

29 March 2012

Secretariat
Commerce Select Committee
Select Committee Office
Parliament Buildings
WELLINGTON 6011

To the Commerce Select Committee

SUBMISSION ON CONSUMER LAW REFORM BILL – PROPOSED AMENDMENTS TO THE CARRIAGE OF GOODS ACT 1979

This submission is from the Insurance Council of New Zealand. We appreciate the opportunity to comment on the Government's Consumer Law Reform Bill ("the Bill"), particularly as regards proposed amendments to the Carriage of Goods Act 1979 ("the Act").

1 The Insurance Council

The Insurance Council of New Zealand ("the Insurance Council") is the industry representation body for fire and general insurance in New Zealand. We have 26 members which write the substantial majority of New Zealand's insurance business. We represent a number of marine insurers that provide insurance to Carriers for loss/damage to goods they are either carrying or storing.

The Insurance Council is active in self-regulating the insurance industry. We promote the Fair Insurance Code that requires Insurers to act ethically. We help fund the Insurance & Savings Ombudsman Scheme that offers independent review of decisions and we apply an Insurance Council solvency test that confirms the financial stability of our members. We also require members to be independently rated and to publish these ratings. We perform an important role in informing and educating consumers about key insurance issues and risks.

2 Executive Summary

We oppose certain proposed amendments to the Act, because of their potential negative implications for Carriers and the consumers of carriage services.

We are particularly concerned that the Government's current proposals would significantly increase costs for the carriage of goods and so potentially reduce the availability and affordability of these services, without actually providing greater consumer protection.

The concern for our members is around the Government's proposals at clauses 60 – 62 of the Bill, to:

1. prohibit contracting out of the Consumer Guarantees Act 1993; and
2. impose mandatory carriage requirements for Carriers.

The above proposals would increase the Carrier's liability, leading to significantly increased insurance costs and the likely withdrawal by a number of Carriers from certain sectors of the market.

The Government's proposed solution was intended to solve a relatively small problem that has arisen regarding online trading. However, the solution goes well beyond addressing this mischief and would have far-reaching negative implications for the wider carriage industry and their consumers.

The original purpose of the Act was to cap liability in exchange for strict liability. The theory being that capped liability, or negotiation out of any liability, increases competition as smaller operators can afford to compete. This has meant that carriage services have been relatively cheap to insure and have subsequently been widely available to all consumers. There is a danger the above changes will reduce competition for "consumers" as the cost of liability insurance for this sector would significantly increase, and the costs involved in offering a declared value solution may put smaller Carriers off carrying for consumers.

Accordingly, we would recommend that the Government does not introduce the proposals at clauses 60-62, but rather maintain the current carriage regime as prescribed under the Act. Nevertheless, we would recommend implementing the proposal at clause 63 of the Bill, to increase the limit under the Act from \$1,500 to \$2,000.

2.1 Clauses 60 and 61 - Prohibit contracting out of the Consumer Guarantees Act 1993

We oppose these two clauses because of their negative implications for Carriers and the consumers of their services.

2.1.1. Effect of clauses 60/61

Currently, a Carrier's liability is restricted to the terms of the contract of carriage, the provisions of the Act and any loss or damage intentionally caused by the Carrier. As outlined by the Supreme Court at paragraph 28 in *Ports of Auckland Limited v Southpac Trucks Limited* [2009] NZSC 112, limited liability provides certainty and simplicity.

The amendments to section 6 and 7 of the Act would mean that a Carrier's liability would increase, as they would no longer be able to contract out of the liabilities or remedies prescribed by the Consumer Guarantees Act 1993.

This proposal would have far reaching implications for Carriers, insurers and consumers, particularly in relation to household removals.

2.1.2. Implications for household removals

Most Carriers' liability policies in the market carry exclusions for household removals. The general practice of home removal Carriers (including office removals etc) is to restrict carriage to "owner's risk" terms, and for the customer to take up their own insurance cover which the Carrier offers under a facility set up with an insurer. This is because of the traditional high-volume and administration costs involved with household removal claims.

If the Government's proposals were implemented and the goods were carried at the owner's risk (i.e. because a limited Carriers or declared value contract was declined), then the consignee would still be entitled to seek full recovery via the Consumer Guarantee Act 1993. If the goods were damaged on arrival, the receiver would now have consumer rights against the Carrier for not performing their service with reasonable care & skill. The Carrier would not have a per unit liability of \$1,500 (or \$2,000 as proposed under clause 63), but a new and separate statutory liability for the full value of the goods shipped. This would

significantly extend the liability of the contracting Carrier as insurers do not currently provide cover for this type of liability. These policies are restricted to liabilities that arise under the present Act, so this would require an additional insurance purchase by the Carrier.

Carrier's liability for this type of carriage would become very expensive as insurers would effectively have to consider the exposure the same as an all-risks home removal policy. The extra costs of this would inevitably be passed on to the consumer and would likely make the cost to have goods professionally moved out of the reach of most consumers.

2.1.3. Other carriage contracts

This requirement would impact on all carriage contracts as Carriers' liability would no longer be limited, as noted above. This would require Carriers to carry greater insurance limits, the costs of which would ultimately need to be passed on to the consumer.

It is important to note that limited liability schemes are also commonplace in other jurisdictions. The international Hague-Visby Rules and the Warsaw Convention, which relate to goods imported and exported by sea and air, are followed in a number of foreign jurisdictions and similarly include limited liability provisions. Limited liability ensures certainty, simplicity and relatively low cost.

Including Consumer Guarantees into the fold will only complicate a system that already operates effectively. More importantly, it may affect the affordability and availability of these services, whilst not providing any actual increased benefit to consumers.

2.1.4. Issues with relying on Consumer Guarantees Act remedies

There is also an issue around what actual additional protection, if any, the Consumer Guarantees Act 1993 would provide consumers of carriage services.

The onus on proving a breach of one of the statutory Consumer Guarantees would rest with the consumer, as opposed to the strict liability regime imposed under the Act (where no proof of fault is required). The process would be more costly and difficult than when seeking redress through the current strict liability regime.

For example, it may be quite difficult for a consumer to prove there has been an actual breach of reasonable care and skill (i.e. in relation to the section 28 Guarantee as to Reasonable Care and Skill) as the matter of reasonableness will be highly fact specific and the consumer will be largely unaware of what has actually occurred during transit. Also, section 20 of the Act already gives consignees the right to bring an action against a contracting Carrier for loss or damage to goods even if they are not the contracting party.

Furthermore, other Consumer Guarantees provided under the Act would not necessarily provide any greater protection for consumers. The Consumer Guarantees Act 1993 provides Guarantees as to the Time of Completion of the service (section 30) and as to the Reasonable Price of the service (section 31). However, there are already price protections under sections 8(9) and 8(10) of the Act and presumably if the time of completion was an immediate issue for the consumer then this would simply be included as a specific term in the contract of carriage.

Accordingly, we are concerned the actual benefit or protection that would be provided to the consumer under the Government's proposal may be disproportionate to the costs that would be incurred.

2.2 Clause 62 – Require mandatory offering of Limited Carrier’s/Declared Value risk contracts

Again, we oppose this clause because of its potential negative implications for Carriers and the consumers of carriage services.

2.2.1. Implications of clause 62

Under the Government’s proposal, if goods are valued at less than the newly proposed limit of \$2,000 then the Carrier must offer to enter into a limited Carrier’s risk contract. The Carrier could no longer require the consignee to enter into an owner’s risk contract.

If the goods are worth more than the \$2,000 proposed limit, then the Carrier must offer to enter into a declared value risk contract, where the value declared in the contract is the actual value of the goods.

2.2.2. Issue with definition of value

Firstly, if this proposal was carried forward there would need to be an effective definition of the abovementioned term “value”.

There is uncertainty around the circumstances in which a declared value risk contract must be offered. Is it if the cumulative value of the goods being carried is over \$2,000, or instead if the value of each good being carried is individually under \$2,000 (but the sum of all the goods may be over \$2,000)?

There is also ambiguity around whether the term “value” refers to:

- the value the consumer sets for the goods (per unit); or
- the actual replacement/indemnity value of the goods, as covered by the insurer.

This definition is very important as the determined “value” would affect the type of contract the Carrier had to offer.

Nevertheless, even if this was clarified we would still be opposed to the clause for the reasons outlined below.

2.2.3. Issue with purpose of clause 62

The Ministry of Consumer Affairs stated in the Consumer Law Reform Additional Paper (February 2011 - Carriage of Goods) that *“the critical problem for consumers with the options for contracts of carriage... is of course that the strict liability Carrier’s risk option is only one of the options under the Carriage of Goods Act, and the other options available to Carriers and consignors leave consumers with no remedy against the Carrier...”* This is presumably the reason for the clause 62 proposal.

The Insurance Council is concerned the above statement is not quite correct and understates the actual protection currently available to consumers. It is important to note that declared terms and declared value risk contracts will not *“leave consumers with no remedy”* as suggested above. Only an owners’ risk contract would potentially restrict the consumer from seeking remedy against the Carrier. Accordingly, the Carrier’s risk option is not the only option that provides remedy against the Carrier.

Furthermore, a consumer can only enter into an owners' risk contract by signing a contract which clearly sets out the terms of carriage and states that carriage is at the owner's risk (section 8(5) of the Act). This requires an election by the consumer and there will be a number of alternative options available for the consumer (including limited Carrier's risk contracts). As such, the consumer will be fully aware of their rights and obligations if they elect to take up an owner's risk contract.

It is also important to note that a consumer who elects such terms of carriage is still able to seek protection from losses during transit through a separate insurance contract. There are also specific rules set out under Trade Me's terms and conditions - for Sellers using the Pay Now service to offer an online credit card payment option to people buying items - which provide specific protection for buyers:

“Clause 2.5 - If the goods have been damaged in transit, then it is the Seller's responsibility to refund the Buyer. The Seller may choose to recover this cost by applying for insurance from the shipping company.”

See: <http://www.trademe.co.nz/help/632/seller-terms-and-conditions-for-pay-now>.

Further, not only is there an issue around whether the Government's proposal would actually provide better protection for consumers, there is an issue with the significant increased costs it would create.

2.2.4. Issue with requirement to offer declared value contracts

Declared value contracts currently have to be pre-approved by insurers before the Carrier can secure insurance protection. This would not be administratively feasible if the Carrier would have to offer this type of carriage for every shipment over \$2,000. Therefore it would be necessary for insurers/Carriers to agree on an open insurance arrangement, allowing the Carrier to offer declared value contracts without prior approval.

The administration and exposure issues that surround this proposal would mean that the cost of this type of cover would increase dramatically and this cost would eventually be passed onto the consumer, resulting in an increase in freight costs. Assuming the Carrier would need to provide evidence that declared value carriage was offered, this would mean a change in the Carriers documentation which would also come at a cost that would have to be eventually passed onto the customer. Smaller operators would find this particularly difficult to arrange and administer.

Furthermore, there are certain products that are typically excluded from Carrier's liability - e.g. household effects (carried for household removal), cash, jewellery and documents etc. These would usually be carried at the owner's risk and the owner would be left to arrange insurance. If the Carrier had to offer declared value for these items it would likely refuse to carry any high-risk product, which could severely affect the ability for consumers to transport such items.

Also, insurers would unlikely be willing to provide Carriers with liability insurance cover for declared value on these carriage of goods transactions if the consumer was able to set their own value expectations for the goods, rather than the insurer being able to set the value as the actual replacement or indemnity value (see above clause 2.2.2.).

2.2.5. Household/office removals (i.e. second-hand removals)

As indicated at clause 2.1.2 above, household removal insurance is usually conducted at owner's risk. This is because insurance for this type of carriage is expensive, due to the traditional high-volume and costly administrative nature of these claims.

There would be a serious issue for this type of removal, if a limited risk contract had to be offered, as second hand goods would not normally be in perfect condition when transported. If the goods were found damaged upon arrival it would be virtually impossible to determine whether damage occurred prior to, or during, transit. However, under a limited liability contract, the Carrier would potentially be responsible for damage they had not caused, unless they could prove the damage already existed (which would be impossible for pre-packaged goods).

If Carriers were required to offer limited Carrier's/declared value risk contracts, it's likely this type of cover would become either unaffordable or unavailable for a number of consumers.

2.3 Clause 63 – Increase limit in the Carriage of Goods Act 1979 from \$1,500 to \$2,000

Although we agree with this proposal, we think it's important the Government recognise and understand that this amendment will also generate increased costs (some members have suggested this limit increase alone would lead to a 25% - 35% increase in premium).

We believe these increased costs are appropriate due to inflationary increases over time. However, if the government also implements the proposals at clauses 60-62, we are concerned the cost of carriage for consumers will become overly burdensome. Accordingly, we have made the following recommendations.

3 Insurance Council Recommendations

For the above reasons, we would recommend the Government does not introduce the proposals at clauses 60-62, but rather maintain the current carriage regime as prescribed under the Act. Nevertheless, we would recommend implementing the proposal at clause 63 of the Bill, to increase the limit under the Act from \$1,500 to \$2,000.

4 Summary

Thank you again for the opportunity to provide input on the proposed amendments to the Bill. The proposals are of significant interest to our members. Accordingly, we would be happy to appear before the Select Committee to speak to our submission.

We can be contacted at:

John Lucas - Insurance Manager
(04) 495 8006 or john@icnz.org.nz.

Yours sincerely



Simon Wilson
Legal Advisor