

EXPLANATORY NOTES ON PROPOSED CONSUMER PROTECTION (FAIR TRADING) BILL IN SECOND PHASE CONSULTATION

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

- (a) to give to a consumer who has entered into a consumer transaction involving an unfair practice the right to bring an action in a court to obtain relief, (see paragraphs 18-32 below) and
- (b) to allow a consumer to cancel certain contracts within a cancellation period (see paragraphs 40-44 below).

2 Additionally, a specified body (e.g. CASE) will be given power:

- (a) to enter into a voluntary compliance agreement with a supplier (see paragraphs 33-35 below), or
- (b) apply for a declaration or injunction against a supplier (see paragraphs 36-38 below).

3 Finally, the Bill also makes provisions on the application of 2 legal rules in consumer transactions, namely:

- (a) by abrogating the parol evidence rule (see paragraph 45 below), and
- (b) reiterating the *contra proferentum* rule (see paragraph 46 below).

Application of the proposed Bill

4 The proposed Bill applies to consumer transactions other than the exclusions in the First Schedule to the Bill. The following transactions are excluded:

- (a) Acquisitions of an estate or interest in any immovable property. (Leases of residential property in consideration of rent and time share contracts are however covered by the Bill),
- (b) Service provided under a contract of employment, and
- (c) Transactions or activities already regulated under the Commodities Trading Act, the Moneylenders Act, the

Pawnbrokers Act, and certain transactions or activities already regulated under written law under the purview of the Monetary Authority of Singapore.

5 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. 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.¹

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

Definition of “consumer”

7 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.

8 To come within the definition of “consumer” the individual must act otherwise than exclusively in the course of a business.² This means that an individual is a consumer even though he obtains goods or services for dual purposes. For example, a sole proprietor who buys a car for use in his business, as well as for his personal use, will be treated as a consumer under the proposed Bill. He can therefore commence action for an unfair practice under clause 6, but the court may grant him relief only to the extent that the goods are used for non-business purposes (clause 7(5)).

9 Paragraph (a) of the definition of “consumer” is not limited only to goods and services that are purchased or leased (or hired) by the consumer. It applies

¹ 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) 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.”

² The first consultation draft of the Bill adopted a different test (adapted from the Alberta Fair Trading Act) namely, whether the goods are “used, or ordinarily used for personal, family or household purposes” or services are offered or provided primarily for those purposes. Based on feedback that it is difficult to characterise certain goods and services under this test and that the test under the local Unfair Contract Terms Act (Cap. 396) (UCTA) test is clearer, the current test had been adapted from the UCTA.

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 13 of the Bill).

10 Paragraph (b) makes it clear an individual who has a legal obligation to pay 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). The other person to whom the goods or services are to be delivered will not have any right to commence an action for an unfair practice (clause 6(2)).³

Definition of “goods” and “services”

11 The definition of “goods” covers all personal property, whether tangible or intangible⁴, and expressly includes chattels that are attached or intended to be attached to real property on or after delivery, and credit (including credit extended solely on the security of land).

12 “Residential property” is also expressly included in the definition of “goods”. The sale of an estate or interest in immovable property is however excluded from the application of the Bill (First Schedule to the Bill, paragraph 1(a)). The sale of freehold or long term leases would therefore be excluded. The Bill however applies to rentals of residential property. (See paragraph 4(a) above.)

13 In addition, “vouchers” are also expressly included in the definition of “goods”. 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” is not exhaustively defined in the Bill. The definition 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.

15 The right to use property under a time share contract is also expressly included. Based on feedback that the definition of “timeshare

³ Clause 6(2) restricts the right of action for unfair practice under clause 6 to the consumer who entered the agreement with the supplier, i.e. having privity of contract with the supplier, and excludes third parties who are not parties to the agreement with the supplier, except in the limited situation (in clause 13) of an heir or assignee of the consumer.

⁴ Intangible property includes licences to use software and other copyrights.

contract” was not sufficiently flexible to reflect certain market practices, the definition has been modified so that a regular interval or single property need not be specified. The definition of timeshare rights has also been restricted to those exercisable during a period of not less than 3 years, and must be for leisure purposes. Rights under a person’s contract of employment (e.g. employer’s holiday bungalow scheme) or a policy of insurance (e.g. insurance policy providing alternative accommodation) have also been excluded.⁵

Definition of “supplier”

16 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. A salesperson, employee or representative could also be liable on his own account for engaging in an unfair practice.

17 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 15 of the Bill)

Unfair Practices

18 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.

⁵ The modifications are adapted from the UK Timeshare Act 1992. The exclusion of rights exercisable during a period of less than 3 years is intended to ensure short term transactions such as leases, student lets and repeat holiday bookings are not caught by the definition of time share contract.

19 The right to commence an action for unfair practice is subject to a \$20,000 cap on the value of the claim. (See paragraph 27 below)

Deceptive or misleading representations

20 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.

21 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.

22 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 the supplier's 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

23 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

24 Paragraph (c) incorporates 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

25 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. Items 18 and 19 are intended to apply to bogus last day sales and closing down sales respectively. 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

26 A consumer who has entered a consumer transaction involving an unfair practice has a right to commence an action in court to sue the supplier.⁶ An action may be commenced in a Small Claims Tribunal, subject to its jurisdictional limits.⁷ An action may also be brought in a Magistrate's Court or the District Court.⁸

27 There is a \$20,000 cap on the value of the claim (clause 6(3) and (6)). If there is no claim for money, then the value of the subject matter of the action must be not exceed \$20,000. The consumer may abandon the excess in order to bring his claim within the cap.⁹

28 The court (other than a Small Claims Tribunal) has powers, where it finds that a supplier has engaged in an unfair practice, to:

- (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 or damage suffered by the consumer because of the unfair practice;

⁶ In the first consultation draft of the Bill, only a consumer who had suffered loss as a result of an unfair practice could commence an action under clause 6. Following feedback that it is difficult to show loss in the case of certain unfair practices, this has been change in the current draft Bill to a consumer "who has entered a consumer transaction involving an unfair practice". The need to show loss will however remain pertinent in relation to a claim for damages (clause 7(3)(b)).

⁷ In the Small Claims Tribunal, the value of the claim must not exceed \$10,000 or, by agreement, \$20,000. Jurisdiction is conferred on the Small Claims Tribunal to hear and determine actions under the Bill and the Regulations by section 7(1). Its jurisdiction is however limited to actions relating to contracts for the sale of goods or the provision of services within the meaning of the Small Claims Tribunals Act. This would exclude tenancy cases, timeshare contracts and some contests or other arrangements envisaged under the Bill.

⁸ The jurisdictional limits of Magistrate's courts (\$50,000) and District Courts (\$250,000) pose no problem in view of the \$20,000 cap on the amount of the claim.

⁹ In the first consultation draft of the Bill, the cap was placed on the *value of the subject matter* of the claim. This has been changed to the *value of the claim* based on feedback that the cap was too restrictive.

- (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.

29 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.

30 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(7)(a) of the Bill. In addition, clause 7(7)(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 costs to the consumer if reasonable efforts were not made by the consumer to resolve the dispute.

31 In addition the court may exercise any other powers it may have to grant relief.¹⁰ 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.

32 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.

¹⁰ 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)

Voluntary compliance agreement (VCA) (Clause 8 of the Bill)

33 VCAs are intended to be used as a non-litigious alternative to an application for injunction against a supplier who has engaged, is engaging or is likely to engage in an unfair practice. The Bill proposes to give CASE¹¹ the power to enter such agreements with suppliers.

34 Under a VCA, a supplier will undertake not to engage in the specified unfair practice or practices. In addition, the supplier may also agree to include undertakings to compensate consumers, to reimburse CASE for costs or expenses, or to publicise the VCA. Undertakings may be varied or added by agreement between CASE and the supplier. In the case of an undertaking to compensate a consumer, the undertaking may only be included or varied at the request of the consumer.¹²

35 In the event of failure to comply with undertakings to pay compensation to the consumer, the consumer may recover the agreed compensation as a civil debt instead of having to commence an action for unfair practice. Similarly, CASE can recover reimbursement and costs and expenses in the event of failure to comply with the respective undertakings.

Declaration and injunction (Clause 9 of the Bill)

36 CASE will also be empowered to apply for declaration and injunction against a supplier who has engaged, is engaging or is likely to engage in an unfair practice. CASE will be administratively governed by MTI¹³ guidelines in its exercise of this power. If the court decides to grant a declaration or injunction, it may also make an order for the supplier to advertise the particulars of the declaration or injunction.¹⁴

37 The court may require CASE to furnish security for costs. This will ensure that the supplier will be compensated for his costs in the event that the action fails.

38 If the court has made a declaration or injunction in respect of an unfair practice against a supplier, that will be conclusive proof in any other civil proceedings involving the supplier that the practice in question is an

¹¹ Consumer Association of Singapore.

¹² It is envisaged that the consumer and the supplier will have first agreed to a compensation amount to settle the dispute. The inclusion as an undertaking in a VCA will allow the consumer an easier way of recovering the agreed compensation if the supplier fails to comply with the undertaking, instead of having to commence action for unfair practice under clause 6 of the Bill.

¹³ Ministry of Trade and Industry.

¹⁴ The provisions are broadly modelled on section 326 of the Securities and Futures Act (Cap.289), section 28 of the Hazardous Waste (Control of Import, Export and Transit) Act (Cap.122A) and section 22 of the Saskatchewan Consumer Protection Act.

unfair practice. For example, in a subsequent action by a consumer against the same supplier in respect of that unfair practice, the consumer need not prove again to the court that that practice is an unfair practice. It will therefore save difficulty, time and costs in the proceedings.

Publicity

39 In addition to the provisions for negative publicity in clauses 8 and 9 of the Bill, CASE may publish information to educate consumers on who to do business with. This may include, for example, general information on unfair business practices as well as specific instances of such practices. (Clause 18 of the Bill). CASE and its members, officers and employees are given protection from liability for loss and damage to members of the public or suppliers as a result of the provision of such information if made in good faith and in the ordinary course of duty. (Clause 19 of the Bill)

Right to cancel certain contracts

40 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 contract¹⁵ within three days, excluding Saturday, Sunday and public holidays, after the day on which the contract is entered into. If the consumer information notice¹⁶ has not been brought to the attention of the consumer, the running of the cancellation period will be postponed until it has been brought to the attention of the consumer.

41 The cancellation of a direct sales or time share contract is effected by giving notice of cancellation to the supplier or a person designated by the supplier as one to whom the notice may be given¹⁷.

¹⁵ "Direct sales contract" and "time share contract" are defined in the Bill and, similarly, in the Regulations. See paragraph 15 above on modifications made to the definition of time share contract.

¹⁶ The consumer information notice must be in a prescribed form. In particular, it informs the consumer of his right of cancellation and how to exercise that right. The supplier must also provide the consumer with the name and address or facsimile of the person to whom the notice of cancellation is to be given. The consumer information notice includes a notice of cancellation form for use by the consumer.

¹⁷ Regulation 3(7) sets out the various ways in which notice of cancellation is to be given to the supplier. A notice of cancellation must be delivered to the supplier or designated person personally, left at or sent by post to an address provided in the consumer information notice, or faxed to the facsimile number provided in the consumer information notice. 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(8) 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. If there is no properly completed consumer information notice, the consumer

Upon the cancellation of the contract, the contract will cease to be enforceable and the supplier has a duty to return to the consumer any sum which the consumer has paid 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 any contracts arranged by the supplier¹⁸, such as credit contracts, are not enforceable against the consumer. The supplier also has a duty to return any trade-in goods or the amount of the trade-in allowance in lieu.

42 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. Where goods or services supplied before the cancellation have been consumed or otherwise cannot be returned to the supplier, the consumer has a duty to pay reasonable compensation for them.¹⁹

43 Breach of any of these duties is actionable as a breach of statutory duty. In the case of failure of the supplier to refund sums paid in contemplation of the contract, the consumer's claim is subject to a cap of \$20,000. If the consumer could have cancelled the contract and recovered the full sum under any other right however, the consumer may take action under that other right to recover any balance in excess of the cap, e.g. if the consumer had a right to cancel the contract for misrepresentation.

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

need not use the prescribed form and may instead use any notice in writing (regulation 3(6)). Notice by electronic means is also available if the supplier agrees (regulation 3(10)).

¹⁸ The provision has been limited to contracts arranged by the supplier. See Alberta Fair Trading Act, section 30(3).

¹⁹ The duty to pay compensation for *services* has been added. Reasonable compensation is now required instead of payment at the rate under the cancelled contract in the earlier draft Regulations.

Legal rules applicable to consumer transactions

45 As most of the representations which could constitute an unfair practice are generally verbal as opposed to written, clause 16 of the Bill proposes the abolishment of the *parol evidence rule*²⁰ in actions relating to consumer transactions. 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 relating to a consumer transaction between a consumer and a supplier, even though it adds to, varies or contradicts a written contract.

46 In addition, clause 17 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.

47 The provisions of the proposed Act are mandatory. Clause 12 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.

48 Subject to exceptions²¹, 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 14 of the Bill).

Limitation period

49 The limitation period for actions under the Bill is one year, for consistency with the limitation period applicable in the Small Claims

²⁰ Sections 93 and 94 of the Evidence Act (Cap.97) codify the parol evidence rule in Singapore and certain exceptions to it.

²¹ The exceptions are express provisions to the contrary in regulations made under the Act, or under clause 8(9) (barring further actions if compensation has been made under a VCA or related actions). These exceptions are intended to prevent the consumer from getting double recovery for the same loss.

Tribunal, where it is envisaged the majority of actions under the Bill will be taken.²² (Clause 11 of the Bill.)

50 The limitation period for actions for unfair practice under clause 6 of the Bill runs from the date of occurrence of the last material event on which the proceedings are based or the earliest date when the consumer had knowledge of the unfair practice, whichever is later. Clause 11(5), (6) and (7) clarify what constitutes knowledge for these purposes. The provision on knowledge prevents the limitation period from running until the consumer should reasonably have known, for example in the case of a false representation by the supplier, that the representation was false. Appropriate dates from which the limitation period runs are also specified for each of the other actions under the Bill and the Regulations.²³

51 The Limitation Act, except sections 24A to 24C (relating to latent damage)²⁴, applies to actions under the Bill and the Regulations. Of particular relevance are the various provisions postponing the running of the limitation period e.g. section 24 on disability and section 29 on fraud and mistake. Modifications to adapt section 24 to actions under the Bill and the Regulations have been specified in the Fourth Schedule.

Regulations

53 Provision has been made for the Minister for Trade and Industry to make regulations for the purposes of the Bill. This will allow for regulations to be made in future to fine-tune the operation of the Bill and to regulate other practices in relation to consumer transactions. A number of specific measures that can be used to regulate such practices have been specified.

T:/Fair Trading:/explanatory note 4

²² Small Claims Tribunals Act (Cap.308) s.3(b). This was reduced from the 2 year limitation period in the earlier consultation draft Bill.

²³ Although the running dates specified in the Bill differ from the Small Claims Tribunals Act (which refers to date of accrual of action), they will usually be of similar effect. The date will however differ if clause 11(1)(b) (postponement based on knowledge of the consumer) comes into play. The limitation period under the Small Claims Tribunals Act will prevail in the case of actions brought in the Small Claims Tribunal.

²⁴ These sections postpone the running of limitation periods in certain actions in cases involving latent damage because under the normal provisions (based on date of accrual), limitation periods may begin to run and expire even before the claimant could reasonably have known that he had a cause of action. These provisions are excluded by paragraph 4 of the Fourth Schedule because they are not relevant in the context of this Bill. Instead special provision has been made in clause 11(1)(b) to postpone the running of the limitation period until the consumer has the requisite knowledge to take action for unfair practice. Clause 11(5), (6) and (7) is however adapted from section 24A in the Limitation Act.