

## **EXPLANATORY NOTES ON PROPOSED CONSUMER PROTECTION (FAIR TRADING) BILL**

1 The proposed Bill provides 2 central remedies to the consumer, namely:

(a) to give to a consumer who has suffered loss as a result of an unfair practice by a supplier the right to bring an action in a court to obtain compensation from the supplier, (see paragraphs 16 to 28 below) and

(b) to allow a consumer to cancel certain contracts within a cancellation period (see paragraphs 29 to 32 below).

### **Application of the proposed Bill**

2 The proposed Bill applies to consumer transactions other than the exclusions in the First Schedule to the Bill (Clause 3(1) of the Bill). Acquisitions of an estate or interest in any immovable property (but not leases of residential property in consideration of rent) are excluded. Financial investments are governed by specific legislation within the regulatory framework administered by the Monetary Authority of Singapore are also excluded.

3 Other transactions or proposed transactions are subject to a cap in value of \$20,000. In the case of the rental of residential property, the cap applies where the annual rent exceeds that amount or the monthly rent exceeds one-twelfth of that amount. In relation to all other transactions, the cap applies where the value of the transaction exceeds \$20,000 or the amount of compensation payable by the consumer exceeds \$20,000. The amount of compensation payable by a consumer may be less than the full value of the transactions, for example where the consumer is responsible to pay for part of the value.

4 The Bill applies (a) where the consumer or supplier is a resident of Singapore *or* (b) where the offer or acceptance is made in or is sent from Singapore. A tourist will be able to commence an action if the supplier is resident in Singapore or (whether or not the supplier is resident in Singapore) if the offer or acceptance is made in or sent from Singapore. The provisions on the place of despatch of an electronic record in the Electronic Transactions Act (Cap.88) would apply to offers and acceptances in the form of electronic records.<sup>1</sup>

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<sup>1</sup> Section 15(3) and (4) provides:

“(4) Unless otherwise agreed to between the originator and the addressee, an electronic record is deemed to be despatched at the place where the originator has its place of business, and is deemed to be received at the place where the addressee has its place of business.

5 The meaning of consumer transaction hinges on the meaning of the “consumer”, “supplier”, “goods” and “services” which are discussed further below.

### **Definition of “consumer”**

6 The meaning of “consumer” is limited to individuals. It therefore applies only to natural persons. It does not apply to incorporated bodies, companies or associations.

7 To come within the definition of “consumer” the individual must not have obtained the goods with the intention of selling them.

8 The definition in paragraph (a) is not limited only to goods and services that are purchased or leased (or hired) by the consumer. It applies also where the right to receive the goods or services arises as a result of a gift, contest or other arrangement. In addition where, other than in the course of business, an individual, as heir or assignee of a consumer, receives goods or services, he has the same rights as the consumer (Clause 11 of the Bill).

9 Paragraphs (b) and (c) make it clear an individual who has a legal obligation to compensate the supplier for goods or services supplied to another individual is considered to be a consumer. For example, where an individual purchases a gift for delivery to another, that individual will be a consumer by virtue of paragraph (b) or (c), and the other individual who receives the gift will be a consumer by virtue of paragraph (a).

### **Definition of “goods” and “services”**

10 The definition of “goods” applies to personal property that is used or ordinarily used primarily for personal, family or household purposes. The definition of “services” is similarly limited to services that are offered or provided primarily for personal, family or household purposes.

11 The application of the Bill is therefore determined by the character of the goods or services, rather than the actual use to which they will be put

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(5) For the purposes of this section —

(a) if the originator or the addressee has more than one place of business, the place of business is that which has the closest relationship to the underlying transaction or, where there is no underlying transaction, the principal place of business;

(b) if the originator or the addressee does not have a place of business, reference is to be made to the usual place of residence; and

(c) “usual place of residence”, in relation to a body corporate, means the place where it is incorporated or otherwise legally constituted.”

by the individual in question, or to the character of that individual. The Bill would therefore extend protection to unincorporated businesses in their acquisition of goods or services of such a character. For example, a sole proprietorship would be protected in its purchase of ordinary stationery supplies for use in his office. Conversely, an individual acquiring goods for personal use will not be protected if the goods themselves do not fall within that description, for example, where an individual purchases a piece of sophisticated medical equipment ordinarily used only in hospitals. Such instances would presumably be rare.

12 The definition of “goods” and “services” also expressly include some items. Those items are not subject to the restriction on the character of the goods or services discussed above.

13 The terms “residential property” and “vouchers” are expressly included in the definition of “goods”. The sale of an estate or interest in immovable property is however absolutely excluded from the application of the Bill (First Schedule to the Bill). The sale of freehold or long term leases would therefore be excluded. The Act however applies to rentals of residential property subject to a cap of \$20,000. (See para 3 above.) A “voucher” is defined to mean any document that purports to give the holder of the document the right to obtain goods or a service or the right to obtain goods or a service at a discounted or reduced price.

14 The term “services” expressly includes “a service offered or provided that involves the addition to or maintenance, repair or alteration of goods or any residential property”. This would include renovation services and equipment maintenance or repair services. A “membership in any club or organisation if the club or organisation is a business formed to make a profit for its owners” is also included. The right to use property under a time share contract is also expressly included.

### **Definition of “supplier”**

15 The definition of supplier extends beyond a retail level supplier to a distributor or a manufacturer, and includes any salesperson, employee, representative or agent of the person. Retailers, manufacturers and distributors may be vicariously responsible for the unfair practices of their employees, agents or representatives.

16 Advertisers will enjoy an exemption from liability under the Bill in respect of any statement, representation or omission in an advertisement printed, published, distributed, broadcast or telecast on behalf of a supplier in good faith and in his ordinary course of business. (Clause 13 of the Bill)

## **Unfair Practices**

16 Under the Bill, it will be an unfair practice in a consumer transaction or proposed consumer transaction to:

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

In addition, a number of specific unfair practices covered by the Bill are listed in the Second Schedule of the Bill.

17 As “supplier” is defined to include any salesperson, employee, representative or agent of the person, retailers, manufacturers and distributors may be responsible for the unfair practices of their employees, agents or representatives. A salesperson, employee or representative could also be liable on his own account for engaging in an unfair practice.

## **Deceptive or misleading representations**

18 Paragraph (a) is objectively worded. Therefore a deceptive or misleading representation may occur notwithstanding the absence of an intention on the part of a supplier to deceive or mislead a consumer. The position is however ameliorated by clause 5(3) of the Bill which provides that in determining whether or not a person has committed an unfair practice, the reasonableness of the actions of that person in those circumstances is to be considered.

19 The reference to “fail to do or say anything” may involve more than an obligation to disclose known facts that may influence a consumer. The Canadian court (interpreting similarly worded legislation) has imposed a positive duty to ascertain pertinent facts, presumably as a step preliminary to their disclosure. A supplier is not, however, required to disclose information that is not likely to affect a consumer's decision regarding the acquisition of goods or services.

20 The word “reasonably” suggests that a supplier should not be found to have committed an unfair practice where only exceptionally unsophisticated consumers might have been deceived or misled by his or

her conduct. However, the fact that a consumer could have discerned the truth had he or she been less trusting will not exonerate the supplier.

### **False claim**

21 Paragraph (b) similarly imposes an objective liability on the supplier. The supplier need not know that the claim is false but the reasonableness of the supplier's actions will be taken into consideration by the court (clause 5(3) of the Bill).

### **Taking advantage of consumer**

22 Paragraph (c) incorporates of a mental component of actual or imputed knowledge on the part of the supplier. It requires that the supplier must know or should reasonably be expected to know the consumer's vulnerabilities. In effect, this provision codifies the most commonly recognised situations of unconscionable conduct by a supplier in respect of a consumer. In addition, items 11 and 12 of the Second Schedule to the Bill deal specifically with some aspects of unconscionable conduct, namely undue pressure or influence, and the imposition of harsh, oppressive or excessively one-sided terms.

### **Specific unfair practices**

23 A number of specific unfair practices are listed in the Second Schedule to the Bill. Items 5 and 17 are intended to apply to bait and switch practices. Item 18 is intended to apply to bogus closing down sales. Item 20 is intended to discourage the use of fine print to conceal a material fact from a consumer or to mislead a consumer as to a material fact.

### **Remedies for unfair practice**

24 A consumer who has suffered loss as a result of an unfair practice has a right to commence an action in court to sue the supplier. An action may be commenced in the Small Claims Tribunal where the value of the claim does not exceed \$10,000 or, by agreement, \$20,000. Alternatively, an action may be brought in a Magistrate's Court or the District Court or even the High Court.<sup>2</sup>

25 The court has powers, where it finds that a supplier has engaged in an unfair practice, to:

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<sup>2</sup> Jurisdictional limit of \$50,000 for Magistrate's courts and \$250,000 for District Courts will pose no problem in the case of actions under this Act which are capped at a value \$20,000.

- (a) order restitution of any money, property or other consideration given or furnished by the consumer;
- (b) award the consumer damages in the amount of any loss suffered because of the unfair practice;
- (c) make an order of specific performance against the supplier;
- (d) make an order directing the supplier to repair goods or provide parts for goods; or
- (e) make an order varying the contract between the supplier and the consumer.

26 The grant of such orders or awards would be subject to any applicable rules of law. For example, specific performance would not usually be granted unless damages would not be an adequate remedy, for instance where the goods to be supplied are unique. Restitution will not be ordered where the parties cannot be returned to their original position, for instance where the goods have been consumed.

27 The award of damages would also be governed by the normal rules of measure and remoteness of damages. The usual duty to mitigate (or minimise) loss would apply. This duty is reiterated by clause 7(2)(a) of the Bill. In addition, clause 7(2)(b) of the Bill requires the court to have regard to whether the consumer made any reasonable effort to resolve the dispute with the supplier before commencing action. The court could reduce the award of damages to the consumer if reasonable efforts were not made by the consumer to resolve the dispute.

28 In addition the court may exercise any other powers it may have to grant relief.<sup>3</sup> The reference to “any proceedings” is significant as unfair practice may arise in proceedings relating to another cause of action, such as breach of contract. It may be pleaded as an additional or alternative cause of action.

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<sup>3</sup> The Small Claims Tribunal has a power to make various orders under section 35 of the Small Claims Tribunal Act (Cap.308). Under that section, it has a power to make “work orders”, defined as an order to rectify a defect in goods or to make good any deficiency in the performance of services, by doing such work or attending to such matters (including the replacement of goods or parts thereof) as may be specified in the order. The District Court has the same powers as the High Court to grant such relief, redress or remedy or combination of remedies, either absolute or conditional, and to give effect to every ground of defence or counterclaim equitable or legal, including the power to grant an injunction as the sole relief in an action and make a binding declaration of rights whether or not any consequential relief is or could be claimed (Subordinate Courts Act (Cap.321), section 31). The magistrate’s court has the jurisdiction and powers conferred on a district court by certain sections of the Subordinate Courts Act. Its jurisdiction and powers may be exercised subject to the magistrate’s court limit, and the same limitations and provisions applicable to a district court. (Subordinate Courts Act, section 52) The powers of the High Court are provided in section 18 of the Supreme Court of Judicature Act (Cap.322) and the First Schedule of that Act.

## Right to cancel certain contracts

29 In relation to certain transactions where high-pressure sales tactics are often complained of, the draft Bill gives consumers a right to cancel the relevant sales contracts within the prescribed cancellation period. In this regard, the draft Consumer Protection (Fair Trading) (Cancellation of Contracts) Regulations provide that a consumer may cancel a direct sales contract or time share contract<sup>4</sup> within three days, excluding Saturday, Sunday and public holidays, after the day on which the contract is entered into.

30 In the draft Regulations, the cancellation of a direct sales or time share contract is effected by serving a notice of cancellation on the supplier or a person designated by the supplier as one to whom the notice may be given<sup>5</sup>. Upon the cancellation of the contract, the contract will cease to be enforceable and the consumer has a right to recover any sum of money paid to the supplier under or in contemplation of the contract. If there are goods in the possession of the consumer or any person on his behalf, the consumer or that person will have a lien on the goods for the sum payable by the supplier. Further, where the consumer has provided security in relation to the contract, the security is treated as never having had effect and the supplier must return to the consumer any property lodged with him for purposes of the security. Another important effect of cancellation is that all related contracts, such as credit contracts, are not enforceable against the consumer.

31 In the case of a direct sales contract, the consumer is under a duty to restore the goods to the supplier, except where the goods are perishable goods, goods which by their nature are consumed by use and which were so consumed before the cancellation, goods supplied to meet an emergency, or goods which had, before the cancellation, been incorporated in any land or thing not comprised in the contract. Whilst the goods are in the possession of the consumer, the consumer must take reasonable care of them.

32 The draft Regulations prohibit the supplier from imposing any additional duty or liability on the consumer. Such a term in the contract is void.

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<sup>4</sup> “Direct sales contract” and “time share contract” are defined in draft regulation 2.

<sup>5</sup> Draft regulation 3(4) sets out the various ways in which a notice of cancellation should be served on the supplier. A notice of cancellation should be served by delivering it to the supplier or designated person personally, by leaving it at or sending it by post to an address provided by the supplier, or by faxing it to the facsimile number provided by the supplier. Where the supplier has not notified the consumer of the address or facsimile number to which the notice of cancellation can be sent, draft regulation 3(5) provides that the notice may be given by leaving it or sending it by post to the usual or last known address of the place of business of the supplier or designated person, or where the supplier is a body corporate, to its registered office or principal office in Singapore.

## **Legal rules applicable to consumer transactions**

33 As most of the representations which could constitute an unfair practice are generally verbal as opposed to written, clause 14 of the Bill proposes the abolishment of the *parol evidence rule*<sup>6</sup> for the purposes of the draft Bill. The *parol evidence rule*, which is subject to certain exceptions, prevents evidence of any oral agreement or statement from being admitted as evidence to contradict, vary, add to, or subtract from the terms of a written contract. The proposed provision would allow extrinsic evidence establishing the existence of an express warranty to be admissible in any action between a consumer and a supplier, even though it adds to, varies or contradicts a written contract.

34 In addition, clause 15 of the Bill reiterates the *contra proferentum rule* in the context of a consumer transaction. In case of ambiguity in any provision in a document provided by a supplier evidencing all or part of a transaction or contract between a consumer and the supplier, the ambiguity will be interpreted against the supplier.

35 The provisions of the proposed Act are mandatory. Clause 10 of the Bill prevents a supplier from inducing a consumer to contract out of his rights conferred by the proposed Act. Any term in a contract will be void to the extent that it is inconsistent with the provisions of the Act. A consumer and supplier may however agree to a release in settlement of a dispute.

36 The Act does not affect any other right or remedy that the consumer may have. The consumer may still exercise those other rights and remedies. For example, the consumer may, in addition to or instead of exercising his rights conferred by the proposed Act, enforce any rights he may have under a contract with the supplier or make a claim against the supplier for breach of contract or in tort. (Clause 12 of the Bill).

### **Limitation period**

37 Proceedings under the Act (namely, a claim for loss suffered as a result of an unfair practice under clause 6 of the Bill) cannot be commenced later than 2 years from the date of occurrence of the last material event on which the proceedings are based. (Clause 9(1) of the Bill.)

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<sup>6</sup> Sections 93 and 94 of the Evidence Act (Cap.97) codify the parol evidence rule in Singapore and certain exceptions to it.

In the case of proceedings arising from a cancellation of a contract pursuant to clause 8 of the Bill, the limitation period is 2 years from the date of cancellation of the contract. This would apply to an action for the recovery of payment or security from the supplier. (Clause 9(2) of the Bill.)

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