

NEW ZEALAND CONSUMERS AND INTERNET PURCHASES

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New Zealanders are increasingly turning to the internet to purchase products and services. This article reviews current regulatory initiatives to protect consumers who participate in the new world of e-commerce. In particular, the article focuses on the protection of the New Zealand consumer. The article argues that the New Zealand consumer is currently significantly less protected by their territorial authorities than their American and European counterparts. Redress of the imbalance is advocated, and mechanisms, particularly chargebacks, for actioning this are discussed in light of their use in other jurisdictions.

I INTRODUCTION

In 1999 New Zealanders spent US\$72.80 million on products and services for personal use over the Internet.¹ Total spending on the Internet in 2000 is predicted to rise to US\$278.86 million, more than twice that in 1999.² By 2004, this is expected to reach US\$2.736 billion.³ However for Internet shopping to reach its full potential, consumers must be confident that the benefits of making purchases online outweigh the risks and uncertainties. Many observers see lack of consumer confidence as the main barrier to growth of electronic commerce.⁴ The traditional assumptions of concurrent delivery and payment⁵ in a world where buyer and seller meet face to face do not apply when shopping

* This paper was submitted in fulfilment of the LLB(Hons) requirements at Victoria University in 2000.

1 Pete Hitchen *The Internet Market in Asia Pacific (Excluding Japan), 1997-2004* (Report 20923, International Data Corporation, 1999) 43. Total Internet spending in 1999 was US\$128.15 million. This includes spending on personal use, business end use and supply chain purchases.

2 Hitchen, above n 1, 41.

3 Hitchen, above n 1, 41.

4 Organisation for Economic Cooperation and Development *Dismantling the Barriers to Global Electronic Commerce*, para 23 <<http://www.oecd.org/dsti/sti/it/ec/prod/DISMANTL.htm>> (last modified 16 October 1997) [*"Dismantling the Barriers"*].

5 Sale of Goods Act 1908, s 30.

over the Internet, resulting in greater levels of risk than those carried by consumers in the traditional environment. Consumers are frequently required to pay for purchases before receipt of the goods.⁶ Contracts are formed at a distance and often across international borders, and the consumer may not know the supplier or its location.

This essay outlines domestic initiatives in section II. These are then compared with initiatives emerging from overseas in section III. Issues arising from international contracts are discussed in section V. Specific areas of potential reform relating to remedial issues and key areas of consumer protection are discussed in sections IV and VI respectively, based on overseas practice in each area, where levels of statutory protection are often greater than in New Zealand. These recommendations would reduce the risks faced by a New Zealand consumer shopping on the Internet, thus increasing the confidence of consumers in this new electronic environment. This would reduce a significant barrier to growth in use of the Internet.

II NATIONAL INITIATIVES CONCERNING INTERNET SHOPPING

A Ministry of Economic Development⁷

The Ministry of Economic Development (MED) has overall responsibility for addressing e-commerce issues. The policy approach taken by the MED is:⁸

one of minimal intervention and encouragement of self-regulation Government intervention will only be considered if it is necessary to address clearly identified market failures, or in order to maintain certainty for business and protection for consumers. Any such intervention should consist of simple, predictable regulation that is technology-neutral ... and able to respond to the pace of change in the electronic environment.

The MED is taking this approach to ensure that the growth of e-commerce is not impeded by over-regulation of the Internet environment, though all legislation applicable to traditional contracts is also applicable to Internet transactions. If there is too much regulation directed specifically towards the Internet, suppliers may choose not to trade online as the costs of trading over the Internet could outweigh the benefits. Innovations may also be stifled if they are inadvertently restricted by regulation. Overseas suppliers

6 Consumers International found that in 71 per cent of cases, prepayment was required. In a number of cases, the consumer was debited long before delivery of goods: Consumers International *Consumers@shopping: An International Comparative Study of Electronic Commerce* (1999) <<http://www.consumersinternational.org/campaigns/electronic/e-comm.pdf>> (last accessed 29 August 2000).

7 Previously known as the Ministry of Commerce.

8 Ministry of Commerce *Electronic Commerce: The "Freezer Ship" of the 21st Century* (Wellington, 1998) 4.

may choose not to trade in New Zealand to reduce compliance costs where New Zealand law may apply. The MED does not want to stifle the growth of this new medium, as there is great opportunity for positive impact on the economy.

Due to the global nature of the Internet, it has been suggested that national policies that are uncoordinated on an international level (no matter how well intentioned) may be worse than no action at all.⁹ The MED should ensure that the environment it creates is comparable with others on a global scale.

B Ministry of Consumer Affairs

The Ministry of Consumer Affairs (MCA), an operating branch of the MED, is responsible for addressing consumer issues within this framework. The most important initiative so far by the MCA has been the development of a Model Code for Consumer Protection in Electronic Commerce.¹⁰ The Model Code provides guidelines for best practice for Internet sellers in a number of areas, particularly disclosure of information online. The MCA is also undertaking educational initiatives, such as the promotion of advice to Internet shoppers.¹¹ At an international level, it has been involved in various forums and international activities to combat Internet fraud.

C Regulation v Self-Regulation

The New Zealand Government generally is promoting industry self-regulation, and this approach is partly justified by the MCA in the consumer protection area by claiming that legislation could not be developed quickly enough to meet the needs of the marketplace.¹² However, when comparing this statement to the time it has taken to implement other consumer legislation, for example the Consumer Guarantees Act

9 *Dismantling the Barriers*, above n 4, para 4.

10 Ministry of Consumer Affairs *Electronic Commerce and the New Zealand Consumer: A Status Report and a Proposed New Zealand Model Code for Consumer Protection in Electronic Commerce* (Wellington, 2000) 23-31 [*Electronic Commerce and the New Zealand Consumer*].

11 See for example Ministry of Consumer Affairs "Shopping on the Internet" <<http://www.consumer-ministry.govt.nz/internet.html>> (last accessed 24 April 2000).

12 *Electronic Commerce and the New Zealand Consumer*, above n 10, 18.

(CGA),¹³ this justification is not persuasive, as consumer issues related to the Internet are likely to be present for a longer time than implementation can take.¹⁴

The MCA also states the need for global solutions due to the borderless nature of the Internet, and claims that self-regulation is a quicker and more effective way of achieving these solutions. However, as discussed below in specific areas, other jurisdictions give consumers greater statutory protection, and the MCA should work towards harmonisation in these areas. Due to the technology-neutral approach being taken, any changes would also need to be applicable to the offline environment. The additional consumer protections provided in these other jurisdictions also apply regardless of how the contract was formed.

The MCA should ensure that there is a sufficient legal framework for consumer protection upon which industry self-regulation, can be built. Organisation for Economic Cooperation and Development commentators have suggested that self-regulation needs a legal framework to operate successfully, or that "soft law" like codes of conduct should complement "hard laws".¹⁵ An example of where self-regulation without a legislative framework has failed in the Internet environment is in a different area of consumer protection, that is, consumer privacy. After three years of self-regulation, the United States Federal Trade Commission (FTC), has released a report recommending that new legislation be adopted to protect consumers' privacy online. The Chairman of the FTC acknowledges, in relation to the privacy issue, that "self-regulation alone, without some legislation, is unlikely to provide online consumers with the level of protection they seek and deserve".¹⁶ This situation is analogous to other consumer protection scenarios, and indicates that the industry, without a regulatory framework upon which to base initiatives, cannot be relied upon to adequately protect consumers. Current industry initiatives, for example the guidelines released regarding consumer protection online by the Electronic

13 The Consumer Guarantees Act 1993 was first introduced to Parliament in March 1992 ((17 March 1992) 522 NZPD 6900-6915), and came into force on 1 April 1993. The Credit (Repossession) Act 1997 came into force the year after its Bill was first introduced. But compare reviews of other legislation, for example, the review of the Credit Contracts Act 1981 began in 1992 and is ongoing.

14 But in other areas of e-commerce, such as payment systems, this reasoning would be more justifiable. However areas such as these are not the issues with which the MCA is dealing.

15 This comment was made in the context of Internet content self-regulation: BIAC/OECD Forum *Internet Content Self Regulation* (Summary Record, Paris, 25 March 1998) para 25 <<http://www.oecd.org//dsti/sti/it/secur/act/selfreg-summary.htm>> (last modified 26 November 1998). An example of where a system such as this applies is with respect to the Health and Safety in Employment Act 1992. Codes of practice have been developed to assist particular industries to comply with legislation that is of more general application.

16 "FTC Gives Up on Net Self-Regulation" *ZDNet News*, para 5 <<http://www.zdnet.com/zdnn/stories/news/0,4586,2574082,00.html>> (last modified 23 May 2000).

Commerce and Consumer Protection Group,¹⁷ do not detail the level of protection that consumers should be given. The focus instead is on adequate disclosure of policies and practices chosen at the supplier's discretion. The MCA should provide a regulatory framework to allow general consumer protection rights, and industry could then build upon this framework to implement its requirements.

III INITIATIVES OF OTHER ORGANISATIONS

A Organisation for Economic Co-operation and Development (OECD)

The MCA has implemented a number of the recommendations of the OECD for consumer protection in electronic commerce,¹⁸ in particular aspects relating to disclosure practices of Internet suppliers, through the development of the Model Code. However, as the OECD does not detail the level of protections which should be given to consumers, the MCA needs to look further, to other jurisdictions, to decide on what protections should be given to consumers in the Internet environment.

The OECD acknowledges that government regulation and industry self-regulation are complementary and governments should therefore aim to achieve an effective balance between these two approaches. However the Government must ensure they protect vulnerable groups.¹⁹ The MCA are following this general approach, but are not addressing statutory regulation that may be necessary to protect consumers when purchasing over the Internet.

B Australia

The MCA has also used the Best Practice Model for Electronic Commerce²⁰ developed by the Australian Government in development of its Model Code. No regulatory initiatives have been undertaken in Australia to change the balance of risks in consumer

17 This group comprises some of the leading companies in the Internet and e-commerce industries, namely America Online, AT&T, Dell, IBM, Microsoft, Network Solutions and Time Warner. The guidelines can be accessed on their web site <<http://www.ecommercegroup.org/guidelines.htm>> (last accessed 29 August 2000).

18 OECD Council *Recommendation of the OECD Council Concerning Guidelines for Consumer Protection in the Context of Electronic Commerce* <<http://www.ftc.gov/opa/1999/9912/oecdguide.htm>> (last accessed 29 August 2000).

19 OECD *Background on Electronic Commerce*, para 7 <www.oecd.org/subject/e_commerce/ec_background.htm> (last accessed 1 July 2000).

20 Hon Joe Hockey Minister for Financial Services and Regulation *Building Consumer Sovereignty in Electronic Commerce: A Best Practice Model for Business* (CanPrint Communications Pty Ltd, 2000) <<http://www.ecommerce.treasury.gov.au/documents/ecommerce.pdf>> (last accessed 25 June 2000).

contracts, similar to the MCA's approach in New Zealand. However, the Australian Government intends to review and respond to consumer problems that emerge, and to closely monitor self-regulatory schemes to ensure they are effective. The Australian Government also notes that a possible option could be underpinning industry codes with legislation.²¹

C *The United States of America*

As in New Zealand, current consumer protection legislation in the United States applicable to conventional shopping also apply in the Internet environment.²² The FTC has circulated information for both consumers and merchants relating to their obligations under these regulations.²³ However the regulatory environment with respect to consumer protection is further developed in the United States than in New Zealand, so consumers in the United States have a greater level of protection. Important federal regulations for which there is no equivalent in New Zealand include the Fair Credit Billing Act²⁴ and the Mail or Telephone Order Merchandise Rule.²⁵

Various other projects undertaken in the United States may impact on future developments of consumer issues, particularly with respect to jurisdictional issues. One of these is the National Conference of Commissioners on Uniform State Laws' Uniform Computer Information Transactions Act (UCITA). While having a wider scope than solely purchases,²⁶ this draft Act includes rules relating to choice of law provisions in contracts and their relationship with mandatory consumer protections. Another project is the

21 Hon Joe Hockey, Minister for Financial Services and Regulation *A Policy Framework for Consumer protection in Electronic Commerce Business* (CanPrint Communications Pty Ltd, 2000) 5 <<http://www.ecommerce.treasury.gov.au/documents/cpiec.pdf>> (last accessed 29 August 2000).

22 Consumers International, above n 6, 16.

23 For example, the FTC published *Going Shopping? Go Global! A Guide for E-consumers Alert*, an information pamphlet for consumers advising them of risks in Internet shopping and how to reduce these risks through provision of a checklist of things to look out for on a supplier's web site. Business education includes, for example, *Selling on the Internet: Prompt Delivery Rules Alert*, advising businesses of their obligations in this respect: see FTC *Consumer Protection: E-commerce and the Internet* <<http://www.ftc.gov/bcp/menu-internet.htm>> (last modified 22 August 2000).

24 Fair Credit Billing Act 15 USC §§ 1666-1666j (1974). This Act forms part of the Truth in Lending Act 15 USC §§ 1601-1667f(1968), discussed below at section IV B 2.

25 Mail or Telephone Order Merchandise 16 CFR § 435 (1975). Discussed below at section VI B 2.

26 UCITA applies to all transactions in "Computer information", defined in s 102 of the Uniform Computer Information Transactions Act (July 1999 draft) as "information in electronic form which is obtained from or through the use of a computer or which is in a form capable of being processed by a computer" <<http://www.law.upenn.edu/bll/ulc/ucita/cita10st.pdf>> (last accessed 29 August 2000). The paradigm transaction under this Act is that of a licence.

Cyberspace Law Committee of the American Bar Association Section of Business Law's (ABA's) project on jurisdiction in cyberspace, which may lead direction of international initiatives on jurisdiction. The MCA needs to keep abreast of developments in these areas.

D European Union

The European Union also has directives relating to aspects of consumer protection, which apply in all shopping transactions, for which New Zealand has no equivalent. Thus consumers in the European Union also have greater protection than their New Zealand counterparts. The MCA should also look towards these directives when considering reform of consumer protection. Particularly relevant directives include the Consumer Credit Directive²⁷ and the Distance Contracts Directive.²⁸

E Consumers International²⁹

The MCA should use the results from research conducted by Consumers International in 1999,³⁰ to gain an idea of actual experiences when engaging in Internet shopping, and to pinpoint areas where initiatives could be focused in balancing risks. Overall the study concluded that there are many obstacles to overcome before consumers can shop with complete trust in cyberspace. The recommendations resulting from the study include: the need for a co-ordinated international approach to the formulation of guidelines; third party redress mechanisms; and a right for consumers to return goods without giving a reason. Consumers International also believes that the law governing Internet transactions should be that of the consumer, but where the merchant chooses otherwise, it should be clear to the consumer. Regardless, the consumer must not be deprived of key consumer protections in his or her own country.

27 The Council of the European Communities *Council Directive 87/102/EEC of 22 December 1986 for the approximation of the laws, regulations and administrative provisions of the Member States concerning consumer credit* <http://europa.eu.int/comm/consumers/policy/developments/cons_cred/cons_cred01_en.html> (last accessed 29 August 2000) ["*Consumer Credit Directive*"]. See Part IV B 2 below.

28 The European Parliament and Council of the European Union *Directive 97/7/EC of the European Parliament and of the Council of 20 May 1997 on the Protection of Consumers in respect of Distance Contracts* <http://europa.eu.int/comm/consumers/policy/developments/dist_sell/dist01_en.html> (last accessed 29 August 2000) ["*Distance Contracts Directive*"]. See Part VI B 2 below.

29 Consumers International is a federation of consumer organisations dedicated to the protection and promotion of consumer interests worldwide, and it has over 230 members in more than 100 different countries. MCA is a government member of Consumers International.

30 Consumers International, above n 6.

IV GAINING AN EFFECTIVE REMEDY

A New Zealand Environment

The consumer's primary concern in situations where something goes wrong with a contract entered into on the Internet will be whether they will be liable for the cost of the goods. The CGA provides for a right of repair, a refund or replacement of goods where the guarantees implied by the statute are not met. The Sale of Goods Act 1908 may provide for a remedy where the CGA doesn't apply, for example where there are problems with delivery. However, these rights may be of little or no practical benefit to the Internet shopper, who may have no way of enforcing them, due to the anonymity of parties in transactions and, often, great geographical distances between parties. Even within New Zealand in relation to non-Internet transactions, consumers have brought few court actions to enforce their rights under these Acts.³¹

This suggests that other remedial schemes need to be investigated to ensure that Internet consumers will obtain refunds where necessary when they have paid for the goods before they have received them. The two main areas with potential for Internet shoppers are "chargebacks" and assurances given by Certified Merchant Programmes.

B Chargebacks

1 The New Zealand system

The situations in which a New Zealand consumer is entitled to have his or her credit card re-credited are not regulated by legislation, and there is no requirement that card issuers undertake liability in this area, whether the transaction was entered into over the Internet or in a traditional way. This has meant that, to date, issuers accept little responsibility where the consumer faces problems, particularly when those problems are related to the goods paid for through credit card transactions.

The New Zealand credit card system, applicable to both Internet and non-Internet transactions, is driven by contractual arrangements. There are usually four parties to a credit card transaction: the cardholder (consumer); the issuer of the credit card to the

³¹ This is primarily due to the small dollar amount of most consumer transactions. If the consumer does decide to argue a dispute, it could be taken to the Disputes Tribunal (disputes under \$7,500: Consumer Guarantees Act 1993, s 47(4)) or the District Court (disputes greater than \$7,500). High legal costs beyond this stage would play a part in discouraging the consumer from taking their case further. These statutes do not change the rules relating to awarding of costs. Although costs awards are a court discretion, the principle is that the party who fails in the action should pay the costs of the party who succeeds (Judicature Act 1908, 2nd Sch, cl 46).

consumer; the supplier; and the supplier's acquirer.³² Both the issuer and the acquirer will generally be banks, which will belong to credit card organisations, usually Visa or Mastercard or both, and the relationship between issuers and acquirers is governed by these rules. The acquirer-supplier relationship will be governed by the merchant agreement between the parties. After a supplier has made a sale, the supplier will present sales vouchers to the acquirer for the credit of their account. The acquirer will then forward the voucher to the issuer, who will pay the acquirer for the amount of the sale. The issuer will then charge the amount to the consumer, who, under the terms and conditions of the card, will be responsible for paying the amount.

If a consumer disputes a charge that appears on his or her statement, the issuer will investigate and, if warranted, credit the account of the customer for the amount of the disputed charge. The rules of the credit card organisation will then dictate rules for allowing the issuer to charge the amount back to the acquirer. The acquirer may then be able to pass the cost onto the supplier by withholding payment or debiting the supplier's account, according to the terms of the merchant agreement.³³

The situations in which the consumer will be entitled to have their account re-credited are many and varied. The Bank of New Zealand (BNZ) gives some detail of where it provides for no or restricted liability. These include situations where unauthorised charges are made to a credit card, where goods are not delivered to consumers, or where a consumer is owed a credit for returned merchandise.³⁴ This indicates that there may be situations where problems with the underlying goods in the contract can be resolved by chargebacks. However other banks will not necessarily provide this level of protection.³⁵

32 See generally Turban and others *Electronic Commerce: A Managerial Perspective* (Prentice Hall International Inc, Upper Saddle River (New Jersey), 2000), 284-287.

33 For example, ASB deal with chargebacks in clause 6 of their merchant agreement, by stating that (among other reasons) they may charge back any sales voucher that is not a valid voucher or where the cardholder disputes liability for any reason.

34 The Bank of New Zealand (BNZ) has two policies for Internet shopping. The first, NetPledge, states that where a consumer has been billed for unauthorised purchases online, the consumer will not be liable (in certain specified circumstances). The second is NetPromise, where if a consumer is billed for merchandise never received, or a consumer is owed a credit for returned merchandise purchased online, BNZ undertakes to investigate and respond to the consumer within seven days, and the consumer will not be charged for any item fraudulently charged: <<http://www.bnz.co.nz/money/2184.html>> (last accessed 29 August 2000).

35 For example, ASB's merchant agreement states that all disputes in respect of goods and services paid for by the card shall be settled entirely between the merchant and the cardholder (clause 3(xiv)). However the merchant agreement does require that the merchant has established a fair policy for exchange or return of merchandise, including provision of a credit voucher (not cash) to the customer (clause 3(iii)).

2 *Credit card issuer liability overseas*

The amount of responsibility undertaken by New Zealand issuers and cardholders in contractual arrangements can be compared with the statutory responsibilities of issuers in the United States, where the Fair Credit Billing Act (FCBA) determines a different balance the relationships between cardholders and issuers. The OECD has credited these provisions with being partly responsible for the high confidence in telephone shopping in the United States.³⁶ The application of the principles to international Internet shopping will also increase consumer confidence in this area.³⁷

The FCBA requires that where the consumer believes there to be a "billing error", the consumer write notice to the creditor within sixty days.³⁸ A billing error includes "a reflection on a statement of goods or services not accepted by the obligor [consumer] ... or not delivered to the obligor... in accordance with the agreement made at the time of the transaction".³⁹ A creditor must then respond with a written acknowledgment within thirty days, and make corrections to the account of the debtor within ninety days where an error is proven.⁴⁰ Where the creditor does not comply with these requirements, any right to collect from the consumer is forfeited.⁴¹

Additionally, an issuer can be subject to all claims and defences arising out of any transaction paid for by credit card where the consumer has made a good faith attempt to resolve the issue with the supplier (for purchases over US\$50).⁴² However this section has geographical limitations, as the transaction must have occurred within 100 miles of the original mailing address given to the issuer by the cardholder. Where the transaction "occurs" is dependant on state law, so whether an Internet transaction will be covered may depend on whether the applicable law determines occurrence to be at the place of the merchant or of the consumer. However the low level of consumer actions brought in courts suggests that this section may be little used by consumers regardless of the interpretation given.

36 *Dismantling the Barriers*, above n 4, para 41.

37 *Dismantling the Barriers*, above n 4, para 41.

38 Fair Credit Billing Act 15 USC § 1666(a) (1974).

39 Fair Credit Billing Act 15 USC § 1666(b)(3) (1974).

40 Fair Credit Billing Act 15 USC § 1666(a) (1974).

41 Fair Credit Billing Act 15 USC § 1666(e) (1974).

42 Fair Credit Billing Act 15 USC § 1666 (e) (1974).

The Electronic Fund Transfer Act⁴³ applies to situations relating to debit cards. The rights given when using a debit card are not as comprehensive as with use of a credit card. A consumer will generally only be able to dispute an amount on a debit card statement that relates to errors in the payment process, not in respect of problems with the underlying goods.⁴⁴

European Union consumers paying by credit card also have greater protections than New Zealand consumers do. The Consumer Credit Directive recommends that Member States, in certain circumstances, allow consumers to pursue remedies against the grantor of credit where the goods or services are not supplied, or are supplied only in part, or are not in conformity with the contract for their supply.⁴⁵ This right applies where the consumer has pursued his remedies against the supplier but has failed to obtain a satisfactory result.

An example of application of the Consumer Credit Directive is in United Kingdom legislation, under section 75 of the Consumer Credit Act 1974.⁴⁶ This section provides that if a debtor in a debtor-creditor-supplier arrangement has any claim against the supplier for breach of contract, he shall also have a claim against the creditor, who shall be jointly and severally liable to the debtor (for purchases over £100).⁴⁷ The Act further provides that the creditor is entitled to be indemnified by the supplier for loss suffered. The Office of Fair Trading (OFT) are of the view that credit card situations, which usually involve four parties (that is, the supplier, their acquirer, the issuer and the consumer) are covered by the section.⁴⁸ This section is seen to be a consumer protection measure of considerable value, as a form of insurance transferring risk from cardholders to card issuers.⁴⁹ The protection extends only to credit cards, so will not apply where debit cards and prepayment cards are used.

43 Electronic Fund Transfer Act 15 USC §§ 1693-1693r (1978).

44 See Electronic Fund Transfer Act 15 USC §1693f(1968).

45 *Consumer Credit Directive*, above n 27, Art 12.

46 This statute predates the *Consumer Credit Directive*, but its provisions are considered to be sufficient for implementation of it: Office of Fair Trading (UK) *Connected Lender Liability* (United Kingdom, 1994).

47 This protection is beyond that required by the *Consumer Credit Directive*, which requires that the consumer pursue the right to remedy with the supplier before having the right to a remedy against a grantor of credit. However Member States are entitled to grant consumers greater levels of protection than those granted under the Directive.

48 Office of Fair Trading (UK), above n 46, 25-26.

49 Office of Fair Trading (UK), above n 46, 5.

For a claim to be brought under section 75, the consumer would have to bring an action under other laws, for example the United Kingdom's Sale of Goods Act 1979, suggesting that there may be little enforcement due to the low number of consumer disputes taken to court. However to dilute the risk faced by issuers as a result of this section, both Visa and Mastercard provide chargeback arrangements that cover a range of transactions, for example where goods ordered do not arrive.⁵⁰ This spreads the risk of liability between issuers, acquirers and suppliers.

The OFT have considered suggestions of changing this liability to "second in line" liability, requiring cardholders to take reasonable steps to gain redress from suppliers first. International transactions could be differentiated from domestic transactions, by requiring a lower standard for "reasonable steps". There is no inherent reason why a change to second in line liability should disadvantage consumers, and regardless, it is good advice for consumers to first attempt to resolve the problem with the supplier.⁵¹ However, as yet there has been no change to the provision.

The OECD has also recognised the potential of chargebacks as a method of consumer redress, especially in cross-border transactions. A study conducted in 1996⁵² does not distinguish between the different types of payment cards, that is, credit, debit or prepayment cards, though recognises that regimes in most countries protect credit purchasers and not debit purchases.

The OECD concluded in their study that where chargeback systems are governed by voluntary rules, there is generally no concept of issuers' liability or responsibility to intervene between transactions of the merchant and the consumer.⁵³ Also noted is that any requirement for a good faith attempt with a supplier before turning to the card issuer is more practical in domestic situations. It is the potential for consumers to hold the issuer, and ultimately the supplier responsible for problems that makes this a possible solution to consumer redress issues.⁵⁴

50 Office of Fair Trading (UK), above n 46, 19.

51 Office of Fair Trading (UK), above n 46, 37-38.

52 OECD *Consumer Redress in the Global Marketplace: Chargebacks* (OCDE/GD(96)142, Paris, 1996) <http://www.oecd.org//dsti/sti/it/consumer/prod/e_96-142.htm> (last modified 1 July 1999) ["Chargebacks"]. The initial aim of the study was to produce a Council recommendation by the end of 1997, however this project was put aside in order to give preference to completion of the Recommendation of the OECD Council Concerning Guidelines for Consumer Protection in the Context of Electronic Commerce.

53 *Chargebacks*, above n 52, 52.

54 *Chargebacks*, above n 52, 53.

3 *Recommendation for chargebacks*

Responsibility issuer is an area that the MCA could develop to ensure that Internet consumers are able to gain redress in disputes with suppliers without costly court action (for purchases over a certain amount). Legislation similar to that in the United States could be implemented, to give a right to a consumer to dispute a charge where the problem relates to a key area of consumer protection.⁵⁵ The effect of such legislation would be to increase the number of situations in which a consumer will not be liable for the cost of goods where there are disputes. The current situation between issuers, acquirers and merchants would remain the same, that is, the contractual arrangements resulting in the supplier being ultimately responsible for the amount of the disputed charge. Any legislation should be applicable to international transactions also, as a way of ensuring that consumers are protected to the same levels in international contracts as when dealing with domestic suppliers.⁵⁶ This legislation would also result in consistency between issuers, to ensure consumers are all protected to the same level. This would reduce potential liability of consumers, and help to achieve the ultimate goal of confident consumers in cyberspace.

Issuers should face second in line liability, so that the consumer is required to first take reasonable steps to attempt to resolve the dispute with the supplier. Thus there would be the opportunity for a supplier to resolve disputes before the consumer approaches their issuer. The requirement to attempt resolution with the supplier first should also apply in international contracts, with the increased difficulties that consumers may face when dealing with international suppliers taken into account when determining reasonable steps the consumer must undertake. There would be incentives for suppliers to resolve issues at this stage, as they could face repercussions from acquirers such as higher fees where they have high levels of chargebacks. This regulation could also mean that acquirers require their suppliers to have good returns policies and dispute resolution systems in place to reduce the acquirer's risk.

Such regulation may create a burden on credit card issuers, due to the cost of investigation of claims.⁵⁷ However, the ability of credit card organisations to provide for chargebacks of disputed amounts from issuers to acquirers, and ultimately to hold suppliers responsible should reduce compliance costs. Costs of investigating claims could be ultimately charged to merchants. Moreover, issuers may be best placed internationally to resolve such disputes. The ability of issuers to charge back amounts to acquirers would also create incentive to acquirers to ensure that they sign up suppliers who are unlikely to

55 Some specific areas of protections are discussed in Part VI below.

56 This issue is further discussed at Part V below.

57 The OECD estimates the cost of each investigation to be US\$35: *Chargebacks*, above n 52, 26.

have high levels of chargebacks, by investigating potential suppliers thoroughly. This is perhaps MCA's best chance of ensuring that New Zealand consumers will receive effective rights of redress. Consumers would be encouraged to use their credit card, and in this way issuers could use chargebacks as a competitive tool, like the BNZ as discussed above, therefore cementing their position as the preferred payment method. Increased consumer confidence in the online environment would result in increased transactions, benefiting both suppliers and credit card companies.

This would also help to harmonise the laws of New Zealand with the United Kingdom and the United States. Many issuers would be faced with similar requirements as their counterparts in these countries, and codes of practice developed in these countries by credit card organisations to deal with chargebacks would be applicable to New Zealand as well.

Initially legislation should apply solely to credit cards, as currently most consumers use credit cards in purchasing this would cover most situations where consumers face problems. As other forms of payment increase, such as debit cards, electronic wallets and prepayment cards, the MCA could look at ways to extend chargeback principles to these methods. The OECD in their 1996 study expressed the view that chargebacks should apply regardless of the type of payment card used, although acknowledged that a number of additional issues arise with this approach.⁵⁸ It may be that in some of these situations, the consumer should bear the extra risk to balance the benefits of different payment methods, such as anonymity, immediate transfers of funds, fewer fees and lower interest charges. In any case, New Zealand should wait for its major trading partners to make moves in this area to ensure some degree of harmonisation.

The technology-neutral approach suggests that this system should apply in all shopping transactions. This is already the case in the United States and the United Kingdom, and liability in this area predates the Internet. If introduced, this would further promote harmonisation between New Zealand and these countries. The situations in which the consumer would need to resort to the card issuer would be likely to be fewer in offline transactions, as the need for new redress mechanisms results from characteristics of the Internet that differ from the characteristics of the traditional shopping environment.

C Certified Merchant Programmes

1 Developments overseas

The second initiative with potential to protect consumers using the Internet is the development of certified merchant programmes, such as the one developed by America

⁵⁸ *Chargebacks*, above n 52, 76.

Online (AOL). This scheme provides a "seal" of assurance on a supplier's web site of membership of the AOL Certified Merchant programme. This scheme is driven by contractual arrangements, where belonging to the scheme gives AOL the right to inspect the supplier and its systems in return for display of the AOL Certified Merchant Guarantee. This means that where consumers have problems with suppliers, they can have some assurance that their complaint will be handled effectively, due to the high standards required of suppliers by AOL for dispute resolution (among other things). In the event that the supplier does not comply with its return policy, AOL will intercede on the consumer's behalf, and, if necessary, pay a full refund to the consumer.⁵⁹ If the supplier does not comply with the requirements of the scheme, AOL can remove the supplier from the programme. Suppliers must pay to belong to the scheme, but they will in turn increase their sales, and the full guarantee given by AOL means that the consumer can be confident in shopping with these stores. Other schemes such as this operate around the world, though with differing levels of protection.

These schemes will become increasingly effective as consumers become aware of them and seek out merchants that belong to them. Though many currently do not offer the level of protection that AOL does, in time increased competition between entities offering these programmes might enable the administrators of these schemes to increase the scope for protection. Improved technology such as authentication of sites and certificates will also increase the reliability and scope of these schemes.

2 Recommendation

The Consumers Institute of New Zealand has expressed some interest in developing a seal scheme for New Zealand consumers.⁶⁰ The scheme would be most effective for consumers if a full refund was offered where communications with the supplier failed. However it might take some time before this is feasible, due to lack of education and resources, and possible teething problems. The appropriate role for the MCA in this area is to educate consumers of such schemes, as there is currently no regulation of these kinds of schemes. This is probably one area where technology could advance too rapidly for regulation, and regulation could also stifle innovation.

59 America Online <<http://shop.aol.com/custserv/guarantee.adp>> (last accessed 29 August 2000).

60 *Electronic Commerce and the New Zealand Consumer*, above n 10, 16.

V INTERNATIONAL TRANSACTIONS

A The Issue

Currently only 10 to 15 per cent of New Zealand Internet shoppers purchase from New Zealand websites.⁶¹ Additionally, Consumers International found that only 10 per cent of suppliers stated applicable law in their contracts.⁶² These figures indicate that the majority of transactions in which consumers in New Zealand enter into over the Internet will be with overseas suppliers who have not stated the law they wish to be applicable to their contracts. The issue for the MCA to consider is whether the key consumer protections in the supplier's jurisdiction or those given by New Zealand law should apply, regardless of which laws apply to the transaction as a whole. Whether the law of the supplier or of the consumer should be applicable generally, or whether choice of law clauses are enforceable are issues beyond the scope of this essay.

B Possible Policy Approaches

In determining the policy approach to be taken towards applicability of key consumer protections in international contracts, the MCA should consider the domestic environment with respect to freedom of contract for situations where there is a choice of law made. MCA should also consider approaches suggested or implemented overseas by a variety of bodies.

Freedom of contract is a fundamental principle in New Zealand,⁶³ and this remains the case with Internet transactions. However this contractual freedom is often a fiction in the case of consumer contracts, where an individual consumer usually lacks the power to negotiate contract terms. The imbalance of contractual power is often the rationale for statutory restrictions on freedom of contract.⁶⁴ The issue for the Internet environment is whether these restrictions on contract that apply to domestic transactions should also be applicable to international transactions.

Those in favour of saying that the consumer should not be deprived of key consumer protections in their own country, whether or not a contract includes a choice of law clause, include consumer protection groups, such as Consumers International, the Trans Atlantic

61 Ord Minnett Research *NZ Retail Sector Review* (Ord Minnett Securities-NZ-Ltd, Wellington, 1999) 8.

62 Consumers International, above n 6, 28, found applicable law stated in only 10 per cent of cases.

63 Parties are often allowed to contract out of statutory provisions, see for example the Sale of Goods Act 1908, s 56 and the Contractual Remedies Act 1979, s 5.

64 For example the Consumer Guarantees Act 1993, s 43, which provides that any attempt to contract out of the provisions of the Act commits an offence against the Fair Trading Act 1986, s 13(1).

Consumer Dialogue⁶⁵ and the Consumers Federation of America.⁶⁶ Also supporting this view is UCITA.⁶⁷ Under section 109 of the current draft, where there is no choice of applicable law in a contract, the law that applies to purchases requiring tangible delivery is that of the jurisdiction of the place of delivery. This would usually mean that the law of the consumer would apply. It is also provided that where there is a choice of law made, that choice is not enforceable in a consumer contract if it would vary a rule that may not be varied under the jurisdiction that would be applicable had no choice been made.

The European Union has also taken this approach. The Rome Convention⁶⁸ states in Article 5 that "a choice of law made by the parties shall not have the result of depriving the consumer of the protection afforded to him by the mandatory rules of the law of the country in which he has his habitual residence". This approach to key consumer protections is seen also in the Distance Contracts Directive, where Article 12 requires the Member State to ensure that the consumer does not lose the protection given by the Directive through a choice of law clause of a non-member country.

Arguments supporting this approach include: the consumer's lack of knowledge of where the seller is based; the need to know laws of many different jurisdictions; increased mistrust if consumers are asked to abide by foreign laws; and disproportionate risks already borne by the consumer due to prepayments of goods. Also, potentially, a supplier could apply laws of a country with little protection, but current practice seems to suggest that merchants will choose the law of the jurisdiction in which they are based.⁶⁹ Even where choices of law have been made in some cases, it is recognised by some suppliers that

65 Trans Atlantic Consumer Dialogue is a consumer dialogue between the EU and the US. It brings together leaders of the consumer movement from all over the EU and the US representing 630 million consumers. Their web site is <<http://www.tacd.org>> (last accessed 29 August 2000).

66 Letter from Jean Ann Fox, Consumers Federation of America, to the Secretary at the Federal Trade Commission (26 March 1999) <<http://www.ftc.gov/bcp/icpw/comments/cfa.htm>> (last accessed 29 August 2000).

67 Uniform Computer Information Transactions Act (July 1999 draft) above n 26, s 102. Although this Uniform Act applies to computer information transactions and not sales of goods, the rules included may be influential on future developments in the area of applicable law.

68 1980 Rome Convention on the Law Applicable to Contractual Obligations (Consolidated Version) <http://www.europa.eu.int/eur-lex/en/lif/dat/1998/en_498Y0126_03.html> (last modified 11 March 1999).

69 Consumers International, above n 6, 28, found that the law chosen by suppliers was generally that of their country of origin. This finding is also supported by the National Conference of Commissioners on Uniform State Laws, who state that "almost all the time, the choice is the home state of the licensor": para 7 <http://nccusl.org/uniformact_qanda/uniformacts-q-ucita.htm#law> (last accessed 29 August 2000).

they may not be able to contract out of key consumer protections given in the jurisdiction of the consumer.

Arguments against the key protections of the consumer being applicable in all transactions include: an unfair burden on the seller regarding understanding the laws of different jurisdictions; impracticality of sellers being able to comply with all of these laws; the cost of compliance creating a barrier to entry; and the potential restriction by suppliers of their products in some areas. Bodies that support application of the laws of the supplier include the Global Business Dialogue on Electronic Commerce, the American Advertising Federation and the International Chamber of Commerce.

A third view is that taken by the ABA in their draft report of the project on jurisdiction. The suggestion is not to focus on the laws of the consumer or of the merchant, but to apply common principles of consumer protection to all transactions, regardless of location.⁷⁰ Industry groups such as the Electronic Commerce and Consumer Protection Group also support this approach.⁷¹ This group believes that at some point a framework will exist whereby local jurisdictions will defer the application of their laws to this new framework. Global standards and third party redress mechanisms would need to be developed to implement this approach.

C Recommendation

A New Zealand supplier can contract out of New Zealand law, but cannot contract out of the key consumer protections. The MCA should extend this approach to international contracts. This also would be in line with the approach of the European Union and UCITA, that key consumer protections cannot be contracted out of by the supplier. Current practice of Internet suppliers indicates that if this approach was not taken, New Zealand consumers may be subject to law that provides for lower levels of consumer protection.⁷² Internet consumers are particularly vulnerable when dealing with international suppliers, and it is the responsibility of MCA to protect these consumers, especially because of the large number of international transactions that New Zealand consumers enter into over the Internet.

70 Section of Business Law Committee on the Law of Cyberspace *Achieving Legal and Business Order in Cyberspace: A Report on Global Jurisdictional Issues Created by the Internet*, 100 <<http://www.abanet.org/buslaw/cyber/initiatives/draft.rtf>> (last accessed 29 August 2000).

71 Electronic Commerce and Consumer Protection Group *Jurisdiction Statement* para 2 <<http://www.ecommercegroup.org/statement.htm>> (last accessed 29 August 2000).

72 The terms and conditions of suppliers often include disclaimers of all warranties to the full extent permissible by applicable law, for example, Amazon.com, Barnes & Noble, Sausage Software, Napster, Inc, Microsoft and Macromedia. Thus there may be a lower level of protection given to New Zealand consumers if New Zealand law was not the applicable law.

Policy such as this could be implemented through the chargeback legislation suggested above in section IV by specifically stating that the legislation applies to credit card transactions with overseas suppliers. This is compatible with the view of the United Kingdom Office of Fair Trading, which has stated that it is of the view that the legislation relating to chargebacks applies to international transactions.⁷³ Obtaining redress through chargebacks could be the most effective way in which the MCA can ensure that consumers receive the key protections applicable under New Zealand law.

In the future there may be developments towards a global framework for consumer protection. The MCA should stay aware and become involved in international developments that emerge in this area. Developments towards global principles of consumer protection are likely to take time to emerge, as current guidelines such as those recommended by the OECD and by industry do not detail specific protections that consumers should be given in the Internet environment.

VI KEY CONSUMER PROTECTIONS

The above discussion relating to chargebacks and international contracts indicates the importance of ensuring that the MCA has adequate key consumer protections in place for New Zealand consumers. The situations in which chargebacks should be applicable are those where a key protection of the consumer has been breached, whether that be in a contract with a domestic or an international supplier. The scenarios below present issues that may arise in the Internet context, and possible solutions to these issues are discussed.

A Non-Delivery of Purchases

1 New Zealand environment

Consumers International found that 9 per cent of goods failed to arrive, despite receipt of a confirmation of order in over half of the cases.⁷⁴ Usually the shopper was not charged for the goods. Findings in a survey conducted in Europe show that 18.6 per cent of goods purchased never reached the customer.⁷⁵ These findings indicate that the risk of non-delivery is significant in Internet transactions. In this context, the primary concern for the consumer is that there will be no liability to pay for goods that are not delivered, so the MCA needs to ensure there is an adequate mechanism for ensuring there will be no

73 Office of Fair Trading (UK), above n 46, 26-28.

74 Consumers International, above n 6, 37.

75 Stiftung-Warentest *Electronic Commerce in Europe* (Berlin, 1999) 39 <http://europa.eu.int/comm/dgs/health_consumer/library/surveys/sur11_en.pdf> (last accessed 29 August 2000). This study was carried out with the financial support of the European Commission. The survey conducted involved purchases from primarily European countries, and involved a sample of 435 orders.

liability. While the consumer is protected by the terms of the contract, there is no way for the consumer to ensure they do not have to pay the issuer for non-delivered goods, except through the voluntary chargeback regimes of issuers, which may or may not cover the situation.

2 Recommendation

Non-delivery of goods should be a situation where the consumer can gain redress through a chargeback. This is the situation in the United States, where charges for non-delivery of goods are considered to be billing errors.

Consumers must also bear some responsibility in this situation, as in all potential Internet purchases, in making sure that they deal with reputable suppliers. The MCA's role in this respect is with consumer education programmes in areas such as certified merchant schemes and rights relating to chargebacks. Promotion of the Model Code will ensure that consumers have some idea of what they should look for in a web site before purchasing from it.

B Late Delivery

1 New Zealand environment

A survey conducted in 1997 found that timely delivery is the most important criterion for shoppers,⁷⁶ yet this is perhaps the most common complaint in Internet purchases. Consumers International found that 59 per cent of suppliers gave a target time for delivery, but only 54 per cent met their own target.⁷⁷ In the European survey, similar problems were experienced.⁷⁸ This suggests that the MCA needs to have some means towards ensuring an improvement of practice in this area, to lower risk of this and therefore build consumer confidence in Internet purchases.

New Zealand legislation, applicable to all sales contracts, implies a reasonable time for delivery where there is no fixed time under the contract.⁷⁹ Additionally, under the Fair

76 Survey by Binary Compass Enterprises as reported in *Dismantling the Barriers*, above n 4, para 63.

77 Consumers International, above n 6, 37.

78 Stiftung-Warentest, above n 75, 39. Where a delivery time was quoted, if that time was within 3 days, the proportion of deliveries arriving on time was 35 per cent. If the quoted time was up to a week, 50 per cent of the orders arrived on time. If the quoted time was up to two weeks, 57.5 per cent of the orders arrived within this time. These figures relate to purchases made from domestic suppliers only. The parallel proportions within delivery times for purchases made from foreign suppliers were 15 per cent (quoted time within 3 days); 20 per cent (within one week) and 70.6 per cent (quoted time within two weeks).

79 Sale of Goods Act 1908, s 31(3).

Trading Act 1989 (FTA), a supplier must have reasonable grounds to believe that it can supply the goods within the time stated.⁸⁰ However, there is no provision to ensure that the consumer can cancel the contract where delivery times in the contract are not met, or where the goods are not delivered in a reasonable time, nor is there any requirement that consumers be informed of these situations. If the consumer does reject the goods due to the late delivery, there is no way for a consumer to ensure that they are not liable for the cost of the goods.

2 Overseas regulation

The situation faced by New Zealand consumers can be compared with consumers facing this problem in the United States, where the Mail or Telephone Order Merchandise Rule applies to Internet sales as well as other mail or telephone order sales. Under this rule, the supplier must have a reasonable basis upon which to state delivery times, as under the FTA. However the rule further provides that where there is no delivery date in the contract, a supplier must deliver within 30 days.⁸¹ If the delivery time cannot be met, the supplier must inform the consumer, who is to be given the option of cancelling the contract or accepting the new delivery date. Where the new date is within 30 days, silence from the consumer can be taken to be consent to the delay. Where the delay is longer than this, the supplier needs to gain express consent from the consumer, and must automatically cancel the contract where this is not obtained.⁸² There are more detailed rules relating to further delays. As an alternative to obtaining consent from the customer for the delay, the business can cancel the order but they must promptly provide notice and a refund.⁸³

The Rule also requires that upon cancellation by the consumer and where the goods have been paid for, the supplier must provide a prompt refund, that is, within one billing cycle from the date on which the consumer has a right to a refund.⁸⁴ Where the consumer paid by credit and a third party is the creditor, the supplier must provide a credit memorandum to the creditor, who will remove the charge. Alternatively, the supplier can make a statement acknowledging that the order is cancelled and that no action will be taken that would result in the consumer being required to pay the third party creditor.⁸⁵

80 Fair Trading Act 1989, s 21.

81 Mail or Telephone Order Merchandise 6 CFR § 435.1(a)(1) (1975).

82 Mail or Telephone Order Merchandise 6 CFR § 435.1(b)(2) (1975).

83 Mail or Telephone Order Merchandise 6 CFR § 435.1(b)(3) (1975).

84 Mail or Telephone Order Merchandise 6 CFR § 435.2(f) (1975).

85 Mail or Telephone Order Merchandise 6 CFR § 435.2(e) (1975).

The FTC can sue a non-complying supplier for injunctive relief, civil penalties of up to US\$10,000, or consumer redress. Actions for civil penalties can be brought within five years, and actions for consumer redress can be brought within three. The FTC has demonstrated that it will enforce the rule with respect to Internet suppliers,⁸⁶ and this has had the effect of ensuring suppliers are more careful when stating delivery times.⁸⁷ A consumer has no right to bring a private action under the rule, but if the supplier fails to provide a refund and payment was made by credit card, the consumer will be able to claim a billing error under the FCBA. The consumer will also have a right to a chargeback where he or she has rejected the goods if the supplier fails to cancel the order. The combination of these two statutes allows the consumer to cancel the contract if necessary, and entitles the consumer to redress where the goods are charged for.

In the European Union, the Distance Contracts Directive (which covers Internet sales⁸⁸) requires that the seller perform the contract within thirty days unless the parties have otherwise agreed. When the supplier fails to do so on the grounds that the goods or services are unavailable, the consumer must be informed and a refund must be given as soon as possible and, at the latest, within 30 days.⁸⁹ All member states were required to implement this Directive by 4 June 2000, but due to the recent introduction of the rule it is yet to be litigated. An action under the national laws resulting from the Directive can be brought by public bodies or their representatives or other professional organisations that have a legitimate interest, as well as by the consumer.

3 Recommendation

The MCA should consider developing rules based on the United States approach in this area, to fill gaps in New Zealand's current regulatory regime. An appropriate vehicle for this could be through the FTA, by building on the existing provisions. Suppliers should be required to inform consumers where delivery times cannot be met, and to allow the

86 In July 2000, the FTC fined seven e-commerce firms, including Macys.com, Toysrus.com and CDNow, a total of US\$1.5 million. FTC spokesperson Eric London says that "the strict penalties were designed to put e-commerce on notice that the FTC will continue to monitor their actions": "The Dot-Com Delivery Challenge" *E-Commerce Times*, para 5 <<http://www.ecommercetimes.com/news/articles2000/000807-1.shtml>> (last modified 7 August 2000).

87 *E-Commerce Times*, above n 86, para 16.

88 "Distance Contract" is defined in art 2 of the *Distance Contracts Directive*, above n 28, as "any contract concerning goods or services concluded between a supplier and a consumer under an organised distance sales or service-provision scheme run by the supplier, who, for the purposes of the contract, makes exclusive use of one or more means of distance communication up to and including the moment at which the contract is concluded".

89 *Distance Contracts Directive*, above 28, art 7.

consumer to cancel the contract. Requirements for a prompt refund should also be included. Like the FTC, the MCA should monitor the regulation.

Alternatively, the European approach could be followed. The vehicle for achieving this could be through revision of the CGA to include a guarantee for delivery of goods parallel to the guarantee currently in place for services. This guarantee requires services to be completed within a reasonable time (where there is no stated time in the contract),⁹⁰ or the consumer has the right to cancel the contract.⁹¹ Any legislation should also give a right to cancel the contract where the delivery time stated in the contract is not met.

If a rule taking either of the above forms were implemented in conjunction with the proposals above relating to chargebacks, the seller would have incentive to be more careful when stating delivery times, and in giving consumers a right to cancel and prompt refunds where necessary. If the seller failed to give a refund or the goods were delivered but rejected by the consumer, the consumer should be entitled to a chargeback.

Regulation such as this would not put an unfair burden on suppliers. They are not bound by the delivery times that they state, but they must be more careful when stating them, and also ensure that they give the consumer the opportunity to cancel the contract where necessary and provide a refund where the goods are paid for. The supplier would be entitled to change shipment promises up until the time an order is placed, and could cancel the contract instead of seeking the consumer's consent to the delay. Adherence to the rule by suppliers would encourage repeat purchases and satisfied customers, and according to the FTC, most businesses regard compliance with the rule as good business practice.⁹²

This would provide a simple, predictable rule for suppliers and consumers. The technology neutral approach would mean that this rule should apply to mail order and telephone sales, which should not be considered an obstruction. The overseas regulations were developed with these situations in mind also, and the rule would be equally well suited to these other situations. This would also bring New Zealand into line with both the United States and the European Union in this area.

90 Consumer Guarantees Act 1993, s 30.

91 Consumer Guarantees Act 1993, s 32.

92 Federal Trade Commission *How to Comply with the Rule* <www.ftc.gov/bcp/online/pubs/buspubs/mailordr/howto.htm> (last accessed 29 August 2000).

C Return of Goods Where the Purchaser Changes His or Her Mind

1 New Zealand environment

A purchaser could change his or her mind for any number of reasons. However New Zealand consumers do not have a statutory right of return except where the CGA applies, or if there is a door-to-door sale.⁹³ The Internet consumer receives the same level of protection as the traditional purchaser, but this may be less appropriate in the Internet environment as the consumer cannot see the goods that they are purchasing. The consumer carries the risk that if they are not satisfied with the product, they will not be able to return it for a refund. This is currently the case in mail order and telephone sales, and perhaps in these situations also, more protection is warranted.

New Zealand retailers frequently do provide a higher level of service, and will often refund purchases voluntarily. However there is no obligation to do so, and any refund given is at the discretion of the retailer. It should be noted that currently most mail order and telephone sales offer a money-back guarantee if the consumer is not satisfied with the product.⁹⁴

2 Overseas regulation

The European Union Directive on Distance Contracts allows a seven-day cooling off period, in which contracts may be cancelled without giving reason. In this case, the only charge to the consumer can be the direct cost of returning the goods. If the consumer exercises the right to cancel the contract but paid by credit granted from a third party, the credit agreement will be cancelled without penalty. Member states are to determine the detailed rules for the cancellation of credit.⁹⁵ Consumers International also recommends that consumers receive a right to return goods within some specified time frame, without having to specify a reason.⁹⁶

The United States (at a federal level) and Australia generally do not give consumers a right to return goods where they change their minds about a purchase, in any kind of shopping transaction.

93 The Door to Door Sales Act 1967, s 7 allows a cooling-off period of seven days after completion of the contract, where the contract can be cancelled, the goods returned and it is as if the transaction has never occurred.

94 For example, L V Martins give a thirty-day money back guarantee if not satisfied for any reason.

95 *Distance Contracts Directive*, above n 28, Art 6.

96 Consumers International, above n 6, 10.

3 Recommendation

It may be considered desirable to reduce the risks borne by the consumer in this respect, but perhaps it is too early to make such an option mandatory, bearing in mind that adoption of any regulation should stay within the boundaries of rights given by important trading partners. While the European Union requires a right of return when a purchaser changes their mind, there is no such general right in Australia or the United States. Perhaps the treatment of door to door sales can be explained by the increased pressure that a consumer may be subjected to, to make a purchase. This pressure does not exist when making an Internet sale.

Until there are developments in this area internationally, suppliers in the industry have the opportunity to reduce consumer risk, thus increasing confidence in Internet shopping, by developing these rights of return. The MCA, while awaiting further international developments in this area, should continue to educate consumers about checking refund policies of the suppliers they deal with to ensure that the supplier has policies to the satisfaction of the consumer. The MCA should also educate consumers about certified merchant programmes, so there is extra assurance for the consumer that these policies will be adhered to.

D Faulty Goods Arrive

1 New Zealand environment

Consumers International received 8 per cent of goods with some sort of defect,⁹⁷ suggesting that this is a significant area of risk. The CGA implies guarantees relating to acceptable quality, fitness for a particular purpose, compliance with description and correspondence with sample. The consumer has a right to have the goods repaired or, in some situations, to receive a refund. However the major concern in this area will be ensuring that the consumer will have access to mechanisms allowing repair of goods and, failing this, receipt of a refund.

2 Recommendation

The rights that the New Zealand consumer has with respect to defective goods and other similar situations are adequately covered in the CGA, but the consumer may find it difficult to get the goods repaired, or obtain a refund. To deal with this problem, this is an area of key consumer protection that should be included in chargeback legislation. The requirement to attempt to resolve the dispute with the supplier initially allows the supplier the chance to remedy any defect. Where the supplier fails to remedy a defect, the

97 Consumers International, above n 6, 37.

consumer should be entitled to a chargeback upon return of goods to the supplier. This would give the consumer an effective right to a remedy, while giving the supplier the chance to fix the problem first. This would broadly achieve the same end result for the consumer as if they had this problem when they purchased defective goods from a local retail outlet.

VII CONCLUSION

New Zealand consumers currently bear disproportionate risks compared with suppliers in the Internet environment. The risks are also disproportionate in relation to those carried by consumers in other jurisdictions such as the United States and the European Union, where consumer protections are more developed, particularly in relation to credit card transactions and distance contracts. For New Zealanders to be able to enjoy the full potential of the Internet and what it has to offer, this balance of risk needs to be changed. The recommendations made throughout this essay, relating to chargebacks and the key consumer protections that should be applicable to chargebacks, regardless of whether there is a domestic or an international supplier, would help to achieve this. The suggestions are in accordance with the MED's requirements for simplicity, predictability and technology-neutrality of any intervention. Self-regulation alone will be insufficient to achieve the appropriate balance of risk.

The evolution of the Internet presents many opportunities for both consumers and suppliers both within New Zealand and internationally. The MCA needs to ensure that these opportunities are not lost through lack of regulatory intervention. Any action to protect consumers will inevitably result in barriers to Internet shopping, but if the MCA does not intervene, consumers will not be confident to shop using the Internet. This lack of confidence will be more damaging to growth than any intervention introduced in an attempt to lessen the risks borne by consumers.