



CONSUMER PROTECTION (AMENDMENT) BILL 2015 EXPLANATORY NOTES

These notes are circulated for the information of Members with the approval of the Member in charge of the Bill, Mr. D J Quirk, MHK.

INTRODUCTION

- 1.** These explanatory notes relate to the Consumer Protection (Amendment) Bill 2015. They have been prepared by the Office of Fair Trading (OFT) in order to assist readers of the Bill. They do not form part of the Bill and have not been endorsed by the House of Keys.
- 2.** The notes need to be read in conjunction with the Bill. They are not meant to be a comprehensive description of the Bill.

SUMMARY AND BACKGROUND

- 3.** The primary purpose of this Bill is to address the issue of 'cold calling' by making it an offence for a trader to enter into a contract for the sale of goods and services as a result of 'cold calling'. The Bill covers all forms of 'cold calling' (including by telephone), although it has to be accepted that since almost all tele-sales emanate from outside the Island (and often from outside the European Union), it will be difficult to pursue prosecutions in those circumstances. At a practical level the primary impact and real benefit will be to disrupt the activities of those who use doorstep pressure selling techniques.
- 4.** The Bill also makes provision to allow the OFT, by Order, to modify the Consumer Protection Act 1991 so that it corresponds with the corresponding legislation of the United Kingdom or to apply any subordinate legislation of the United Kingdom relating to consumer protection with any modifications necessary for the Island. It is not the intention to import complex and unnecessary legislation but rather to 'cherry pick' what is needed and what is most appropriate and effective to ensure that consumers in the Isle of Man are adequately protected. The proposal will enable the OFT to react more quickly to emerging threats whilst ensuring effective scrutiny as any secondary legislation applying modified UK legislation to the Island will require Tynwald approval.
- 5.** The Bill amends the Consumer Protection Act 1991, principally but not exclusively Part VII (Cancellation of Certain Contracts).
- 6.** 'Cold calling' is a sales tactic used by traders to try to persuade consumers to purchase goods or services during unsolicited visits to their homes or places of work, during excursions away from the traders' business premises or during unsolicited telephone calls. There is clear evidence that scammers and unscrupulous

traders employ this sales tactic for criminal purposes and the Bill is intended to address this issue.

The activities of unscrupulous traders who operate through doorstep selling remain of serious concern in the Island. These traders tend to target the vulnerable, frail and elderly and although relatively few in number, the hardship and grief which they cause should not be underestimated.

Having made the doorstep sale, these traders often go on to commit criminal offences such as, charging for work not undertaken, or distraction burglaries. At that stage, the real harm has been done to the unfortunate victims. Furthermore, victims are generally targeted in the first place because they are vulnerable, frail or elderly and so are more likely to be reluctant and easily challengeable witnesses.

Whilst the OFT has had some success in pursuing prosecutions, it often takes hundreds of hours of work to mount a successful prosecution. Even then, the success is tainted by the fact that there is still a victim whose life, independence and sometimes even health has been blighted.

- 7.** Whilst it is accepted that there are some firms who, whilst generally regarded as reputable, utilise 'cold calling' as a sales technique, it is clear from the feedback to the consultation and more general feedback to the OFT, that the public are fed up with being pestered by uninvited sales staff. The OFT believes that this sales technique is, in itself, unreasonable and unfair on consumers. It certainly carries with it a real risk that consumers will be "persuaded" to acquire unnecessary and expensive goods and services. Although this is a particular issue for the more vulnerable members of society; others who would not be classed as vulnerable can fall victim to pressurised bad decision making. The practical effect of the Bill will be that whilst firms can continue advertising and marketing, the initiation of direct contact between the consumer and the firm will have to be made by the consumer.
- 8.** The 'cold calling' provisions within the Criminal Justice (Miscellaneous Provisions) Bill 2010, which unfortunately ran out of time prior to the 2011 General Election, were subject to public consultation as part of the wider consultation and were generally strongly supported.
- 9.** Following a six week consultation period the OFT considered 42 responses. There was overwhelming support for the Bill. Some respondents did suggest additional measures which would have led to expanded scope, including a ban on 'cold calling' through emails, but the OFT did not feel that these ideas were justified or in some cases enforceable in practice.
- 10.** Following the consultation exercise and further detailed consideration of the responses and opinions received, the OFT agreed it was appropriate to introduce the Bill to the Legislative Branches in December 2015 with a view to it coming into operation by January 2017 at the latest.
- 11.** The Bill is split into two parts, namely **Part 1 – Introductory** and **Part 2 – Amendment of the Consumer Protection Act 1991**, comprising 23 clauses.

EUROPEAN CONVENTION ON HUMAN RIGHTS (hereafter referred to as the "Convention")

- 12.** Section 16 of the Human Rights Act 2001 requires the member moving the Bill to make a statement about the compatibility of the provisions of the Bill with the Convention rights (as defined by section 1 of that Act). In the opinion of the member moving the Bill, the provisions of the Consumer Protection (Amendment) Bill 2015 are compatible with the Convention rights.

FINANCIAL EFFECTS OF THE BILL

- 13.** In the view of the mover of the Bill, it is not expected to have any human or financial resource implications.

NOTES ON CLAUSES

PART 1 – INTRODUCTORY

- 14.** Part 1 of the Bill provides the basic legal framework. **Clause 1** gives the Bill its short title. **Clause 2** provides that the Bill will come into force as an Act on the day specified in an Order made by the OFT and that if necessary different provisions can come into force at different times. **Clause 3** provides for expiry of the Bill on the day after its promulgation, if all of its provisions are in operation on its promulgation, or on the day after the last provision is brought into operation. The purpose of the Bill is to amend existing legislation so once all of its provisions are in operation it serves no further purpose.

PART 2 – AMENDMENT OF THE CONSUMER PROTECTION ACT 1991

- 15.** Part 2 provides the substance of the Bill.
- 16.** **Clause 4** serves to introduce clauses 5 to 23 and provides that they amend the Consumer Protection Act 1991.
- 17.** **Clauses 5, 6 and 7** are technical amendments of no practical substance.
- 18.** **Clause 8** amends section 46 and defines a “relevant contract”, that is to say a contract created as a result of ‘cold calling’. The practical effect is that ‘cold calling’ includes:-

An unsolicited visit to the consumer’s home or place of work

Example: A trader goes around an estate knocking on doors to sell goods or services – that is ‘cold calling’

Taking the consumer on an excursion away from the trader’s business premises

Example: A trader organises a coach trip for a group of consumers to entice them into buying goods or services – that is ‘cold calling’

An unsolicited telephone call to the consumer

Example: Out of the blue, a consumer receives a call from a trader or a call centre selling goods or services – that is ‘cold calling’

Any negotiation between the consumer and the trader does not negate the fact that it is still ‘cold calling’.

Clause 8 also provides for an “excepted contract”, i.e. a contract created as a result of ‘cold calling’ but not deemed to be a “relevant contract”, and allows the OFT, by Order, to prescribe contracts to which Part VII does not apply, persons or classes of persons to whose contracts Part VII does not apply or other circumstances where Part VII is not to apply

The new Schedule 2B, which is introduced in **clause 23**, has effect to define “excepted contract”.

- 19. Clause 9** of the Bill inserts a new section 46A which creates the new offence of entering into a “relevant contract”.

Example: A trader knocks on the door of an elderly householder and offers to replace some ridge tiles that have worked loose during a storm. The resident is persuaded to have the work done and pays the trader. The trader has committed an offence.

The practical result of this clause is that there is effectively a ban on using ‘cold calling’ as a sales tactic unless the total payments to be made by the consumer do not exceed such amount as may be prescribed, i.e. unless the contract is a “low value contract”.

Clause 9 also provides the Courts with a range of penalties for the offence – on summary conviction a fine of up to £10,000 or 6 months imprisonment or both; with the ability to refer the case to a higher Court where there is an unlimited fine and up to two years in prison.

Whilst it is relatively easy to see how the OFT could enforce the provisions in relation to traders who use doorstep ‘cold calling’ or excursion-based selling tactics (since both activities take place wholly within the Island), unsolicited tele-sales would be much more problematic. Almost all tele-sales emanate from outside the Island (and often from outside the European Union). Notwithstanding the obvious limitations on enforcement, the OFT still believes that unsolicited tele-sales should be covered, not least because it gives an opportunity (see **clause 17**) to ensure that the resultant contract is governed by Manx law and enforceable only in Manx Courts.

It will be noted that the Bill does not fix the value below which a contract is low value; this will be fixed by an Order. The OFT is minded to exempt contracts with a total cost to the consumer of less than £100 including VAT and all credit charges but that is a matter for subsequent secondary legislation which will require Tynwald approval.

- 20. Clause 10** makes a consequential amendment to section 47. More significantly it also extends the current 7 day cancellation notice period (cooling-off period) to 14 days. The OFT is concerned that the victims of pressure selling are often the vulnerable, frail and elderly; and where cases come to light it is often based on discovery of what has happened by relatives or friends of the victim. By extending the period to 14 days there is a better chance of the matter being discovered before it is too late. Some respondents to the consultation suggested that this period should be increased still further (30 days being the most common suggestion) but the OFT believes that 14 days represents a proportionate balance between consumer protection and the right of the individual to spend money as they see fit.
- 21. Clause 11** makes consequential amendments to section 47A and in particular brings the penalties for failure to provide a cancellation notice in line with the new level proposed in clause 9.
- 22. Clauses 12 and 13** make consequential amendments to section 47B and section 47C respectively.

- 23. Clause 14** inserts a new section 47CA which allows the OFT to test purchase goods or services in order to ensure compliance with the effective ban on 'cold calling'. Test purchases are a valuable enforcement tool which allows the OFT to target traders whom it suspects of operating illegally without having to involve a real victim.
- 24. Clause 15** modifies section 47D and in particular modernises the scope of the term "document" so that it includes information in any recorded form.
- Example: document would include information on a computer disk drive.
- 25. Clause 16** provides some consequential amendments to section 47E which deals with obstruction of OFT staff involved in enforcement.
- 26. Clause 17** modifies section 52 which deals with the potential for a trader to seek to avoid the provisions of the Act by inserting terms in his contract. Most of the changes are technical however there is one of real significance. The new sub-section (2) provides that where a contract is formed as a result of illegal 'cold calling', any term in that contract which provides for a governing law other than Manx law, or for jurisdiction other than in Manx Courts is void. In addition, because the contract is now subject to Manx law, the consumer is also protected against unfair terms. The OFT accepts that the protection of the consumer is less than perfect but it is much better than at present. It is hoped that the obstacles presented by this clause will go some way to persuading tele-sales operators to avoid the Island.
- 27. Clauses 18 and 20** amend existing interpretations, insert new ones and make an associated consequential amendment. **Clause 19** amends section 57A to ensure that there is no conflict with Part VIIIA (Distance Selling), whilst **clause 21** amends a marginal note.
- 28. Clause 22** is an important one because it provides a mechanism to allow the OFT to regularly update its consumer protection legislation without the repeated need for primary legislation. Whilst the Isle of Man does not need the full range of UK consumer protection legislation, much of which is driven by membership of the European Union, it is important that consumers in the Island are effectively protected. Clause 22 inserts a new section 62A, which will allow the OFT, by Order, to modify the Consumer Protection Act 1991 so that it corresponds with the corresponding legislation of the United Kingdom or to apply any subordinate legislation of the United Kingdom relating to consumer protection with any modifications necessary for the Island. Such an Order could also make any ancillary changes to other legislation. It is important that there is clear scrutiny on the use of these powers and for that reason, any Order made pursuant to the new section 62A, would require Tynwald approval. The benefit is that the use of an Order would enable the OFT to react more quickly to emerging issues affecting consumers. Typically an Order would take around 4 months to enact whereas new primary legislation typically takes 1 to 2 years.
- 29. Clause 23** inserts a new Schedule 2B, which defines "excepted contract":-
- land transactions
 - deliveries by roundsmen

- routine catalogue sales
- insurance contracts; and
- low value contracts.