



Isle of Man Office of Fair Trading

Summary of Responses to the Consultation on the implementation of Legislation in relation to Unfair Terms in Consumer Contracts

December 2013

Page intentionally left blank

Contents

1. Introduction
2. The Consultation Exercise
3. The Responses
4. Conclusion

Appendix 1: List of Respondents

Appendix 2: Summary of Responses

General Comments Received

Response Sheet Replies

1. Introduction

The consultation document was produced to invite comment on proposals to implement legislation in relation to unfair terms in consumer contracts under the Fair Trading (Amendment) Act 2001, namely Sections 4 to 7 and Schedule 1, which relate to unfair terms in consumer contracts.

2. The Consultation Exercise

The public consultation exercise ran from 31st July to 30th September 2013.

The consultation document was issued directly to the following:

- Tynwald Members
- Attorney General
- Local Authorities
- Chief Officers of Government Departments, Boards and Offices
- Isle of Man Chamber of Commerce
- Isle of Man Law Society
- Isle of Man Trade Union Council
- Isle of Man Bankers Association
- Manx Insurance Association
- Isle of Man Association of Corporate Service Providers

The document was also made available in the 'Consultations' section of the Isle of Man Government and Office of Fair Trading website.

3. The Responses

A total of 14 responses were received; a list of respondents is attached at [Appendix 1](#) and a summary of those responses is attached at [Appendix 2](#).

4. Conclusion

Following the consultation exercise and further consideration, the Isle of Man Office of Fair Trading agreed to request the Minister for the Department of Community, Culture and Leisure to make an Appointed Day Order bringing into force Sections 4 to 7 and Schedule 1 of the Fair Trading (Amendment) Act 2001 on 1st April 2014.

Appendix 1

List of Respondents

- Patrick Parish Commissioners*
- Marown Parish Commissioners*
- Ramsey Town Commissioners
- Ballaugh Parish Commissioners*
- Andreas Parish Commissioners*
- Jurby Parish Commissioners*
- Douglas Borough Council
- Communications Commission
- Manx Insurance Association
- Department of Infrastructure*
- Department of Social Care*
- Mr G Kirkpatrick
- Department of Economic Development

One further response was received but marked confidential and therefore has not been named in the above list; however the response made no comment to the consultation.

**No comments made*

Summary of Responses

General Comments Received

Ramsey Town Commissioners

I am instructed to advise that in the Commissioners view, whilst recognising the wish to consult, as this particular piece of legislation is already enacted as an Act of Tynwald, for which Royal Assent has been received, the legislation ought to have been applied without undue delay.

Manx Insurance Association (MIA)

First of all I would say that the MIA supports the introduction of reasonable and fair legislation. Many of our members have been working to similar principles for some time now as they have been bound to do so by their UK parent companies.

We do have a few points to raise and the validity of those points will really depend on the approach that the Ombudsmen and Courts may take if this legislation is introduced. If you were to play 'Devil's advocate' and take a literal interpretation there are a number of areas that could be problematic:

- 1. (b) - Given the international nature of our industry, insisting on Isle of Man law applying may potentially be interpreted as "limiting the legal rights". Indeed appliance of the requirement for Manx probate to be provided before releasing the proceeds of a claim could potentially also be an issue in certain circumstances.*
- 1. (c) - There are (as in any life assurance contract) areas where discretion is used and even with the involvement of an appointed actuary, there could be elements that are "whose realisation depends on his own will". Also we can open and close new internal funds at any time which is of course at the insurers discretion.*
- 1. (e) – Remuneration for those selling our products is built into the product itself. If the policyholder does not maintain the contract then any fees paid to their adviser etc are reclaimed by us prior to terminating the contract. As such, I think the term "pay a disproportionately high sum in compensation" needs to be clarified so that it does not prohibit organisations claiming back what is in effect their money should a policyholder decide not to proceed or maintain the contract.*
- 1. (i) – This suggests that any clauses in policy's terms that bind a policyholder are to be considered unfair if the policyholder has not had the opportunity to become acquainted with the terms before acceptance. We don't disclose T&Cs pre-acceptance so how would the OFT regard this in relation to an insurance contract? There is an exemption in paragraph 2(4) but I don't see that it covers this situation.*
- 1. (q) - Governing law comes to mind "excluding or hindering the consumer's right to take legal action".*

To reiterate my opening comments, it really is a question of how pragmatic or literal one wants to be. Our experiences with the Ombudsman to date have been sensible and realistic however, looking at the UK you simply need a consumer scandal and the parameters can change overnight. As such, whilst making contract terms as fair as possible for the

consumer, they do also have to protect the organisation that is providing the contract in the first place and I'm not sure that those contained in the proposed legislation do that just yet.

Further information to support the comments above can be provided upon request. I would also add that the MIA will of course be more than happy to take an active role in introducing legislation that is fair to all should you require our help in doing so.

Whilst it is not normal to enter into a dialogue with Consultees following the closure of the Consultation the OFT was so concerned at the implications of some of these comments that it needed to seek clarification from the MIA which it did in the following terms

OFT Request for Clarification

Whilst the OFT does not understand the intricacies of the insurance industry it is puzzled by the MIA's description of the way in which it sells a product. It seems that they are saying that they expect the customer to sign an irrevocable contract without being able, before signing it, to know the terms of the contract. The OFT is sure that is not the case, because from a consumer protection perspective that is most unfair; is highly likely to be deemed unfair by Financial Services Ombudsman Scheme and indeed would almost certainly breach 1(i) were it in force. The point in Paragraph 1(i) is that before the customer is **irrevocably committed** to the contract he must have a **reasonable opportunity** to see the terms of that contract.

The OFT is also not clear the point MIA are making in relation to 1(q). The provision once in force would apply to a contract under Manx law and a necessary consequence is that any ensuing action (Court or Financial Services Ombudsman Scheme (FSOS)) would be under Manx law.

MIA Subsequent Response

Although not automatically provided at the point of sale, a consumer can request a copy of the full terms and conditions of the contract prior to signing it. The ability to request the T & C's is made clear in other documents such as the 'key features' etc which the applicant must acknowledge that they have read and understood prior to the application being accepted. Therefore, taking into account your comments below, I would assume that because we make it clear that the document is available for review that this would satisfy the proposed requirement?

The point I was making under 1(q), was that by stipulating that a contract was concluded under Manx law, that this itself could maybe be construed as being unfair as the consumer would have to appoint a representative/be present in the IOM to take action under this legislation. However, if I am reading your response correctly, then this is exactly what would have to happen in any case and therefore, shouldn't be a concern.

OFT Response

In the light of the response and clarification the OFT believe that the implementation of the remaining provisions of the Fair Trading (Amendment) Act 2001 should not cause undue problems for the insurance sector. Whilst there are some risks of challenge if customers considered that the contracts were unfair they can already be challenged through the FSOS.

Department of Economic Development

Whilst generally supportive of your proposals the Department is uncertain as to whether they may cause any issues with any companies in the e-gaming sector and / or those corporate service providers that have a particular focus on that sector. Consequently we are contacting the companies and will revert to you as soon as possible.

17/10/13 - DED responded in relation to e-gaming and they have said:

'Further to DED's submission of 4th October I can now confirm that OFT's proposals are unlikely to be problematic to the e-gaming sector and that, in particular, the industry will not require a temporary exemption'.

OFT Response

The OFT would agree that the provisions will not cause problems for the e-gaming sector.

Communications Commission

The Commission notes that an Order may be made under s.40 of the Fair Trading Act designating certain bodies to exercise the functions of the Act in respect of specific sectors. The Commission notes that in the equivalent legislation in the UK the designated body has a choice of whether to take up a particular issue. In the absence of such a choice, the Commission considers that it is insufficiently resourced to enable it to investigate all complaints re unfair contract terms in the communications sector. However, it would encourage the OFT to seek advice from the Commission in relation to complaints in this area and build on the existing good working relationship with the OFT in relation to customer complaints.

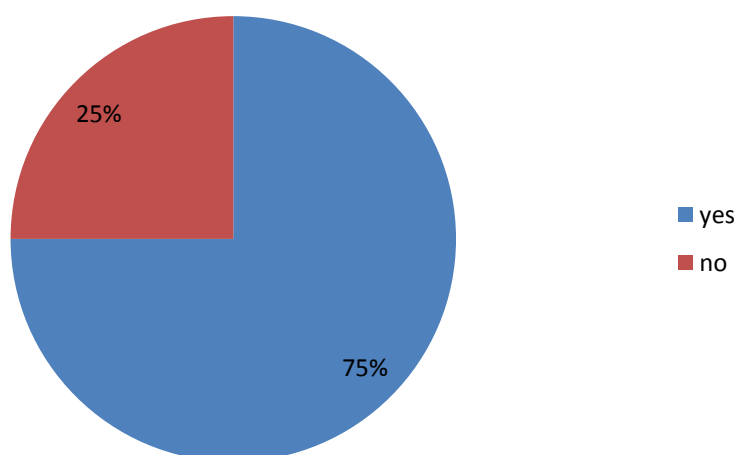
OFT Response

The OFT note the position of the Communications Commission. Regardless of the legislative position it is important that the OFT and the Communications Commission work together closely in relation to any issues affecting the regulated sector.

Response Sheet Replies

Question 1

Do you agree with the OFT that, in principle, the delayed provisions relating to unfair terms in consumer contracts should be brought into force as soon as possible? If no, please state reasons.



COMMENTS TO QUESTION 1

Douglas Borough Council

Douglas Borough Council does not have any direct interest in the subject of the consultation and therefore does not wish to comment in detail but it does support the full implementation of the provisions which have already been approved by Tynwald.

OFT Response

The OFT welcomes the response from Douglas Borough Council.

Mr G Kirkpatrick

The approach fails to take account of many of the issues raised in The Law Commission and Scottish Law Commission Report - Unfair Terms in Contracts published in February 2005 which should be considered in detail and addressed before embarking upon the piecemeal approach of taking essentially the English 1977 Act and 1999 Regulations without addressing their inconsistent elements. Otherwise we are in danger of inheriting mistakes from other jurisdictions legislation and missing opportunities to correct errors and problems that have already been identified as being in need of legislative reform. The public of the Isle of Man deserve to avoid these pitfalls.

OFT Response

It is certainly the case that the Unfair Terms in Consumer Contracts Regulations 1999, led to a lot of litigation in the UK and the decision of the former OFT Board to delay the introduction of the Manx equivalent legislation was very sensible. The 2005 Report by the Law Commission and the Scottish Law Commission¹ provides an interesting critique of the

¹ <http://lawcommission.justice.gov.uk/publications/unfair-terms-in-contracts.htm>

corresponding UK provisions and proposals for changes in legislation. The UK Government accepted in principle the recommendations in the 2005 Report, subject to further consideration of the issues and potential cost impacts. The UK Government subsequently decided to await the outcome of Consumer Rights Directive negotiations, and in October 2010 said it would revisit the issue when it implemented that Directive. The matter was further considered by the two Law Commissions in 2012 and their advice to the UK Government was published in March 2013².

Whilst the respondent is correct in his assertion that the corresponding UK legislation is likely to change, the complexity of those changes covering both business to consumer and business to business contracts; and implementing EU Regulations which are not applicable to the Isle of Man, means that any new legislation for the Island would be a major task. Furthermore the introduction of new legislation will (if 1999 is anything to go by) result in a new round of challenges. If, having looked at the new UK Bill (should it become law), even if the OFT is minded to promote new primary legislation it would be well advised to allow time for the new UK legislation to settle in.

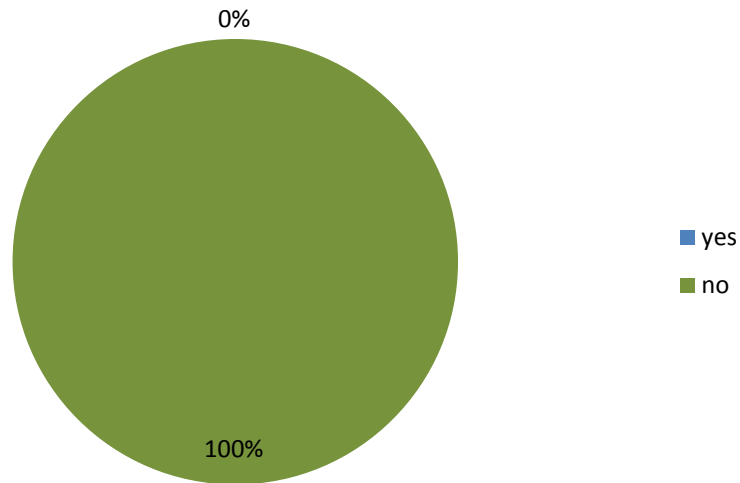
Overall the OFT is not minded to have yet further delay in making an appointed day order to bring the "missing" provisions into force because: -

- Given the above timescales it is likely to be at least 2018 before the Board of the OFT would consider new primary legislation and, thus, around 2020 before it would be implemented. In the meantime local consumers are denied the protection from unfair terms in contracts which Tynwald believes they are entitled to; and
- The substance of the schedule of terms that may be regarded as unfair (the grey list) is not proposed to be altered other than by addition of new items – Section 31 of the 2013 Report provides "*Following consultation we have been persuaded that the grey list should be retained in its current form with some limited additions.*" Thus the main protection to consumers should not change.

² <http://lawcommission.justice.gov.uk/publications/unfair-terms.htm>

Question 2

Are you aware of any consumer contracts currently being issued in the Isle of Man which are NOT compliant with the provisions of Schedule 1 (Schedule 2A of the 1991 Act once amended – see pages 7 & 8)? If yes, please send a copy of the contract to the OFT and explain which provision(s) it fails to comply with.

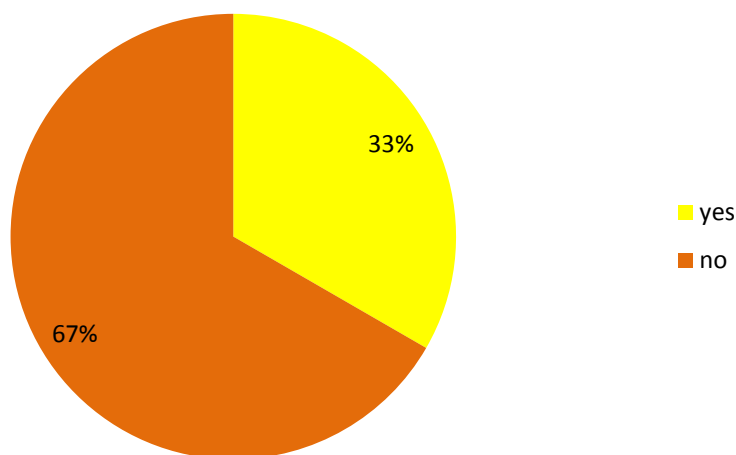


COMMENTS TO QUESTION 2

There were no comments received in relation to Question 2.

Question 3

Do you believe that any types of contract would need to be permanently exempted from the provisions relating to unfair terms in consumer contracts? If yes, please specify the type of contract and give reasons for exemption.



COMMENTS TO QUESTION 3

Mr G Kirkpatrick

There should be excluded contracts relating to the sale of land as in accordance with the English exemption under the 1977 UCTA provisions for the same reasons as being excluded in that jurisdiction.

OFT Response

Mr Kirkpatrick suggests that if, notwithstanding his views on delaying implementation, the OFT decide to bring the provisions into force there should be exemptions which would cover land, property and construction. This view is based on a mistaken understanding of the legal position in the United Kingdom, and that the UK equivalent legislation, the Unfair Contract Terms Act 1977 excludes property. The equivalent Manx legislation to the 1977 Act of Parliament is the Misrepresentation and Unfair Contract Terms Act 1980³. Like the UK Act upon which it is based the 1980 Act excludes both land and insurance contracts.

However, the UK list of potentially unfair terms in contracts does not derive from the Unfair Contract Terms Act 1977 of Parliament but rather from the Unfair Terms in Consumer Contracts Regulations 1999, made under the European Communities Act 1972 (of Parliament). The Unfair Terms in Consumer Contracts Regulations 1999 in the UK created the list of terms which may potentially be regarded as unfair (referred to in the Law Commission Reports as "the grey list") and it is that list which provides the derivation for the new Schedule 2A to the Consumer Protection Act 1991 which will be introduced by the final parts of the Fair Trading (Amendment) Act 2001.

There are no exclusions to the UK grey list – it covers both land and insurance contracts. It is also worth pointing out that the UK Unfair Terms in Consumer Contracts Regulations 1999

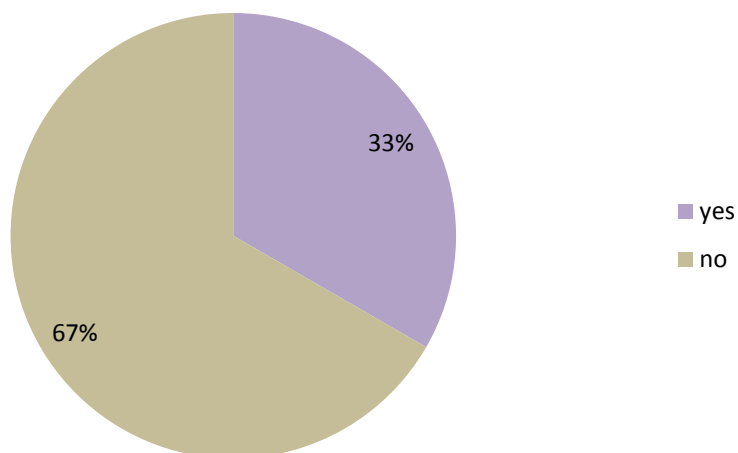
³ http://www.legislation.gov.uk/cms/images/LEGISLATION/PRINCIPAL/1980/1980-0018/MisrepresentationandUnfairContractTermsAct1980_1.pdf

apply only to consumer contracts (and implement EU consumer law) whereas the Unfair Contract Terms Act 1977 (of Parliament) has wider applicability.

It is felt that there is no case to exclude land, property and construction.

Question 4

Assuming that the Appointed Day Order would be 1st April 2014, are there any types of contract that would need to be temporarily exempted from the provisions relating to unfair terms in consumer contracts? If yes, please specify the type of contract, give reasons for exemption and state the period required.



COMMENTS TO QUESTION 4

Mr G Kirkpatrick

All contracts relating to land, property and construction if the matters as raised in the Law Commission report of 2005 are not to be addressed until proper measured consideration can be given to them.

OFT Response

See response to question 3.

Page intentionally left blank