let The Buyer Beware’ is so deeply enshrined in commercial common law that this would now be unimaginable.” Hon Heather Roy, Minister of Consumer Affairs “Less is More — Can Legislation Improve Consumer Confidence?” (speech to the Marlborough Chamber of Commerce, Marlborough, 21 January 2009).

28 Consumer Guarantees Act 1993, s 43(1). The prohibition on contracting out is not absolute, see, for example the CGA can be contracted out of when the goods are acquired for the purposes of a business and certain conditions are met (s 43(2)).

29 Ibid, s 43(4) “Every supplier and every manufacturer commits an offence against s 13(i) of the Fair Trading Act 1986 who purports to contract out of any provision of this Act other than in accordance with subsection (2) or section 43A.”

30 Ibid, s 6. Other guarantees include guarantees as to title (s 5), guarantees as to fitness for particular purpose (s 8), guarantee that goods comply with description (s 9), guarantee that goods comply with sample (s 10), guarantee as to price (s 11).

31 Ibid, ss 7(1)(a)-(e), other relevant factors in determining whether the goods are acceptable include the nature of the goods, the price, any statements made about the goods on any packaging, representations made about the goods by suppliers or manufacturers and other relevant circumstances. Note s 7(4) provides, however, that the goods will not fail to comply with the guarantee of acceptable quality if they have been used in a way which is inconsistent with the extent of use that a reasonable consumer would have expected to obtain from the goods and the goods would have complied with the guarantee of acceptable quality if they had not been used in that way (eg a domestic washing machine used by an industrial laundry business which is operated 24 hours per day).

32 Ibid, s 17 provides that the supplier is not liable if the goods fail to comply with the guarantee of acceptable quality if that representation had not been made”.

33 The CGA also provides that the manufacturer must take “reasonable action to ensure that facilities for repair of the goods and supply of parts for the goods are reasonably available for a reasonable period after the goods are so supplied.” Ibid, s 12(1). Thus not only must the goods work when they were purchased, the consumer is entitled to be able to get the goods fixed at a later date. Section s 42(1), however, provides a defence, “where reasonable action is taken to notify the consumer who first acquires the goods from a supplier in New Zealand, at or before the time the goods are supplied, that the manufacturer does not undertake that repair facilities and parts will be available for those goods.”

34 Guarantee as to reasonable care and skill (s 28), fitness for particular purpose (s29), time of completion (s 30) and price (s 31).
2.2 The Consumer Guarantees Act in Practice

The Ministry of Consumer Affairs’ web site currently contains a word of advice page which provides that: 35

“Under the Consumer Guarantees Act, when you buy something and then discover it is not of acceptable quality usually you have to take it back and let the shop decide whether to repair it, replace it or give you a refund. But when the problem is serious and/or makes the goods unsafe you don’t have to accept a repair. You can choose to get a refund or replacement, or if you want to keep the goods you can get compensation for the loss of value.”

However, not all traders repair, replace or refund defective goods when requested to by consumers. For example, in the recent Ministry of Consumer Affairs National Consumer Survey 2009 respondents were asked about the reaction of traders when respondents had approached them with a problem relating to a good or service they had purchased. Of those who approached a car dealer, 40 per cent stated that the dealer would not co-operate, and 31 per cent found that the dealer would not co-operate over the claim on a guarantee or warranty. 36 Of those who had purchased a new product, which had broken or failed soon after purchase, 11 per cent found that the trader would not co-operate. 37 So common are problems with goods that many consumers do not even bother approaching traders to rectify problems. The Ministry of Consumer Affairs’s earlier 2005 National Consumer Survey on Awareness and Experience of Consumer Legislation noted that the many “adverse encounters [that consumers experienced were] . . . considered economically minor and are readily passed over.” 38

Those “economically minor” adverse encounters — problems with goods where the value of them does not justify complaining to a trader or taking further action — have consequences when they are cumulative: 39

“Little injustices are the greater part of everyday living in a consumption society, and, of course, people’s attitudes towards the law are formed by their encounters with the law or by the absence of encounters when the need arises. If there is no access for those things that matter, then the law becomes irrelevant to its citizens and, something else, alternatives to the law become all they have.”

And those “economically adverse” encounters, through the provision of substandard goods or services, are likely to affect large numbers of people. Public policy cannot allow a person to cause a small amount of loss to a large number of people: 40

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35 See, for example, Ministry of Consumer Affairs “What to do with unsafe products” (7 September 2009) <www.consumeraffairs.govt.nz> which simply states that: “[u]nder the Consumer Guarantees Act, when you buy something and then discover it is not of acceptable quality usually you have to take it back and let the shop decide whether to repair it, replace it or give you a refund. But when the problem is serious and/or makes the goods unsafe you don’t have to accept a repair. You can choose to get a refund or replacement, or if you want to keep the goods you can get compensation for the loss of value.” There is no indication that a trader will actually do any of the things stated.

36 Colmar Brunton National Consumer Survey 2009 (prepared for the Ministry of Consumer Affairs, 2009) at 44.

37 Ibid.


40 Walter Mondale, Vice President of the United States “Address to the Second Judicial Circuit Conference” (10 September 1977) quoted by Kate Tokeley “Class Actions for New Zealand Consumers” in Christian Twigg-Flesner, Deborah Parry,
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“Nothing is more destructive to a sense of justice that the widespread belief that it is much more risky for an ordinary citizen to take $5 from one person at the point of a gun than it is for a corporation to take $5 each from a million customers at the point of a pen.”

Indeed, studies in New Zealand, England and Canada have shown that the most common injustices faced by people are consumer issues and money problems. The 2005 National Consumer Survey on Awareness and Experience of Consumer Legislation noted that consumers’ experience of adverse encounters over consumer transactions were common.

Why then do people not complain to a trader and insist upon their rights under the CGA when they have purchased a defective good or service? In the National Consumer Survey 2009 the 41 per cent of respondents who said that they simply “just put up” with a problem were asked why they had made that decision. The three main reasons were: could not be bothered (37 per cent); only involved a small amount/cheap item (14 per cent) and not a large enough issue (14 per cent). Quite simply, consumers consume or experience so many different products and services that it is not worth the consumer complaining about each faulty or poorly performing one. Moreover, a primary reason for not complaining to a trader is due to the socio-economic status of the consumer: the lower the socio-economic status of the consumer, the less likely the consumer is to complain.

Even if consumers do complain to a supplier and try to enforce their rights directly under the CGA, as we have seen complaints are not always successful. It is not uncommon for traders to refuse to comply with the requirements of the CGA. The following explanation by a Noel Leeming salesperson to a consumer of why that consumer should purchase an extended warranty demonstrates clearly the attitude of some traders to complaints that are covered by the CGA.


National Research Bureau National Consumer Survey on Awareness and Experience of Consumer Legislation (prepared for the Ministry of Consumer Affairs, 2005) at 12. The survey size was large, 1000 people. The survey has been repeated with similar questions in Colmar Brunton National Consumer Survey 2009 (prepared for the Ministry of Consumer Affairs, 2009). The latter survey, although the results are similar to the 2005 one, the 2009 survey is careful not to say that adverse encounters over consumer transactions are common, despite almost two thirds (63 per cent) experiencing a problem with a product or service within the past two years (at 7).

Colmar Brunton National Consumer Survey 2009 (prepared for the Ministry of Consumer Affairs, 2009) at 46. The other responses were: I felt there was no other option (11 per cent); time factor/too busy to go back (10 per cent); the problem was a mistake on my part (8 per cent); I felt I would not get any satisfaction (6 per cent); used strategy of not using service/not going back there again (6 per cent); misled by information (5 per cent); couldn’t re-contact/don’t know who to contact (5 per cent); didn’t want to create a fuss (4 per cent); it costs more/too much to pursue (2 per cent); have yet to take action (2 per cent); and don’t want to deal with a big company (1 per cent).


Iain Ramsay “Consumer Redress and Access to Justice” in CEF Rickett and TGW Telfer (eds) International Perspectives on Consumers’ Access to Justice (Cambridge University Press, Cambridge, 2003) 17 at 28. Cf in the National Consumer Survey 2009 of those who just put up with a problem because they felt they would not get any satisfaction, those who had the greatest knowledge of consumer rights answered gave this response (15 per cent) compared to 4 per cent of those in the low or medium knowledge groups) at 46), thus indicating that those in the high knowledge group knew there was little point in approaching a trader as the trader would refuse to do anything.

An extended warranty is a warranty that extends beyond the manufacturer’s standard warranty, however, unlike the standard warranty, the consumer must pay extra for it. Extended warranties typically last for one year to anywhere up to five years, depending on the goods. While some extended warranties do offer valuable benefits to consumers, eg providing protection...
“If you think you are using it for private purposes, strictly private purposes, then you are covered for the period that is reasonable for a laptop to last for, which I think is about three years. But the manufacturer isn’t going to say ‘OK, we’re going to cover it because of the Consumers Guarantees Act’. To get that Consumers Guarantees Act to work for you you’ve actually got to file a case with a Arbitration Tribunal [sic], and they charge you $80 for that and then you’ve got to take time off work and it could take days . . .

“The standard warranty is just what the manufacturer provides you with which is 12 months. And under the . . . [CGA] you’re covered for longer than that, only the manufacturer won’t cover you, they’ll contest it, OK? And so you have to battle it out in court. If you don’t want the hassles, you get one of these warranties because you don’t have to go through that sort of pain and time trying to sort out something that that shouldn’t take time and energy and money . . .

“The Consumers Guarantees Act is something that does exist to protect those people who want to go through the hassles. If you want to avoid hassles just get the extended warranty. OK, it does cost but it’s a lot, lot easier, far less pain, far less pain. Because I’ve seen people going through that procedure to get their laptop or whatever covered under the Consumers Guarantees Act and they’ve gone through so much hassle and strife and lost sleep over it.”

For those consumers who do wish to exercise their rights under the CGA it is not viable for them to go to the courts (and thus engage lawyers) to sort their disputes out, “[f]or ordinary causes our contentious system has great merit as a means of getting at the truth. But it is a denial of justice in small causes to drive litigants to employ lawyers”. Forunately for consumers, the majority of consumer disputes do not require consumers to embark on expensive and uncertain legal action through the courts. Instead consumers can go to the Disputes Tribunal.

3 THE DISPUTES TRIBUNAL

3.1 The Advantages of the Disputes Tribunal

In New Zealand, the first point of call for a consumer in the judicial system (once an approach to a trader has been unsuccessful) will normally be the Disputes Tribunal or another Tribunal or decision-making body, rather than the courts. The Disputes Tribunal, with its generalist jurisdiction, is popular. In the year ending 30 June 2008, the Disputes Tribunal heard 23,318 claims.

The Disputes Tribunal’s key advantage to the courts is its low cost. The minimum a complainant must pay is $30, the

beyond that provided in the CGA, such as covering all damage no matter how caused, eg accidentally dropping a laptop, most extended warranties do no more than cover problems which are covered by the CGA.


49 There are other avenues for consumers depending on the nature and value of the dispute, eg the Motor Vehicle Disputes Tribunal can hear claims up to $50,000.

50 The Disputes Tribunal is able to hear most disputes, the exceptions are: disputes involving the recovery of land or any estate or interest in any land, the title to any land, or any estate or interest in any land, or to any franchise is in question, the entitlement of any person under a will, or settlement, or on any intestacy (including a partial intestacy); or goodwill; or any chose in action; or any trade secret or other intellectual property: s 11(5).

51 Ministry of Justice, Annual Report 1 July 2007-30 June 2008 (Wellington, 2008) at 81. Not all of the claims heard by the Disputes Tribunal concern matters arising under the CGA.
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maximum $100.\textsuperscript{52} Taking a case through the courts, in contrast, is a lot more expensive and there is no certainty for the consumer as to the final cost of the action.\textsuperscript{53}

Another feature of the Disputes Tribunal, unlike the courts, is that it attempts not to favour the “haves”,\textsuperscript{54} and “repeat players”.\textsuperscript{55} The haves and repeat players are people (including non-natural persons such as companies) who use the courts regularly and are better at playing the “litigation game”.\textsuperscript{56} The haves and repeat players have better knowledge of the court system, are able to manipulate the rules to suit themselves and they normally have deeper pockets.\textsuperscript{57} New Zealand, in contrast to the United States, where the courts have been admonished openly for any signs of compromise or discretion,\textsuperscript{58} has structured the Disputes Tribunal in an attempt to remove the bias against the “have nots”. The Disputes Tribunal with its banishment of lawyers\textsuperscript{59} is intent on providing justice for all. The Referees in the Disputes Tribunal are generally aware of the haves and repeat players, and will attempt to mitigate their influence. For example, by distributing claims between Disputes Tribunals thus ensuring that Referees do not become overly familiar with such litigants.\textsuperscript{60} Referees also go to some lengths to explain procedures to the have nots and the merits of the dispute at hand are focused upon.\textsuperscript{61} Indeed, in a recent debate in Parliament over the Disputes Tribunals Amendment Bill it was observed that, “[i]n the disputes tribunal people can rock up with very low levels of skill, business knowledge, or eloquence and put their case in the best way they can, and the referees have the flexibility to work with them to get justice.”\textsuperscript{62} It is not surprising, therefore, that a claim has been made that the Disputes Tribunal provides, “readily accessible, inexpensive, informal, non-legal, and fair resolution of small claims.”\textsuperscript{63}

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\item \textsuperscript{52} Disputes Tribunal Rules 1989, Rule 5(1)(a) $30: for claims under than $1,000; (b) $50, for claims between $1,000 and $5,000; (c) $100, claims for $5,000 or more.
\item \textsuperscript{53} See, for example District Court Fees Regulations 2009, Schedule Fees Payable in Respect of Proceedings in District Courts, eg filing of the original document commencing any proceeding is $140, the filing of subsequent documents also incur costs and the hearing fee for each half-day or part of a half-day, after the first half-day is $750. Plus the consumer will normally have to engage and pay a lawyer.
\item \textsuperscript{54} See, generally, Marc Galanter “Why the ‘Haves’ Come Out Ahead: Speculations on the Limits of Legal Change” (1974) 9 Law and Society Review 95 who explains that the ‘haves’ are more likely to be repeat players.
\item \textsuperscript{55} Peter Spiller \textit{The Disputes Tribunals of New Zealand} (2nd ed, Brookers, Wellington, 2003) at 76. At the time of writing his book, Spiller was the Principal Disputes Referee for the Disputes Tribunal. See also Alex Frame “Fundamental Elements of the Small Claims Tribunal System in New Zealand” in Christopher Whelan (ed) \textit{Small Claims Courts: A Comparative Study} (Clarendon Press, Oxford, 1990) at 85-86.
\item \textsuperscript{56} Marc Galanter “Why the ‘Haves’ Come Out Ahead: Speculations on the Limits of Legal Change” (1974) 9 Law and Society Review 95 at 98.
\item \textsuperscript{57} In particular, see ibid, at 98-101.
\item \textsuperscript{58} See ibid, at 147 where Galanter quotes Justice Frankfurter in \textit{Terminiello v Chicago} 337 US 1, 11 (1948) “[the Courts] must not sit like a kadi under a tree dispensing justice according to conditions of individual expediency.”
\item \textsuperscript{59} Lawyers are not permitted to appear before the Disputes Tribunal unless the lawyer is a party to a dispute which is being heard or a party is a company and the person proposed is the majority shareholder of the company, Disputes Tribunal Act 1988, s 38(7) See also Peter Spiller \textit{The Disputes Tribunals of New Zealand} (2nd ed, Brookers, Wellington, 2003) at 53.
\item \textsuperscript{60} Peter Spiller \textit{The Disputes Tribunals of New Zealand} (2nd ed, Brookers, Wellington, 2003) at 76.
\item \textsuperscript{61} Ibid.
\item \textsuperscript{62} Hon Amy Adams (22 July 2009) 655 NZPD 5063.
\end{itemize}
3.2 Shortcomings of the Disputes Tribunal

Notwithstanding the advantages of the Disputes Tribunal for consumers, it suffers from a number of shortcomings. As we shall see, the possible steps of educating the public both about their rights under the CGA and the operation of the Disputes Tribunal, while important, will not by themselves fix the problems of consumers failing to go to the Disputes Tribunal when dealing with issues that arise under the CGA.

3.2.1 Consumers lack of knowledge of the CGA and the Disputes Tribunal

Consumers must realise that they have rights under the CGA and they must know of the existence of the Disputes Tribunal if the trader refuses to comply with their obligations under the CGA. Consumers’ knowledge of their rights is low. In the Ministry of Consumer Affairs’ National Consumer Survey 2009 only 22 per cent gave the correct answer to the simple true or false question, “If your fridge breaks down a month after the manufacturer’s 12 month warranty has run out, the store still has to repair it free of charge”. Of five questions related to rights under the CGA, the majority of people surveyed were only able to answer two out of five correctly. Those respondents who were able to answer four of the five questions correctly — the “high knowledge group” — were more likely to earn over $60,000 per year, have completed education beyond secondary level and be male.

The question, “Suppose you were in a dispute with a supplier and neither of you were willing to back down. Can you name the legal service that would hear the dispute and rule on it?” found only 53 per cent of the respondents were able to name the Disputes Tribunal. Nearly one third (31 per cent) of consumers had no idea who would deal with a dispute. Also concerning was that nearly half of the respondents of Maori and Pacific ethnicity did not know the name of the relevant legal body. Little has changed over the years. A 1992 Consumer Knowledge Survey found that those consumers least aware of the ability to use the Disputes Tribunal as a way to sort out a dispute over a consumer matter “tended to be Maori or Pacific people, those living on low incomes, and those with no formal qualifications.”

64 Colmar Brunton National Consumer Survey 2009 (prepared for the Ministry of Consumer Affairs, 2009) at 17 — the answer was “True”. Although 84 per cent of surveyed people correctly answered the question, “If you buy something that’s on sale and at sale price, then you find it’s faulty — the shopkeeper has to replace, refund or repair it.” — the answer was “True”.


66 Ibid, at 29. Note: references to the small claims courts were treated as though they were references to the Disputes Tribunal.

67 Ibid, at 10. See also Peter Spiller The Disputes Tribunals of New Zealand (2nd ed, Brookers, Wellington, 2003) at 43, quoting.
3.2.2 Disputes Tribunal is not “non-legal”

The description of the Disputes Tribunal being a place that is “non-legal” is only partly true. Three-quarters of the Referees are trained lawyers, and despite lawyers not being permitted to appear before the Tribunal, in a 1986 review of the Small Claims Tribunals — the predecessor of the Disputes Tribunal — 25 per cent of claimants and 21 per cent of respondents had taken the advice of a lawyer prior to attending a hearing. Those armed with legal advice will often be in a better position than those without such advice. In addition, parties can provide submissions written by lawyers. As one consumer has complained, “(the trader’s) submissions had been prepared by their lawyer and therefore were in a more formal manner.” That particular consumer believed the assistance of lawyers gave the other side an unfair advantage.

On the other hand, as the Explanatory Note for the Disputes Amendment Bill 2009 noted, “Referees’ decisions are not necessarily based on the law but rather the substantial merits and justice of the case.” Section 18 of the Disputes Tribunals Act 1988 provides that:

1. The Tribunal shall, as regards every claim within its jurisdiction, assess whether, in all the circumstances, it is appropriate for the Tribunal to assist the parties to negotiate an agreed settlement in relation to the claim.
2. Without limiting the generality of subsection (1) of this section, in making an assessment under that subsection, the Tribunal shall have regard to any factors that, in the Tribunal’s opinion, are likely to impair the ability of either or both of the parties to negotiate an agreed settlement.
3. . . .
4. In approving an agreed settlement pursuant to subsection (3) of this section, a Tribunal shall not be bound by the monetary restrictions provided for by subsections (4) to (7) of section 19 of this Act.

Prue Oxley Small Claims Tribunal Evaluation. Volume 1: Discussion Paper (prepared for the Department of Justice, 1986) at 11: “women, the young and the elderly, those in low socio-economic groups, and Maori and Pacific Islanders are under represented amongst those who are aware of small claims tribunals.”

Cheryl Britton “Book Review: The Disputes Tribunals of New Zealand (2nd ed) by P Spiller, Wellington, Brookers, 2003” (2003) 11 Waikato Law Review 168, where the Disputes Tribunal was described as providing “readily accessible, inexpensive, informal, non-legal, and fair resolution of small claims.”

In 2009 over three-quarters of Referees were trained lawyers: Peter Spiller “Disputes Tribunals and Access to Justice” (2009) 722 Law Talk 28 (2 February 2009).

Disputes Tribunals Act 1988, s 38(7), unless the lawyer is a party to the dispute (s 38(7)(d)) or a party is a company and the person proposed is the majority shareholder of the company (s 38(7)(e)).


See Ibid, at 133 where in relation to an insurance dispute before the Disputes Tribunal the representative was well versed in the law and referred to relevant case law on point.

One Referee has commented on the number of submissions being prepared by lawyers, Ministry of Consumer Affairs Review of the Operation of the Disputes Tribunals From a Consumer Perspective (1994) at 81. And see Peter Spiller The Disputes Tribunals of New Zealand (2nd ed, Brookers, Wellington, 2003) at 52, where Spiller argues that the decision in Tannahill v Frank Millar & Co DC Porirua DT16894, 27 March 1993, that the prohibition on legal representation extended to a written opinion of the applicant’s solicitors was incorrect. Spiller argues that the prohibition on lawyers only extends to their physical presence at the proceedings.


Ibid.

Disputes Tribunals Amendment Bill 2009 (22-1) (explanatory note) at 4.
(5) Where—
   (a) It appears to the Tribunal that it would not be appropriate for it to assist the parties to negotiate an agreed settlement in relation to the claim; or
   (b) The parties are unable to reach an agreed settlement in relation to the claim; or
   (c) The Tribunal does not approve an agreed settlement reached by the parties in relation to the claim,—

   the Tribunal shall proceed to determine the dispute.

(6) The Tribunal shall determine the dispute according to the substantial merits and justice of the case, and in doing so shall have regard to the law but shall not be bound to give effect to strict legal rights or obligations or to legal forms or technicalities.

(7) Without limiting the generality of subsection (6) of this section, a Tribunal may, in respect of any agreement or document that directly or indirectly bears upon the dispute between the parties, disregard any provision in that agreement or document that excludes or limits—
   (a) Conditions, warranties, or undertakings; or
   (b) Any right, duty, liability, or remedy that would arise or accrue in the circumstances of the dispute if there were no such exclusion or limitation.

Thus the role of the Disputes Tribunal is not one of adjudicating solely; it is also one of attempting where possible to help the parties negotiate an agreed settlement. Moreover, the Disputes Tribunal is permitted not to give effect to strict legal rights in determining disputes.

3.2.3 Consumers inability to write complaints

A consumer must put his or her complaint in writing before the Disputes Tribunal can hear it. Yet a large proportion of New Zealanders are functionally illiterate. Thus many consumers are unable to prepare the documentation required. The Disputes Tribunals Act 1988 does provide that Registrars “shall ensure that assistance is reasonably available, either from that Registrar himself or herself, or from that Registrar’s staff, to any person who seeks it in completing the forms required by this Act.”

However, such assistance depends on the competency and willingness of Registrars and their staff. There is anecdotal evidence that some Registrars and their staff, far from helping people, do not provide even basic information such as who can help fill in the forms.

80 Ministry of Consumer Affairs Consumer Credit Law Review, Part 5: Redress and Enforcement (2000) at 2 and 21 where it was estimated that 45 per cent of adult New Zealanders were functionally illiterate. “A person is functionally illiterate who cannot engage in all those activities in which literacy is required for effective functioning of his group and community and also for enabling him to continue to use reading, writing and calculation for his own and the community’s development.” United Nations, Department of International Economic and Social Affairs, Statistical Office Handbook of Household Surveys (1984) [15.63]. Thus a functionally illiterate person can read (and possibly write) simple sentences, but is unable to understand more complicated things such as newspaper articles and job advertisements and would struggle to fill in a form which required an explanation of a complaint against a trader.

81 Disputes Tribunals Act, s 55.

82 Peter Spiller The Disputes Tribunals of New Zealand (2nd ed, Brookers, Wellington, 2003) at 61.

83 Hon Rahui Katene (1 April 2009) 653 NZPD 2311, Disputes Tribunals Amendment Bill — First Reading. “Given that there are forms to fill out [for the Disputes Tribunal], it would be helpful to have someone to explain the procedures and what needs to go where on the forms. This is where organisations like community law centres come in. We would like to see the court staff routinely referring parties to community law centres for help with this. Although this is done now on an ad hoc basis, it would be a positive move for it to be a requirement where appropriate.”
3.2.4 The cost of accessing the Disputes Tribunal
The Disputes Tribunal is not cost free. 84 The minimum a complainant must pay is $30, yet $30 could represent a substantial portion of a family’s weekly food budget. 85 As the Citizen’s Advice Bureau has argued: 86

“In our experience many people with very legitimate cases, such as being ripped off by a tradesperson or retailer, have not been able to get things put right because they cannot afford to go to [the Disputes Tribunal]. For example, if a person has saved to buy a $300 vacuum cleaner that breaks down, and the retailer won’t replace or repair it, the purchaser will then have to spend 10% of the cost of the vacuum cleaner to have their case heard in the Disputes Tribunal.”

Indeed, after the minimum cost of accessing the Disputes Tribunal was increased from $10 to $30, the numbers of claims made to the Disputes Tribunal is alleged to have decreased by ten per cent. 87

3.2.5 Damages are limited under the CGA
The damages obtainable under the CGA are limited to the reduction of value of the goods or the costs of repairing or replacing the goods. 88 The low level of remedies available for a breach of the CGA means that it is not worth a consumer individually pursuing a claim for a low dollar amount through the Disputes Tribunal and certainly not through the courts. 89 Indeed, the filing fee is non-refundable. Even if the consumer is successful he or she will be out of pocket for the filing fee. There is therefore simply no point in going to the Disputes Tribunal to recover the cost of a $30 electric jug which breaks after 12 months. A wise consumer would use the $30 filing fee to buy a new jug. 90

3.2.6 Difficulties in accessing the Disputes Tribunal
Some consumers find it difficult to access the Disputes Tribunal physically. The Disputes Tribunal operates standard business hours Monday to Friday, thus many people would be required to take time off work to attend a hearing and others would need to arrange child care. 91 In 1994 it was recommended that Disputes Tribunal hearings were held routinely at night and the weekends to

84 See Disputes Tribunal Rules 1989, r 5(1)(a), the minimum a complainant must pay is $30.
85 Hon Rahui Katene (1 April 2009) 653 NZPD 2311, Disputes Tribunals Amendment Bill — First Reading, noting that $100 filing fees was considered too expensive by clients of the Māori Legal Service.
86 “CAB Calls for Disputes Tribunal Fees to be Scraped” (20 December 2000) <www.cab.org.nz>.
88 Consumer Guarantees Act, s 27. The one exception is, if the defective good causes damage to other property, the cost of the consequential damage can be recovered from the supplier and manufacturer: ss 18(4) and 27(1)(b).
90 If a consumer was successful in the Disputes Tribunal and was awarded $30, being the cost of the defective jug, the consumer would still have no jug, as he or she would have spent $30 on the filing fee for the Disputes Tribunal.
facilitate better access to the Disputes Tribunal. In addition, travel is often required\textsuperscript{92} disadvantaging those without access to a car or public transport.\textsuperscript{93}

3.2.7 Support people are not allowed as of right

Support people are unable to attend the Disputes Tribunal as of right. Support people are only permitted to attend a hearing if the Registrar permits this.\textsuperscript{94} Yet some 72 per cent of Tribunal users surveyed in 2008 expected to be able to bring family or friends to support them.\textsuperscript{95} Even if a support person is permitted to attend the hearing, that person is not entitled to be heard at the hearing.\textsuperscript{96}

The ability for support people to attend and the right to speak being at the discretion of each Referee has a potential impact upon certain sectors of consumers: "for many Maori and Pacific Island people the use of speaking representatives and supporters is the norm".\textsuperscript{97}

Denying support people the right to speak for consumers often puts consumers at a distinct disadvantage, especially if English is their second language. If traders are incorporated they are able to choose which employee represents the trader at the hearing. As one consumer complainant has observed:\textsuperscript{98}

“[T]he person that dealt with me through my hearing (from Citizens Advice) wasn’t able to speak on behalf of myself. Yet the respondent (trader) had someone who could answer any questions, which I felt was between myself and the respondent who advised me with the insurance.”

\textsuperscript{92} The Disputes Tribunals appear to be allocated on a population basis, not a geographic one. Thus while there are eight Disputes Tribunals in the Manawatu/Wanganui region, there are only two on the West Coast.

\textsuperscript{93} There is provision where a party lives more than 100 kilometres away from the Disputes Tribunal concerned and is unable to appear in person to attend his or her local High Court. The District Court will arrange and the Department of Courts will pay for a telephone link to the Disputes Tribunal: s 60(2)(ga) Disputes Tribunals Act 1988. However, this use of technology is not favoured by Referees as they are unable to see the person speaking to their claim: Ministry of Consumer Affairs \textit{Review of the Operation of the Disputes Tribunals From a Consumer Perspective} (1994) at 74 and see generally Peter Spiller \textit{The Disputes Tribunals of New Zealand} (2nd ed, Brookers, Wellington, 2003) at 68.

\textsuperscript{94} Disputes Tribunal Act 1988, s 38(5). See also Peter Spiller \textit{The Disputes Tribunals of New Zealand} (2nd ed, Brookers, Wellington, 2003) at 56.

\textsuperscript{95} Research New Zealand \textit{Tribunal Reform Programme} (prepared for the Ministry of Justice 2008) at 77. Note for this question the Report did not differentiate between the different Tribunals, the Tribunals covered in the Report were the Disputes Tribunal, Tenancy Tribunal, Employment Relations Authority, Legal Aid Review Panel, Motor Vehicle Disputes Tribunal, Liquor Licensing Authority, Social Security Appeal Authority, Student Allowance Appeal Authority, Accident Compensation Appeal Authority, Weather Tight Homes Authority, and the Human Rights Review Tribunal. Despite the large number of tribunals of the 1000 people surveyed, 316 had used the Disputes Tribunal.

\textsuperscript{96} Disputes Tribunal Act 1988, s 38(6). “No person approved by a Tribunal under subsection (5) of this section shall be entitled to be heard at the hearing, and the Tribunal may exclude any such person from the hearing at any time.” See also Peter Spiller \textit{The Disputes Tribunals of New Zealand} (2nd ed, Brookers, Wellington, 2003) at 56. Although it appears that the Referee has the discretion to allow the support person to speak. See \textit{McElhinney v Day} DC Hamilton DT1128/99, 15 June 2000 where the appellant appealed against the Disputes Tribunal’s decision on the grounds of procedural unfairness because the successful party’s father who was there as a support person spoke (and who was a police officer). Burnett J found that there was no procedural unfairness. See Spiller at 56.

\textsuperscript{97} Ministry of Consumer Affairs \textit{Review of the Operation of the Disputes Tribunals From a Consumer Perspective} (1994) at 84, quoted by Peter Spiller \textit{The Disputes Tribunals of New Zealand} (2nd ed, Brookers, Wellington, 2003) at 57 and Spiller cites \textit{Potter v Neuhaus} DC Tauranga DT159/94, 7 October 1994 where an appeal was successful where the Referee permitted a supporter to give evidence of an accident that the supporter had not witnessed.

\textsuperscript{98} Ministry of Consumer Affairs \textit{Review of the Operation of the Disputes Tribunals From a Consumer Perspective} (1994) at 16.
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Of course, under s 18 of the Disputes Tribunal Act 1988, the Disputes Tribunals role is to assist parties to negotiate an agreed settlement to a claim. Thus if the negotiations take place outside of the Tribunal support people will be able to assist consumers. But not all disputes are solved this way, making the presence of support people and their ability to speak at the hearing necessary for some parties.

3.2.8 Many “wins” in the Disputes Tribunal are Pyrrhic victories
Consumers face difficulties in enforcing Disputes Tribunal’s orders. The Disputes Tribunals Act 1994 is clear that Referees’ orders are binding. Section 45(1) provides that “[e]very order made by a Tribunal requiring a party to pay money or deliver specific property to another party shall be deemed to be an order of the District Court of which the Tribunal is a division, and, subject to this section, may be enforced accordingly.” Section 48 goes on to provide that when a person seeks enforcement through the District Court that person is not required to pay a filing fee. Yet there is considerable concern over the enforceability of Disputes Tribunal orders in practice. In 1993 it was estimated that half of the Disputes Tribunals orders were not carried out. Indeed, the 1994 Ministry of Consumer Affairs’ Review of the Operation of the Disputes Tribunals From a Consumer Perspective recommended that “[r]eferees ascertain parties’ ability to pay at the end of the hearing and order immediate payment or payment by installment where appropriate.” This recommendation was not acted upon. The Law Commission in its 2004 Report on Delivering Justice to All noted that “[a]n area of concern that we do not consider here was the difficulty that many creditors encountered when trying to enforce a Disputes or Tenancy Tribunal order and recover their debt.” More recently, in a 2008 report on users’ perceptions of tribunals in New Zealand there was still dissatisfaction from users of the Disputes Tribunal as many were unable to get orders made in their favour enforced. As one user observed, “The [Disputes Tribunal] has no powers to enforce the decision. The legal judicial system enforcement of tribunal decision is fatally flawed.” Therefore, even if the consumer is successful in the Disputes Tribunal, to enforce a Disputes Tribunal order against a recalcitrant trader requires a consumer mount another hurdle and go to the District Court. Consumers know this, whether by reputation or practical experience. The knowledge of a consumer of the futility of the Disputes Tribunal will dissuade many from going to the Disputes Tribunal in the first place.

99 See Peter Spiller The Disputes Tribunals of New Zealand (2nd ed, Brookers, Wellington, 2003) at 109-111.
100 The filing fee is recoverable from the party against which the enforcement proceedings are taken: s 48 Disputes Tribunals Act 1988.
102 Ibid, at 111.
104 See Research New Zealand Tribunal Reform Programme (prepared for the Ministry of Justice 2008) at 115.
105 Ibid, at 75.
The Disputes Tribunals Act should be amended to require Referees to ask the parties about their means at the end of the hearing, and where appropriate order immediate payment or order installment payments where appropriate.\(^{107}\)

3.2.9 Consumers may not recover the actual amount they have lost

As the maximum that can be claimed in the Disputes Tribunal is $15,000 or $20,000 if both parties agree,\(^{108}\) consumers often reduce their claim to get their dispute heard.\(^{109}\) Thus even if a consumer is successful in the Disputes Tribunal, if the claim has been reduced to meet the Disputes Tribunal’s limit, the consumer will be out of pocket. However, as the limit was only raised recently,\(^{110}\) it is unlikely for the limit to be raised again in the near future.\(^{111}\)

3.2.10 Disputes Tribunal complainants are not representative of consumers

International studies of similar tribunal and courts, where lawyers have been barred, consistently show that the highest users of those tribunals and courts are well-educated, affluent white males.\(^{112}\) New Zealand’s experience of the Disputes Tribunal has been no different. The Tribunal’s users are disproportionately male, Pakeha, better educated and in the middle income bracket.\(^{113}\) In a recent comprehensive review of Tribunals in New Zealand carried out for the Ministry of Justice and which looked at demographic details of complainants to the Disputes Tribunal: men comprised 62 per cent, women 38 per cent;\(^{114}\) 75 per cent were New Zealand European, with only seven per cent Maori.\(^{115}\)

\(^{107}\) See Ministry of Consumer Affairs Review of the Operation of the Disputes Tribunals From a Consumer Perspective (1994) at 111.

\(^{108}\) Disputes Tribunals Act 1988, s 10(1A)(b) and s 13(2).

\(^{109}\) Hon Carmel Sepuloni (22 July 2009) 655 NZPD 506, Disputes Tribunals Amendment Bill — In Committee. Note, Sepuloni was referring to the CGA prior to the limits being raised to $15,000 and $20,000 respectively, but even with the higher limits, some complainants will reduce their claims to have the matter heard in the Disputes Tribunal. See also Disputes Tribunals Amendment Bill 2009 (22-1) (explanatory note) at 5, “[s]ome claimants in the Disputes Tribunal reduce the level of their claims below the current $7,500 threshold to allow a dispute to be heard in the Tribunal.”

\(^{110}\) Disputes Tribunals Amendment Act 2009, s 4.

\(^{111}\) The Disputes Tribunals Amendment Bill 2009 (22-1) (explanatory note) at 5-6 explored the effects of increasing the maximum claim level to $25,000 or $50,000. Both levels were rejected. The Explanatory Note observed that in the interests of achieving a simpler, cheaper and faster service than the normal court system, certain protections for parties were reduced. At $25,000 the protections would need to be strengthened making the Tribunal system more complex for users, thus it would become more similar to a traditional court. Appeal rights would need modification and the basis for making decisions would change too. More disputes could potentially be heard, and those disputes at the higher end would require longer hearing times, thus increasing the period before claims could be heard. The cost to Government would increase with managing the workload and engaging more Referees. At $50,000 the disadvantages would be even greater.


\(^{113}\) See Peter Spiller The Disputes Tribunals of New Zealand (2nd ed, Brookers, Wellington, 2003) at 42 citing Ministry of Consumer Affairs Review of the Operation of the Disputes Tribunals From a Consumer Perspective (1994) at 40.

\(^{114}\) Research New Zealand Tribunal Reform Programme (prepared for the Ministry of Justice 2008) at 34. The sample size of people accessing the Disputes Tribunal was fairly large at 300 people. The high percentage of men utilising tribunals was a constant factor across the tribunals, with the average split being 61 per cent (men) and 39 per cent (women).

\(^{115}\) Ibid, at 32. Interestingly people of Indian descent (8 per cent) outnumbered Maori (7 per cent) as complainants. In the 2006 Census 14.6 per cent of New Zealand’s population identified as being Maori. Although an exact percentage figure is not given for those of Indian descent, the Asian ethnic group of which those of Indian descent are a part only comprised 7.9 per cent of the population. “QuickStats about Culture and Identity: 2006 Census” Statistics New Zealand (2006) <www.stats.govt.nz>.
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Only 13 per cent of complainants were under 30 years of age, and of the ten-year age bands, the greatest proportion was in the 50 to 59-year age band. The most common level of educational qualification was a bachelors degree or higher.

3.2.11 Disputes Tribunal operates behind a veil of secrecy

Unlike most court proceedings, the Disputes Tribunal decisions are not normally made public. A trader may have had hundreds of decisions made against it for breaches of the CGA, but consumers will have no way of knowing this. Traders suffer no public opprobrium for their conduct.

3.2.12 Disputes Tribunal is not free from the influence of repeat players

It has been said that one of the strengths of the Disputes Tribunal is its informal nature. That steps have been put in place to ensure that certain groups, such as repeat players, are not favoured over others. However, even if the steps put in place in the Disputes Tribunal in an attempt to avoid the influence of repeat players have indeed managed to stop the common problem of traders manipulating the system to their advantage, there is always the fact that many traders will be in a better position than most consumers. That is, while there will be some sophisticated consumers and less knowledgeable traders, traders will normally be more knowledgeable about the Disputes Tribunal and the CGA than the average consumer.

4 PROPOSALS TO STRENGTHEN THE CONSUMER GUARANTEES ACT AND ITS ENFORCEMENT

The CGA as it is currently formulated and enforced does not protect consumers adequately. The CGA therefore requires amendment, which this part outlines. The Disputes Tribunal also is not hearing all the claims it should and of the ones it does hear the outcome for consumers could be improved. Thus this part goes on to suggest improvements which can be made to the Disputes Tribunal and its processes.

4.1 Reforming the Consumer Guarantees Act

In the Minister of Consumer Affairs’ “one law, one door” speech, the Minister expressed a desire for a principle-based consumer law, “[t]he ‘one law’ refers to the goal of a one principle-based piece of

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116 Ibid, at 31, 30-39 (18 per cent), 40-49 (22 per cent), 50-59 (27 per cent), 60 plus (20 per cent).
117 Ibid, at 33: no qualification (10 per cent), secondary school qualification (27 per cent), polytech or trade qualification (26 per cent), bachelors degree or higher (33 per cent), other (3 per cent), don’t know (1 per cent). Just over one third (34 per cent) had incomes above $50,000: under $10,000 (8 per cent), $30,000-$50,000 (24 per cent), $50,000-$70,000 (17 per cent), $70,000-$100,000 (7 per cent), $100,000 plus (10 per cent).
118 There are, of course, exceptions, eg under s 11B of the Family Courts Act 1980, decisions of the Family Court cannot be published if there is identifying information about a person under the age of 18 years.
119 There is extremely limited publication of some decisions, see <www.justice.govt.nz/tribunals/disputes-tribunal/decisions>.
120 See above notes 54 to 62 and accompanying text.
121 Such as distributing claims between Disputes Tribunals, thus ensuring that Referees do not become overly familiar with such litigants, see Peter Spiller The Disputes Tribunals of New Zealand (2nd ed, Brookers, Wellington, 2003).
122 Ministry of Consumer Affairs Review of the Operation of the Disputes Tribunals From a Consumer Perspective (1994) at 82, “The Law Society considered that traders and insurance companies have greater familiarity and experience with the Disputes Tribunals system and are able to, and commonly do, manipulate the system to their own advantage.”
123 Ibid, at 82.
consumer-supplier legislation similar to the approach found in the Privacy Act.”
However, principles, while commendable in theory, can be problematic in practice: it is often not clear when a law has been breached.  

Bright line rules benefit consumers, especially those in the lower socio-economic groups. Indeed, the current framework of rights under the CGA, unlike the protean and slippery concept of privacy, lends itself more to bright line rules than principles. The CGA with its relatively simple and clear rules must not be changed to vague principles. To undo the certainty of the CGA for consumers would be a step backwards. The following would be an apt description of the position of consumers under a principle-based law:

“...as if there was some breakdown in the competitive structure which permitted, even fostered, the production of shoddy goods — not dangerous, just crummy — and one sought to have an impact upon that disutility by encouraging individual suits by individual buyers for individual product insufficiencies on (often) very individual factual patterns. One cannot think of a more expensive and frustrating course than to seek to regulate goods or “contract” quality through repeated lawsuits against inventive ‘wrongdoers’.”

Next, the Minister in her “one law, one door” speech indicated that consumers should also include businesses as they also purchase goods. Currently, businesses, both large and small are protected by the CGA if they purchase a good which is “of a kind ordinarily acquired for personal, domestic, or household use or consumption and the business is not resupplying them in trade; or consuming them in the course of a process of production or manufacture; or in the case of goods, repairing or treating in trade other goods or fixtures on land.”

The Privacy Act 1993 operates as a good example of the difficulties of a principle based law, the Law Commission has observed, “No one doubts that privacy is important, but there is much that is elusive and uncertain about the concept”: Law Commission Privacy: Concept and Issues — Review of the Law of Privacy: Stage 1 (SP 19, 2008) at 8.


Nor should other consumer rights be watered down. There is a fear, however, that the government is interested in removing consumer rights rather than strengthening them. In the first reading of the Disputes Tribunals Amendment Bill, Hon Allan Peachy noted that the Bill amended “the Consumer Guarantees Act 1993, the Credit Contracts and Consumer Finance Act 2003, the Fair Trading Act 1986, the Fencing Act 1978, the Minors’ Contracts Act 1969, and the Retirement Villages Act 2003. Just as an aside, when we go through that list of legislation that has to have consequential change made to it, we realise what an over-governed country this is.” Hon Alan Peachy (1 April 2009) 653 NZPD 2311, Disputes Tribunals Amendment Bill — First Reading.

It is arguable that the CGA with its convoluted definition of, eg acceptable quality is more of a standard that a rule. For the distinction between rules and standards see generally Pierre Schlag “Rules and Standards” (1985) 33 UCLA Law Review 379. For the purposes of this article, however, the guarantees granted by the CGA are accepted as being adequate.


“...as if there was some breakdown in the competitive structure which permitted, even fostered, the production of shoddy goods — not dangerous, just crummy — and one sought to have an impact upon that disutility by encouraging individual suits by individual buyers for individual product insufficiencies on (often) very individual factual patterns. One cannot think of a more expensive and frustrating course than to seek to regulate goods or “contract” quality through repeated lawsuits against inventive ‘wrongdoers’.”

“It is often mistakenly thought that consumers are just people purchasing goods or services. While it shouldn’t be forgotten that businesses are consumers as well, there has been a trend toward an ‘us and them’ type of legislation where the customer somehow must be ‘protected’ from potentially bad business. This is ludicrous. There are as many customers deceiving businesses about their credit-worthiness, or intent to actually purchase, as there are businesses withholding information about goods or services.” Hon Heather Roy, Minister of Consumer Affairs “Less Is More — Can Legislation Improve Consumer Confidence?” (speech to the Marlborough Chamber of Commerce, Marlborough, 21 January 2008).

Consumer Guarantees Act 1993, s 2.
Reforming the Consumer Guarantees Act 1993 and its Enforcement

CGA.131 It is common for traders to exclude liability for goods and services purchased by businesses.132 If businesses are, as the Minister suggests, to enjoy the same benefits as consumers currently do, the ability for traders to contract out of the CGA for business use would have to be removed.

To be sure, small businesses are arguably akin to private consumers in one respect:133 many small businesses simply do not have the resources and sophistication to engage lawyers on a regular basis.134 In contrast to New Zealand where contracting out for business purposes is allowed, small businesses in Australia can bring claims under the equivalent provisions of the Trade Practices Act 1974 provided the goods are under A$40,000 and they are of the type used domestically and are not to be resupplied or consumed in trade.135 However, the Final Report of the United Kingdom’s Committee on Consumer Protection rejected the argument that the small shopkeeper and the like were closely comparable with domestic consumers.136 The Committee found that while the problems experienced by small businesses are different than those experienced by larger entities, both share the similarity of a “commercial relationship arising between those who have elected to buy and sell as a matter of business.”137 Small businesses, therefore, were clearly different from “the purchaser who shops purely in their private capacity.”138 The OECD Committee on Consumer Policy in its Recommendation on Consumer Dispute Resolution and Redress, made it clear that its recommendations were “to apply solely to complaints initiated by or on behalf of consumers, and not to complaints initiated by . . . another business.”139

To allow businesses to bring claims for all goods they have purchased would be a distortion of the term “consumer”. It would mean a radical change to consumer law and it is not clear how actual consumers would benefit. Indeed, in the Australian Trade Practices Amendment (Australian Consumer Law) Bill 2009 in relation to unfair contract terms, a consumer contract is defined as a supply of goods or services or a sale or grant of an interest in land, “to an individual whose acquisition of the goods, services or interest is wholly or predominantly for personal, domestic or household use or

131 See Consumer Guarantees Act 1993, s 43(2).
132 The following is common in terms and conditions: “[I]f you use the TiVo Products for business purposes (or have told or represent to us you will do so) then you agree that [the CGA] does not apply to the TiVo Products you purchase from us” <www.telecom.co.nz>.
133 However, businesses are not automatically excluded under the CGA in New Zealand. If a business is purchasing something which is of a kind ordinarily acquired for personal, domestic, or household use or consumption and the business is not resupplying them in trade; or consuming them in the course of a process of production or manufacture; or in the case of goods, repairing or treating in trade other goods or fixtures on land, that business is a consumer for the purposes of the Act, unless s 43 of the CGA applies.
135 Section 4B of the Trade Practices Act 1974 (Cth) states that a person will be a consumer for the purposes of the Act if the goods did not exceed A$40,000. Goods which exceed A$40,000 will only be covered if the goods were of a kind ordinarily acquired for personal, domestic or household use or consumption or the goods consisted of a commercial road vehicle, and the person did not acquire the goods, or hold himself or herself out as acquiring the goods, for the purpose of resupply or for the purpose of using them up or transforming them, in trade or commerce, in the course of a process of production or manufacture or of repairing or treating other goods or fixtures on land.
137 Ibid.
138 Ibid.
consumption.” Thus consumer law in Australia means the protection of individual consumers, not businesses.

4.2 Changes to the Consumer Guarantees Act itself

4.2.1 Ability for the Commerce Commission to bring actions under the CGA

The Commerce Commission cannot enforce consumer rights under the CGA. In contrast, the Commerce Commission can bring actions against traders under the Fair Trading Act 1986 and the Credit Contracts and Consumer Finance Act 2003. The inability of the Commerce Commission to represent consumers in claims under the CGA runs counter to the OECD Recommendation on Consumer Dispute Resolution and Redress that, “Member countries should work towards ensuring that consumer protection enforcement authorities have the ability to take action and obtain or facilitate redress for consumers, including monetary redress.”

There are many occasions where it is simply not worth a consumer even going to the Disputes Tribunal because of the relatively small sum involved, yet that small sum, if taken from thousands of people, is substantial. As the District Court in Commerce Commission v Ticketek New Zealand Ltd observed in relation to Ticketek’s attempt to retain its service fee for cancelled shows: “[w]hile it might be suggested that $6 is a very small amount by current standards, it is the cumulative potential effect of a number of transactions such as that involving Mr Wild which is significant in this context.” The Court estimated conservatively that in 2001 alone Ticketek would have received $30,000 through the retention of service fees. It cannot be public policy to allow the trader to retain its illegal gains.

There is, however, an argument that there is no real need for the Commerce Commission’s jurisdiction to be amended, that ultimately most actions under the CGA come down to misleading and deceptive conduct on the part of the trader. For example, take a consumer who has purchased a good which contains a defect which cannot be remedied. He or she asks the trader for his or her purchase price back citing the CGA. If the trader refuses to refund the money and claims that the consumer has no such right under the CGA, the consumer would have mislead the trader. Thus the argument goes

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140 Trade Practices Amendment (Australian Consumer Law) Bill 2009, Sch 1, Pt 2 Unfair and prohibited contract terms, Division 1 — Unfair terms, cl 2(3).
141 The one exception being when a trader attempts to contract out of the CGA, see Consumer Guarantees Act 1993, s 43.
142 Fair Trading Act 1986, s 2(1). “Person includes a local authority, and any association of persons whether incorporated or not” and the opening words of ss 41 and 43 of that Act: s 41(1) “The Court may, on the application of the Commission or any other person, grant an injunction restraining a person from engaging in conduct that constitutes or would constitute any of the following”; and s 43(1) “Where, in any proceedings under this Part of this Act, or on the application of any person, the Court finds that a person, whether or not that person is a party to the proceedings, has suffered, or is likely to suffer, loss or damage by conduct of any other person . . .” See also s 90 of the Credit Contracts and Consumer Finance Act 2003, “(1) The Court may, on the application of the Commission or any party to a consumer credit contract, guarantee, consumer lease, or buy-back transaction, make an order directing a creditor, a lessor, a transferee, or a buy-back promoter to pay any statutory damages that are payable under section 88 . . . (4) An application by the Commission under this section may be made by the Commission on behalf of a person or a class of persons.” And s 112 of that Act which deals with the Commerce Commission’s rights to appear and adduce evidence. See also Kate Tokeley “Class Actions for New Zealand Consumers” in Christian Twigg-Flesner, Deborah Parry, Geraint Howells, Annette Nordhausen (eds) The Yearbook of Consumer Law 2008 (Ashgate, Aldershot, England, 2007) 297 at 322.
144 [2007] DCR 910.
145 Ibid, at [59].
146 Ibid, at [24].
that the Commerce Commission is able to step in and take an action under s 9 of the Fair Trading Act.\footnote{147} If this argument is true, then in principle there can be no objection to the Commerce Commission’s part in regulating the CGA being formally recognised. Indeed, the current position is untenable and serves to undermine the position of consumers. Traders will believe that — so long as they do not attempt to contract out of the CGA — they have nothing to fear from the Commerce Commission for a breach of the CGA. A cynical trader would ignore complaints from consumers and consumers do not realise that they could complain to the Commerce Commission. The current situation of locking the front door of the CGA to the Commerce Commission, but allowing it to sneak in through a side door under the clock of the Fair Trading Act makes the law unnecessarily complex and uncertain.

\subsection*{4.2.2 Consumer refunds and fines}

Any amending legislation to allow the Commerce Commission to bring an action on behalf of consumers must also provide the courts with the power to award consumer refunds.\footnote{148} In addition, the courts must be directed to award such refunds where it is shown that an entire batch of goods or services were defective, without individual consumers having to demonstrate that their particular good or service was defective.\footnote{149} To be sure, it will be rare for the Commerce Commission to show, for example, the high probability that every alarm clock of a certain batch was defective, but there may well be occasions when it can do so.

In addition, fines for certain conduct that breaches the CGA should be put in place. In respect to the Fair Trading Act 1986 Tipping J in \emph{Commerce Commission v L D Nathan & Co Ltd}\footnote{150} observed that “the more substantial fines are to be reserved for repeated offenders, for deliberate breaches, particularly if done for commercial gain, and cases where there is a widespread and large-scale breach with a real risk of damage or injury to consumers.”\footnote{151} Tipping J also observed in \emph{Lane Appliance Centre Ltd v Commerce Commission}\footnote{152} that:

“\[I\]t is important that the \[Fair Trading\] Act be seen to have some teeth. Traders must not be left with the view that it is worthwhile breaching the Act because the profits will outweigh the fine. Obviously the element of deterrence must be kept in perspective and one must balance the need for teeth with the

\footnote{147 Not every breach of the CGA will result in a breach of s 9 of the Fair Trading Act. For example, lack of availability of repair facilities and parts (Consumer Guarantees Act 1993, s 12(1)) unless the trader has represented that such a facility would be available.}

\footnote{148 See \emph{ACCC v Danoz Direct Pty Ltd} [2003] FCA 881 where approximately 100,000 Abtronic Fitness Systems were sold at A$165 each. The Abtronic failed to do that which it promised, such as being able to “flatten your stomach once and for all”. The Court held that there had been numerous breaches of s 52 of the Trade Practices Act 1974 (CTH) (equivalent to s 9 of the Fair Trading Act 1986). The Court, however, held that it had no power to award a refund to people who were not parties to the action (\cite{tipping}). For the frustration of the ACCC in the inability to obtain consumer refunds see Louise Sylvan, ACCC Deputy Chair “The ACCC in 2004: Advancing Australia Fair and Competitive!” (speech to the Law Institute of Victoria’s Presidents Luncheon, Melbourne, 26 February 2004).

\footnote{149 In \emph{ACCC v Danoz Direct Pty Ltd} [2003] FCA 881, even if Dowsett J had had the ability to order a refund to each purchaser, he was reluctant to award such a refund, “the Court is asked to determine that any purchaser who claims to have been misled by any of the promotional material is to be accepted at face value. The first respondent is to be deprived of any opportunity to cross-examine as to such reliance. Further, even a purchaser who believes that he or she has derived benefit from using the AbTronic is to be entitled to a refund. These considerations suggest that I should be reluctant to make such an order” (\cite{tipping}).

\footnote{150 \cite{tipping}.}

\footnote{151 Ibid, at 166.}

\footnote{152 \cite{tipping}.}
avoidance of a penalty which would be oppressive in the individual case . . . in the administration of the Act it is important that those involved in trade be encouraged to comply with the law by the knowledge that non-compliance may well result in significant penalties being imposed.”

For example, if a supplier refused consistently to repair, replace or refund the purchase price of defective goods or failed repeatedly to remedy substandard work, a substantial fine under the CGA would be appropriate. The fines would be the same as those found under the Fair Trading Act, thus the maximum would be $60,000 for a person other than a corporate body and $200,000 for a corporate body.153

4.2.3 Exemplary damages

Many small disputes are simply not worth taking to the Disputes Tribunal.154 The one exception to the low damages awards is for consequential loss.155 If there is significant consequential loss, for example, a house burns down because of a fault in an electrical appliance and the consumer was not insured, it would be well worth the consumer going to court to recover the loss of the house.156 The courts also come into their own if the goods are expensive, for example, a boat that cost $100,000 and due to poor workmanship is worthless. However, a victorious consumer will be out of pocket as not all the solicitor and other costs including filing fees are recoverable in full from the trader.157

Even for goods where it is worthwhile for a consumer to go to the Disputes Tribunal, for example, a computer printer brought for $120, few consumers will bother if it requires taking time off work to attend a hearing. And even if a few consumers do go to the Disputes Tribunal and are successful, if a trader has sold hundreds or even thousands of those printers, the loss to the trader (if the trader abides by the Referee’s decision and refunds the money) is negligible. In short, the current remedies simply offer little or no deterrent effect.

A solution would be to increase the penalties available under the Act and allow for the awarding of exemplary damages by the District and High Courts. The courts, however, are wary of awarding exemplary damages.158 In New Zealand the maximum award of exemplary damages has been

153 Fair Trading Act 1986, s 40(1).
154 See the electric jug example, above n 90.
155 Damages can be obtained from the supplier and manufacturer, “[f]or any loss or damage to the consumer or that other person resulting from the failure (other than loss or damage through a reduction in value of the goods) which was reasonably foreseeable as liable to result from the failure.” Consumer Guarantees Act, ss 18(4) and 27(1)(b).
156 The Disputes Tribunal would not be an option for the consumer as the limit of claims that can be heard by the Disputes Tribunal is $15,000 or if both parties agree $20,000: Disputes Tribunals Act 1988, ss 10(1A)(b) and 13(2). See A & W Holdings (New Zealand) Ltd v Hosking HC Auckland, HC 191/98, 14 April 1999 where the manufacturer was successfully sued for $50,000 for the loss caused by a faulty electric blanket. The damages included repairs to the house, replacement of chattels and rental accommodation while the house was repaired.
157 As the Supreme Court observed in Prebble v Awatere Huata (No 2) [2005] NZSC 18, [2005] 2 NZLR 467 at [6], “In New Zealand, costs have not been awarded to indemnify successful litigants for their actual solicitor and client costs, except in rare cases generally entailing breach of confidence or flagrant misconduct. Except in such cases . . . costs have been limited to a reasonable contribution to the costs of the successful party.” The award of costs in the District Court is primarily governed by Schedule 2 of the District Courts Rules 2009, that Schedule sets out the appropriate daily recovery rate.
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Thus the mere ability of a court to award exemplary damages does not mean that they will be awarded. Because consumers will not know ex ante whether they will receive exemplary damages, it is unlikely that the number of cases before the courts would increase significantly. While allowing the Disputes Tribunal to award exemplary damages would see an increase of disputes brought before it, the ability to award such damages would change the nature of the Disputes Tribunal and make it more akin to a traditional court, thus the awarding of exemplary damages should be confined to the District and High Courts.

There is nothing exceptional in allowing exemplary damages for consumer transactions. The Saskatchewan Consumer Protection Act 1996 expressly allows for the awarding of exemplary damages for willful violation of the Act’s guarantees. Importantly, the predecessor of the Saskatchewan Consumer Protection Act 1996, the Saskatchewan Consumer Products Warranties Act 1977, was the model for the CGA. Had exemplary damages been available under the Saskatchewan Consumer Products Warranties Act 1977, there is little doubt that the CGA would have incorporated them.

4.2.4 Double and Treble Damages — 30-Day Demand Letter

Given the reluctance of courts to award exemplary damages, a more practical and effective solution would be for the courts and the Disputes Tribunal to award double and up to treble damages automatically if the consumer can show that the trader willfully ignored the CGA. For example, if a $120 printer broke down after three months and the supplier refused to refund the purchase price claiming that it was the manufacturer’s responsibility to arrange for a refund, the consumer would be entitled to either $240 or $360. The Massachusetts Consumer Protection Law currently operates under such a model. The consumer must send the trader a detailed 30-Day Demand Letter: the trader has 30 days to respond in writing with the trader’s offer. The consumer must either reject or accept the trader’s offer. If the consumer refuses to accept the trader’s offer and a court subsequently finds the trader’s offer was reasonable, the court can limit the amount the complainant receives and


160 The observations made in the Disputes Tribunals Amendment Bill 2009 (22-1) (explanatory note) over possible increases in the maximum claim level in the Disputes Tribunal (see above n 111) apply equally to the suggestion that the Disputes Tribunal be permitted to order exemplary damages.

161 Section 82A of the Commerce Act 1986 now allows for the awarding of exemplary damages for the contravention of any of the provisions in Part 2 of that Act.

162 Saskatchewan Consumer Protection Act 1996, s 65(1). See Prebushewski v Dodge City Auto (1984) Ltd [2005] 1 SCR 649 where exemplary damages of $25,000 (Can) were upheld by the Supreme Court of Canada. The consumer had purchased a new truck from Chrysler which had caught fire just over one year later. The fire was caused by a defect in the running light module. The car dealer and Chrysler denied liability. In court it transpired that Chrysler had known of the defective module and had failed to fix the problem.

163 See above n 26 and accompanying text.


165 Massachusetts General Laws Chapter 93A, s 11.


167 The letter states the name and address of the complainant, the description of the unfair or deceptive act or practice, the injury suffered (eg the sale of a defective household product which is useless and worthless) and the demanded relief, including the amount of money sought.
importantly the complainant is not entitled to costs.\textsuperscript{168} If the trader does not respond or the offer is found to be unreasonable, the complainant is entitled to monetary relief, and if the court or Disputes Tribunal finds that the breach was "willful or knowing", or the trader’s refusal to settle was made in bad faith, a minimum of double damages to a maximum of treble damages of actual damages will be awarded.\textsuperscript{169} There is no reason why New Zealand could not adopt a similar approach.

There will no doubt be unease with the suggestion that the Disputes Tribunal be permitted to award double or treble damages. However, the ability of a Tribunal to have a punitive function is not new. For example, in Victoria, the Victorian Civil and Administrative Tribunal,\textsuperscript{170} which deals inter alia with small claims, is specially allowed to award exemplary damages in consumer and trader disputes.\textsuperscript{171} Closer to home, the Tenancy Tribunal is able to award exemplary damages.\textsuperscript{172} To be sure, in the preceding section exemplary damages were ruled out for the Disputes Tribunal. But double and triple damages are more certain and can be quantified ahead of time by the trader.

4.2.5 \textit{Expressly allow class actions to occur}

Rule 4.24 of the High Court Rules 2009 allows for class actions to be brought in New Zealand:\textsuperscript{173}

One or more persons may sue or be sued on behalf of, or for the benefit of, all persons with the same interest in the subject matter of a proceeding—
(a) with the consent of the other persons who have the same interest; or
(b) as directed by the court on an application made by a party or intending party to the proceeding.

However, as Kate Tokeley has explained, rule 4.24 is of little practical use to consumers wanting to mount a class action against a trader.\textsuperscript{174} Notwithstanding statements in \textit{RJ Flowers Ltd v Burns}\textsuperscript{175} and \textit{Taspac Oysters Ltd v James Hardie & Co Pty Ltd}\textsuperscript{176} that the rules should be interpreted and applied so as to secure "just, speedy, and inexpensive determination of any proceeding",\textsuperscript{177} "[t]he traditional concern to ensure that representative actions are not to be allowed to work injustice must be kept constantly in mind."\textsuperscript{178} The two stumbling blocks for consumers are that the "the action cover[s] the

\begin{thebibliography}{99}
\bibitem{168} If the trader’s offer is judged reasonable then the complainant will not be entitled to reasonable lawyer’s fees and costs. Thus it is the interest of complainants not to refuse reasonable offers.
\bibitem{169} Massachusetts General Laws Chapter 93A, s 11.
\bibitem{170} See Victorian Civil and Administrative Tribunal Act 1988 (Vic).
\bibitem{171} Fair Trading Act 1999, s 108(2)(b)(ii).
\bibitem{172} Residential Tenancies Act 1986, s 77(2)(o).
\bibitem{173} Rule 3.33.5 of the District Court Rules 2009 provides that r 4.24 of the High Court Rules 2009 applies to proceedings in the District Court (see also r 1.6.1 of the District Court Rules 2009).
\bibitem{174} Kate Tokeley “Class Actions for New Zealand Consumers” in Christian Twigg-Flesner, Deborah Parry, Geraint Howells, Annette Nordhausen (eds) \textit{The Yearbook of Consumer Law 2008} (Ashgate, Aldershot, England, 2007) 297 at 306-313. Note Tokeley was referring to rule 80 of the District Court Rules 1992 which was identical to Rule 78 of the now repealed High Court Rules: “Where two or more persons have the same interest in the subject-matter of a proceeding, one or more of them may, with the consent of the other or others, or by direction of the Court on the application of any party or intended party to the proceeding, sue or be sued in such proceeding on behalf of or for the benefit of all persons so interested.”
\bibitem{175} [1987] 1 NZLR 260.
\bibitem{176} [1990] 1 NZLR 442.
\bibitem{177} \textit{RJ Flowers Ltd v Burns} [1987] 1 NZLR 260, 271 and see \textit{Taspac Oysters Ltd v James Hardie & Co Pty Ltd} [1990] 1 NZLR 442, 447.
\bibitem{178} \textit{RJ Flowers Ltd v Burns} [1987] 1 NZLR 260, 271.
\end{thebibliography}
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whole or virtually the whole of the class of potential plaintiffs”\textsuperscript{179} and that “the consent of all represented members to payment of global damages to the representative plaintiff [must be] given.”\textsuperscript{180} First, for many defective consumer goods it will be difficult to track down all or virtually all affected consumers. Second, as Tokeley explains, with such a large group of consumers, many of whom are unknown, it would be impossible to meet the consent requirement.\textsuperscript{181}

Despite the traditional reluctance towards class actions, the High Court in \textit{Houghton v Saunders}\textsuperscript{182} appears to have been lenient in allowing a class action against the directors of Feltex.\textsuperscript{183} Yet, for every decision that favours the ability of plaintiffs to bring class actions, another case prevents the bringing of the action. For example, in \textit{Houghton v Saunders, Registered Securities Ltd (in liq) v Westpac Banking Corp}\textsuperscript{184} was cited with approval for the proposition that “[t]he requisite commonality of interest is not a high threshold and the Court should be wary about looking for impediment to the representative action rather than being facilitative of it”,\textsuperscript{185} yet the latter case was distinguished in \textit{Beggs v Attorney-General},\textsuperscript{186} where it was said that in relation to police brutality in a demonstration “it is not possible for the Court to conclude that simply because one plaintiff was subjected to an assault or a strip-search, then so were the other named plaintiffs in that particular group”. Thus the actual ability of consumers to bring class actions is far from certain.

In limiting the occasions when class actions can be brought by consumers, New Zealand is out of step with the \textit{OECD Recommendation on Consumer Dispute Resolution and Redress}. The OECD has recommended that consumers should have the ability to act collectively to resolve their disputes:\textsuperscript{187}

“When a number of consumers allege that they have suffered economic harm as a result of the similar conduct of the same entity or related entities, and it is not practicable or efficient for them to act individually to resolve their disputes, those consumers should have access to mechanisms that provide for the collective resolution of those disputes.”

To be sure, there are concerns with allowing class actions, for example, monitoring the lawyers who represented the consumers.\textsuperscript{188} In \textit{Houghton v Saunders}\textsuperscript{189} the court noted that it reserved its right to keep the funding agreement under review as the proceeding progressed.\textsuperscript{190} The OECD Committee on


\textsuperscript{182}(2008) 19 PRNZ 173.

\textsuperscript{183}\textit{Houghton v Saunders} is currently on appeal on the issue of the class action and other matters.

\textsuperscript{184}(2000) 14 PRNZ 348 (HC).

\textsuperscript{185}(2008) 19 PRNZ 173 (HC) at [100].

\textsuperscript{186}(2006) 18 PRNZ 214 (HC) at [31].

\textsuperscript{187}OECD Committee on Consumer Policy \textit{Recommendation on Consumer Dispute Resolution and Redress} (2007) at 10.


\textsuperscript{189}(2008) 19 PRNZ 173 (HC).

\textsuperscript{190}Ibid, at [202].
Consumer Policy recommends that steps be put in place to discourage abusive collective actions, particularly when consumers have not suffered economic harm, and “[s]uch procedures are not used to protect domestic businesses from competition or applied unfairly against foreign businesses.” Also there is the practical question of whether the class actions should be on an opt-in or opt-out basis. In opt-in actions the class includes only those who have consented to the action proceeding on their behalf. With opt-out actions, all potential plaintiffs are included in the class unless they remove themselves from it. The OECD Committee on Consumer Policy recommends that reasonable measures are taken to ensure that with opt-in actions consumers are informed of the action so they can include themselves within the group and, with opt-out actions, consumers are informed so that they can exclude themselves if they so wish. The opt-out actions would appear to be preferable for consumer class actions.

That class actions pose some challenges does not mean that consumers should be excluded from using a legitimate tool to enforce their rights against wrongdoing traders.

4.2.6 Consumers not to have costs awarded against them
A further reason for consumers not pursuing claims through the courts is that they will have costs awarded against them if they are unsuccessful. In contrast, s 66 of the Saskatchewan Consumer Protection Act 1996 states that costs shall not be awarded against a consumer who brings an action for a breach of a warranty under the Act, or for a consumer who defends or counterclaims in an action for a breach warranty under that Act, unless in the court’s opinion the action, defence or counterclaim was frivolous or vexatious. As the Supreme Court of Canada explained in Prebushewski v Dodge City Auto (1984) Ltd, “[t]he spirit of s. 66 is to protect consumers who start legitimate lawsuits from the disincentive of potentially onerous costs awards against them. Its intent is to encourage the lawful pursuit of such claims.” A similarly worded section to s 66 of the Saskatchewan Consumer Protection Act 1996 should be included in the CGA.

193 Ibid, at 303-304.
194 OECD Committee on Consumer Policy Recommendation on Consumer Dispute Resolution and Redress (2007) at 10-11. Note: there are the normal concerns over class actions, that it can lead to blackmail; the floodgates would be opened for litigation; lawyers would receive excessive fees and plaintiffs would receive excessive awards. Kate Tokeley “Class Actions for New Zealand Consumers” in Christian Twigg-Flesner, Deborah Parry, Geraint Howells, Annette Nordhausen (eds) The Yearbook of Consumer Law 2008 (Ashgate, Aldershot, England, 2007) 297 at 301-303, however, has argued that each fear is irrational and is not a cogent reason to deny consumers’ the right to take collective action against wrongdoers. See also generally, Byrant Garth, Ilene H Nagel and S Jay Plager “The Institution of the Private Attorney General: Perspectives from an Empirical Study of Class Actions” (1988) 61 Southern California Law Review 353 for a discussion on lawyers’ fees in the United States.
195 [2005] SCC 28, [2005] 1 SCR 649 at [43]. The Saskatchewan Court of Appeal [2003] SKCA 133, [2004] 4 WWR 42 had awarded costs against the consumer as it had found that the trial judge had been incorrect to award exemplary damages. The Supreme Court stated that: “[l]imiting the application of such costs protection to the trial level would have the opposite effect, given the likelihood that unsuccessful defendants may, as they have a right to do, seek to appeal.”
4.2.7 Extending coverage to online auctions

The CGA does not cover all sales made by traders. Section 41(3) of the CGA provides that “Nothing in this Act shall apply in cases where goods are supplied . . . By auction . . .”. Thus traders who sell goods through online auction sites are not caught by the CGA (the exception being if there is a “Buy Now” price, in which case it is not supplied by an auction and would be caught by the CGA). The CGA was drafted in the nascent period of the Internet, and certainly at a time when Trade Me and Ebay were not even flickers on the horizon and is in urgent need of reform on this point. Increasingly traders are selling through online auction sites and as the purchase of goods online increases, a growing proportion of consumer purchases are not being protected under the CGA.

4.2.8 Assessment of proposed changes to the CGA

Allowing the Commerce Commission to bring an action on behalf of consumers, allowing consumer refunds, imposing fines upon errant traders, shielding consumers with legitimate complaints from a costs award and the use of either exemplary damages or double or treble damages to be awarded would make some difference, but it would be at the margins. The Commerce Commission is overstretched and underfunded with monitoring various Acts, without adding another to its books. A solution, of course, is for the Commerce Commission to be better funded to take actions on behalf of consumers, but increased funding is unlikely at present. Class actions, even if the uncertainty surrounding their use is removed are extremely expensive: most people are not willing to go to the Disputes Tribunal let alone a court over a $120 printer even if 10,000 defective printers were sold.

Some disquiet will be expressed at the ability of courts to impose fines and award exemplary damages, particularly as the presence of large penalties is not guaranteed to deter wrongdoing. A study of 999 large Australian businesses’ experiences of compliance and enforcement under the Trade Practices Act 1974 found that higher penalties and other supposed deterrent measures did not have an impact on businesses’ behaviour. Instead other ways may be more effective in ensuring that actors change their behaviour. Indeed, the Commerce Commission works with traders to ensure that they

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196 The CGA also does not apply to goods or services which are supplied otherwise than in trade (s 41(1)); where a charitable organisation has supplied goods or services for the principal purpose of benefiting the person to whom the supply is made (s 41(2)); or where goods are supplied by competitive tender or auction (s 41(3)).


198 Which thankfully the Ministry of Consumer Affairs appears to be working on, see Claire Trevett “Govt Bid to Simplify Online Auction Rules” The New Zealand Herald (New Zealand, 18 March, 2009).


200 The Commerce Commission has only brought two actions against traders for their attempts to contract out of the CGA. Commerce Commission v Ticketek New Zealand Ltd [2007] DCR 910 where Ticketek attempted to retain a $2 service charge for a cancelled show, when in fact it was covered by the CGA and see also Commerce Commission v Kearney DC Christchurch, CRN-70090005379, 11 December 1998 see John McBride “Consumer Guarantees Act 1993: Recent Case Law” (2008) McBride Law <www.mcbidelaw.co.nz>.


comply with the CGA. For example, the Bank of New Zealand made the statement in its credit card brochures that “[w]e are not responsible for any indirect, special or consequential losses caused by occurrences within our control.” This statement was clearly incorrect and misleading as consequential loss for foreseeable damages and losses as a result of failure of a service is recoverable under the CGA. The Commerce Commission was able to convince the Bank of New Zealand to change its statement. However, the Commerce Commissions’ approach of working with traders, while commendable, is not working perfectly. If it was a trader such as Noel Leeming would not be acting the way it does and the use of extended warranties would not be widespread.

In addition to the Commerce Commission continuing to work with traders and the proposed changes to the CGA contained in this section being made, changes must also be made to the Disputes Tribunal process. It is in the Disputes Tribunal where the overwhelming majority of disputes concerning the CGA are heard and the greatest impact can be made.

4.3 Changes to the Disputes Tribunal Process

This section outlines a number of changes that could be made to the Disputes Tribunal to meet consumers’ needs better. In addition, the proposed increase in remedies available under the CGA would also operate in the Disputes Tribunal. Thus a scheme similar to the Massachusetts Consumer Protection law would be required to be set up with its 30-Day Demand Letter and double and treble damages.

4.3.1 Assistance with writing complaints

A written complaint is required before the Disputes Tribunal will hear a complaint. Yet many potential complainants struggle with writing complaints and the help they receive from Referees and their staff is uneven. Thus it is likely that some potential complainants struggling with language would give up and not file their complaint. Unless more resources are given to the Disputes Tribunal, which is unlikely in the present economic climate, a statutory amendment will do little to remedy the situation as the Referees and their staff already have a duty to help where possible. A practical way of assisting consumers would be for the new entity the Minister of Consumer Affairs wishes to set up as the “one door” to provide potential complainants with a list of organisations and people in the local community able to assist. This entity, instead of merely pointing consumers to the correct disputes resolution body and providing information on organisations which could help in writing complaints could also assist consumers in writing complaints. Although there are no details yet on the proposed new entity, it would be unlikely for physical branches of that entity to be based in each city let alone town: communication would be by telephone or the Internet. Thus local organisations would still play a vital role in assisting consumers writing complaints.

204 Sales and Marketing Law in New Zealand (CCH, Auckland, 2007) at [36-880].
205 Consumer Guarantees Act 1993, s 32(c) and see Sales and Marketing Law in New Zealand (CCH, Auckland, 2007) at [36-880].
206 Disputes Tribunals Act 1988, s 55.
207 For example, providing the contact details for the closest community law centres and Citizen’s Advice Bureaus and so on. This list would be both in hard copy form, which was available at the Disputes Tribunal for people to pick up, it would be posted to people who requested it, and finally it would also be posted on the Internet.
4.3.2 Support people attending hearings as of right
Support people must be allowed to attend hearings as of right and those support people must also be able to speak at the hearing. The admittance of support people would not extend, however, to the presence of lawyers at the hearing.\textsuperscript{208}

4.3.2 Recovering filing fees
Currently if a consumer is successful in the Disputes Tribunal and, for example, receives the purchase price back of a good which has broken, the consumer will not receive the filing fee back. The consumer therefore will be out of pocket. A change is needed so that if a consumer does succeed in the hearing then the trader must be required to pay the filing fee to the consumer. If the consumer is partially successful, for example, the consumer was not awarded the full amount he or she claimed, a portion of the fee should be awarded in line with the percentage of what the consumer received in relation to the claimed amount.\textsuperscript{209}

4.3.3 Publication of Referees’ decisions
A trader may constantly be before the Disputes Tribunal for failure to remedy problems, which it is obliged to do under the CGA, yet consumers will not know of this. The decisions of the Disputes Tribunal when they relate to disputes by consumers against traders under the CGA — or any other consumer protection law such as the Fair Trading Act — must be published so consumers are able to see the track record of traders if they so wish.\textsuperscript{210} Consumers would then find it easier to avoid those traders who have had many successful complaints made against them. Facilitating consumers’ knowledge about poorly performing traders must be at the heart of consumer protection law.\textsuperscript{211}

“Consumer protection works to ensure that consumers can make well informed decisions about their choices and that sellers will fulfil their promises about the products they offer . . . If sellers make a habit of lying about their products, a pernicious atmosphere of consumer distrust may well develop . . . By striving to keep sellers honest, therefore, consumer protection policy does more than safeguard the interests of the individual consumer — it serves the interest of consumers generally and facilitates competition . . . well-conceived competition policy and consumer protection policy take complementary paths to the destination of promoting consumer welfare.”

The suggestion that Disputes Tribunal decisions be published is not new;\textsuperscript{212} it is a move that is long overdue. In Australia it has been observed that one way of forcing traders to take consumer claims

\textsuperscript{208} But see s 38(7) of the Disputes Tribunal Act 1988, unless the lawyer is a party to the dispute (s 38(7)(d)) or a party is a company and the person proposed is the majority shareholder of the company (s 38(7)(e)).

\textsuperscript{209} If the consumer claimed $200 in relation to a minor defect in a fridge and only received $100, then the consumer would receive $15 (50 per cent of the filing fee of $30).

\textsuperscript{210} There is currently some reporting of Disputes Tribunal Decisions, see <www.justice.govt.nz/tribunals/disputes-tribunal/decisions>. The decisions, however, are summaries of appeals from the Disputes Tribunal. They do not contain much detail and tend to be focused on procedural matters rather than substantive issues. In contrast, see the decisions of the Motor Vehicle Disputes Tribunal <www.nzlii.org/nz/cases/NZMVDT/>.


\textsuperscript{212} See Hon Simon Power, Minister of Justice (21 July 2009) 655 NZPD 4967. Disputes Tribunals Amendment Bill — Second Reading.
seriously is to publish results from tribunals. As Katsh has argued, it is of vital importance to publish information on decisions generally as “they will have the practical effect of influencing the future behaviour of nondisputants.”

Granted there will be concerns over the publication of decisions, such as the quality of the decisions, Referees’ increased workloads and the cost of publication. The concerns can be addressed, however. Publishing the decisions will assist indirectly with increasing the quality of decisions as Referees will know they will be read widely. In respect to Referees’ workloads, if the suggestion of implementing a system of a 30-Day Demand Letter and double and treble damages were adopted, the number of complaints reaching the Disputes Tribunal would decrease. Traders would have an incentive to make reasonable offers. To keep down costs of publishing decisions, the decisions would be in electronic form only and available online.

Another argument against publication is that publishing decisions may have an adverse effect as many concessions are made for the sake of achieving settlements. The publication of decisions might therefore hinder such compromises being achieved. To be sure, some compromises may be affected, however, knowledge of the publication of decisions would mean that traders would be more likely to reach a compromise with consumers early and before the matter escalated to the Disputes Tribunal.

Consumers’ desire for privacy may also create problems. Many complaints heard in the Disputes Tribunal involve disputes between private individuals, for example, a fencing dispute between neighbours. It is not proposed that complaints between private individuals would be published. Some consumers may nevertheless be reluctant to go to the Disputes Tribunal if decisions identifying them are published. This concern can be avoided by requiring that consumers’ names are not revealed upon a request by the consumer.

There will also be concerns that the nature and culture of the Disputes Tribunal may alter with the publication of decisions. That is, its informal nature may be under threat with the requirement that a written account of the nature of the dispute and the reasons for the decision be provided. However, s 21 of the Disputes Tribunals Act 1988 currently provides that a Tribunal must give its reasons for a final decision either orally or in writing. If the decision is given orally a party to the proceedings can request that the decisions be made in writing. Once the request is made, the Tribunal is obliged to record the reasons in writing. Thus Referees are obliged to give reasons and put those reasons in writing once a valid request has been made. The only change would be that the decision would be accessible by more than just the parties to the dispute.

The issue of an increase in appeals from the Disputes Tribunal to the District Court will be raised. The Disputes Tribunal, in line with its role as a Tribunal rather than a court, has limited grounds of appeal.

215 Fencing Act 1978, s 24A.
216 Disputes Tribunals Act 1988, s 21(1) and (2).
217 Disputes Tribunals Act 1988, s 21(3).
218 The request for decisions to be recorded in writing must be either orally at the conclusion of the hearing (s 21(4)(a)) or if made after the conclusion of the hearing must be made in writing and within 28 days of the conclusion of the hearing, or within such further time as a District Court Judge may, on application, allow (s 21(4)(b)(i) and (ii)).
appeal. Section 50 provides that appeals can only be made on the grounds that “(a) [t]he proceedings were conducted by the Referee; or (b) An inquiry was carried out by an Investigator — in a manner that was unfair to the appellant and prejudicially affected the result of the proceedings.” Unfair has been interpreted broadly, for example, failure to consider evidence led by a party, lack of a logical basis to decision, and lack of natural justice. It may well be that there is an increase in appeals; however, complainants are entitled to have their disputes handled competently. As Referees are currently obliged to provide reasons for their decisions there should be little or no increase in the number of appeals.

Currently the orders of the Tenancy Tribunal and the decisions of the Motor Vehicle Disputes Tribunal are published on-line. There is no justifiable ground for the difference in treatment of the Disputes Tribunal and other Tribunals.

4.3.4 Referees ordering immediate payment
The recommendation in the 1994 Ministry of Consumer Affairs’ Review that “[r]eferees ascertain parties’ ability to pay at the end of the hearing and order immediate payment or payment by installment where appropriate” must be implemented. One relatively easy way to ensure compliance with orders would be to link the payment with the publication of decisions. There could be a delay of ten working days from the date of the decision until its publication on the Internet. If the payment had not been made within five working days of the decision, the published decision would state this. Consumers seeing the names of traders who had failed to pay the ordered amount would do well to avoid those traders.

4.3.5 Assessment of proposed changes to the Disputes Tribunal
As the Citizen’s Advice Bureau has observed, if a person purchases a vacuum cleaner which breaks down and the trader refuses to refund the money, if that person cannot afford the $30 filing fee for the Disputes Tribunal, “then the retailer gets away with it, and will probably continue to ignore their obligations to future customers.” One important aspect of this article’s proposed reform is to encourage consumers to take complaints to the Disputes Tribunal so that traders will realise that it does
not pay to ignore their obligations under the Act, in time leading to a reduction in the number of complaints that are made to the Disputes Tribunal.

The preceding changes outlined in this section — assistance with writing complaints, support people attending hearings as of right, recovery of filing fees, and Referees ordering immediate payment — would facilitate and make it easier for consumers to bring complaints. The use of the system of a 30-Day Demand Letter scheme would help ease the workload of the Disputes Tribunal as many more disputes would settle before they got to the Disputes Tribunal. Under the 30-Day Demand Letter scheme, the trader has an incentive to offer something reasonable to the consumer: failure to make a reasonable offer will see the trader paying double or triple the actual cost of repairing the good or the purchase price if the consumer takes the trader to the Disputes Tribunal. The consumer too has the incentive to accept a reasonable offer: the consumer would be unable to recover the filing fee if the Disputes Tribunal found that the offer was reasonable and the amount of the award would be limited. In addition, the 30-Day Demand Letter scheme would mean that consumers would only be required to travel to the Disputes Tribunal if the trader made an offer which was unreasonable or failed to reply to the letter, thus the difficulties of access by consumers would be partially solved. There is still the problem with functionally illiterate people writing the 30-Day Demand Letter, but the Referees and their staff would be instructed to give the same assistance as if it was a complaint to the Disputes Tribunal. Finally, the publication of Referees’ decisions will help consumers choosing between different traders.229

5 CONCLUSION

Consumer protection is a necessary and vital part of the law. Not all traders, however, are complying with their obligations under the primary piece of consumer protection law, the CGA. And consumers are not approaching the institutions that are in place to solve their disputes for a variety of reasons. It is not primarily because — as the Minister would have us believe — that consumers are confused between the many different bodies that can hear disputes. Instead consumers are not approaching the appropriate body (normally the Disputes Tribunal) for three reasons: consumers are not aware of their rights; they are aware of their rights but do not realise that there is a body that can assist them; or they are aware of their rights and the appropriate body but the cost (time, money and effort) is too high. Lack of knowledge of rights and enforcement bodies can be addressed by education campaigns; the third — the cost in the form of time, money and effort — constitutes a significant part of the discussion in this article. The courts will almost always be beyond the reach of consumers. The primary dispute resolution service for consumer disputes, the Disputes Tribunal, has provided a patchy service, primarily for the benefit of white, well-educated males on decent incomes. In short, the rights granted by the CGA are of little use if they are unable to be enforced.

Currently even if a consumer is successful in the Disputes Tribunal230 — and the trader pays the amount ordered, which does not always occur — the trader will be no worse off than if he or she had complied with his or her obligations under the CGA at the outset. That is, there is no penalty involved

229 See Gillian K Hadfield, Robert Howse and Michael J Trebilcock “Information-Based Principles for Rethinking Consumer Protection Policy” (1998) 21 Journal of Consumer Policy 131, 160 where a call is made for the greater provision of information to consumers and that government has a major role to play in the provision of such information. As the Department of Justice operates the Disputes Tribunal, the Department of Justice is in an excellent position to provide information on breaches of the CGA.

230 In the Colmar Brunton National Consumer Survey 2009 (prepared for the Ministry of Consumer Affairs, 2009) at 33 respondents reported that when they had lodged complaints about sellers to various bodies including the Disputes Tribunal, not one of the complaints had been found in favour of the seller.
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with breaching the CGA. Thus a rational trader, who is not seeking repeat business from that consumer, has no incentive to comply with the CGA. To aggravate matters, only a tiny minority of consumers will ever take a complaint to the Disputes Tribunal\textsuperscript{231} so the trader has even more reason to ignore consumer complaints. Reform of the CGA and the Disputes Tribunal processes are therefore required as too many consumers are not receiving the protection of the CGA.

The proposed reforms of the CGA, apart from extending the CGA to cover online auctions, are not those articulated by the Minister of Consumer Affairs. The Minister’s proposed changes — principles based rules and businesses classed as consumers — would benefit traders, not consumers. Instead, changes such as increasing the remedies available, allowing the Commerce Commission to bring actions on behalf of consumers (including obtaining consumer refunds) and allowing class actions to occur would benefit consumers. While the changes to the CGA are important and will go some way towards benefitting consumers, it is the changes to the Disputes Tribunals such as assistance with writing complaints, support people attending hearings as of right, double or even treble damages, recovery of the filing fee, Referees ordering immediate payment and publication of decisions, that are of primary importance. Cumulatively they will have a dramatic impact on the adherence of traders to their obligations under the CGA.

Creating an additional door for consumers replete with signposts directing them to the most appropriate disputes resolution body will do little if the landscape beyond remains unchanged.

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\textsuperscript{231} See ibid at 31 where only 2 per cent of the 629 respondents who had experienced a problem with a good or service took the matter to a formal complaints scheme or had a hearing, such as in the Disputes Tribunal.