

# STATES OF JERSEY



## **DRAFT CONSUMER PROTECTION (UNFAIR PRACTICES) (JERSEY) LAW 201-**

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**Lodged au Greffe on 29th December 2017  
by the Minister for Economic Development, Tourism, Sport and Culture**

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**STATES GREFFE**





Jersey

## **DRAFT CONSUMER PROTECTION (UNFAIR PRACTICES) (JERSEY) LAW 201-**

### **European Convention on Human Rights**

In accordance with the provisions of Article 16 of the Human Rights (Jersey) Law 2000, the Minister for Economic Development, Tourism, Sport and Culture has made the following statement –

In the view of the Minister for Economic Development, Tourism, Sport and Culture, the provisions of the Draft Consumer Protection (Unfair Practices) (Jersey) Law 201- are compatible with the Convention Rights.

Signed: **Senator L.J. Farnham**

*Minister for Economic Development, Tourism, Sport and Culture*

Dated: 22nd December 2017

## REPORT

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In October 2015 the Minister for Economic Development, Tourism, Sport and Culture lodged the Draft EU legislation (Consumer Protection – Unfair Practices) (Jersey) Regulations 201- (*see* [P.134/2015](#)).

Concerns were raised about cross-referencing to a Directive. It was therefore agreed to withdraw the draft and present this back to the States Assembly as primary legislation.

This Law is based on the Unfair Commercial Practices Directive 2005 which was implemented in the UK by the Consumer Protection from Unfair Trading Regulations.

These Regulations were seen as one of the most significant overhauls of consumer protection, replacing most of the Trade Descriptions Act and the Consumer Protection Act in the UK.

If approved, this Law will provide Islanders with modern and fit for purpose consumer protection.

### **What this law will mean to consumers**

Consumers should be able to rely on the information traders provide, in order to make decisions on whether to buy goods or not, or to engage a tradesman to carry out a service.

Consumers may have been misled by an advertisement, be unsure if they are getting a genuine bargain in a sale or a doorstep seller just wouldn't go away. This Law seeks to protect them by clamping down on those traders who won't trade fairly.

It will achieve this in 4 ways.

1. For the first time there will be a list of 31 banned practices. They are seen to be so unfair that they are banned outright. Traders who are caught carrying out these practices can be prosecuted.
2. The Law bans misleading practices. When you want to buy goods or need to employ a tradesman, the information they provide consumers with must be accurate. They must also provide this information at the right time. That means not holding important information back or giving it after consumers have made up their mind. This should help to clamp down on unexpected and unwelcomed charges and fees.
3. Nobody should feel under pressure to buy. Aggressive practices will be banned. Vulnerable consumers will also be given extra protection if they are targeted so 'no really means no'.
4. Finally, practices that are generally unfair will be banned if traders don't act in a professional manner.

This Law applies to all businesses who deal with consumers and covers the very start of that journey to the very end. From advertising and promotions, quotes and estimates, contracts and agreements, whilst they are completing the job through to any after sales services.

### **Who will investigate**

This Law will give Trading Standards the power to investigate and take action.

Trading Standards currently handle approximately 1000 consumer cases every year. Only about 1/3 of consumers disclose the value of goods and services in dispute, but of this third, in 2017 to date this totalled exceeded 1.8 million pounds.

Consumers can contact Trading Standards for free and confidential consumer advice. What this Law will do is give officers the tools to put things right when they are obviously wrong.

### **Fines**

If found guilty, traders could face a £10,000 fine. For less serious breaches, traders may be asked to agree to immediately stop treating consumers unfairly.

### **What this Law will mean for businesses**

This Law is good news for businesses who trade fairly. If they provide consumers with accurate and timely information and always act in a professional manner they do not have to do anything as a result of this Law.

It was important that any new law would not burden the majority of businesses who do trade fairly. This Law will however look to remove the advantages ‘rogue’ traders gain from trading unfairly.

### **31 Banned practices**

Here is a simplified list of the 31 banned practices. The full list can be found in the Schedule of the Law.

#### **Endorsements or authorisations**

1. You should not claim that you are a signatory to a code of conduct when you’re not.
2. You must not display a trust mark or quality mark without authorisation to do so.
3. You must not claim that a code of conduct is endorsed by a public or other body if it is not.
4. You must not claim that you, your business or product has been approved/endorsed/authorised by a public or private body if that is untrue.

*For example, a plumber who claims that he is ‘Gas Safe’ registered, when they are not.*

#### **Product availability**

5. You must not lure a consumer into believing that they can buy a product at a price when you already know that you can’t supply that product or have limited availability and you haven’t made the consumer aware of this. This is known as ‘bait’ advertising.
6. You must not lure consumers to purchase a product and then –
  - refuse to show the advertised item to the consumer;
  - refuse to take orders for it or deliver it within a reasonable time;
  - show a defective sample of the product to convince the consumer to purchase a different product (known as bait and switch).
7. You must not falsely claim that a product or special offer will only be available for a very limited time, or that it will only be available on particular terms for a very limited time, in order to force a consumer into making a quick decision to buy that product. This can take away the customer’s opportunity to make an informed decision.

### **Communicating in other languages**

8. If your aftersales service is only available in English and where you have communicated with the consumer in another language, you must inform them of this before the sale takes place.

### **Illegally selling goods**

9. You must not state or create the impression that goods can be legally sold when they can't.

### **Using consumer rights to make a sale**

10. You must not use legal consumer rights as a distinctive feature of your offer. For example, you should not claim that refunding or replacing faulty goods is only available in your shop.

### **Advertorials and the media**

11. You must not use editorial content in the media to promote a product where the promotion has been paid for by a trader (advertorial) without making this clear to the consumer.

### **Risks to personal security**

12. You must not make a false claim regarding risks to the personal security of consumers or their families if they don't buy your product.

### **Imitation goods**

13. You must not promote a product similar to one made by a particular manufacturer if this could deliberately mislead the consumer into believing that it was made by the same manufacturer when it is not.

### **Pyramid schemes**

14. You must not establish, operate or promote a pyramid promotional scheme where a consumer pays for the opportunity to receive money that comes from the introduction of other consumers into the scheme, rather than from the sale of products.

### **Closing down or moving premises**

15. You must not claim that you are about to cease trading or move premises when you are not.

### **Claims about a product or market conditions**

16. You must not claim that a product can help you win a game of chance.
17. You must not falsely claim that a product is able to cure illnesses.
18. You must not give a consumer materially inaccurate information on market conditions relating to a product (or on the possibility of finding that product) to convince the consumer to buy that product at conditions which are worse than normal market conditions. *For example, a trader bidding under a separate account for their own goods on eBay in order to increase the price the consumer will pay for those goods.*

### **Awarding competition prizes**

19. You must not claim to offer a competition or prize promotion without awarding the prizes described or a reasonable equivalent.

### **Free products**

20. You must not claim that a product is 'free', 'without charge' or similar if the consumer has to pay anything other than the unavoidable cost of responding and collecting or paying for delivery of the item.

### **Seeking payment**

21. You must not include in marketing materials any invoice or document seeking payment which may give the impression that the consumer has ordered the product when they have not.

### **Trade status**

22. You must not claim to be, or create the impression that you are, a consumer when you are acting in your trade, business or professional capacity. For example, a trader who advertises a used car for sale, does not mention that this is a trade sale and parks the car on the road to give the impression it is a private sale.

### **Aftersales (availability in the EU)**

23. You must not give the impression to a consumer that aftersales services for their product are available within the European Economic Area (EEA) if this service is only available in Jersey.

### **Putting pressure on the consumer**

24. You must not create the impression that the consumer cannot leave premises until they have bought goods or services.
25. You must not ignore a consumer's request to leave (and/or not return) when visiting their home. There are legal exceptions to this, for example Viscount Officers collecting debts.
26. You must not make persistent and unwanted contact with a consumer. For example phone calls, emails and texts. There are legal exceptions to this, for example Viscount Officers collecting debts.

### **Insurance claims**

27. You must not ask a consumer to provide unnecessary and irrelevant information to prove a valid insurance claim, or fail to respond to important correspondence both of which could put the consumer off making that insurance claim.

### **Advertising to children**

28. In advertisements you must not directly encourage a child to buy a product or persuade other adults to buy it for them.

### **Payment for goods not ordered**

29. You must not demand payment for goods that were not ordered by a consumer (unless they have agreed to substitute goods in accordance with the Distance Selling (Jersey) Law 2007).

*For example, a trader writes to consumers informing them of a new quality dishcloth which they are selling for £2.99. In the letter, the trader encloses one of the cloths for the consumer to inspect and says that if the consumer does not return the cloth within 7 days, then action will be taken to collect the £2.99.*

### **Using guilt to make a sale**

30. You must not tell a consumer that your job or livelihood will be at risk if they do not buy the product or service you are offering.

## **Claiming a prize**

31. You must not create a false impression that the consumer has already won, will win (or will on doing a particular act win) a prize, when in fact there is no prize, or, in order to claim the prize, the consumer has to pay money or incur a cost.

## **The Law in more detail**

This Law will provide Jersey consumers with protection against unfair commercial practices. It applies to all transactions where one party deals as a consumer in relation to the sale of goods and the supply of services.

Written in broad terms, it should also protect consumers from future emerging unfair commercial practices.

“Commercial practice” means any act, omission, course of conduct, representation or commercial communication (including advertising and marketing) by a trader, which is directly connected with the promotion, sale or supply of a product (goods and services) to or from consumers, whether occurring before, during or after a commercial transaction (if any) in relation to a product.

This Law does not impose any obligations on businesses to demonstrate that they are trading fairly and is not prescriptive, therefore there are no costly burdens to business. In general terms, if businesses furnish consumers with clear, timely and accurate information from advertising and promotion of goods and services, through to the sale, supply and any after sales services, businesses need take no further action.

The Law does however seek to prohibit unfair commercial practices which are –

- (a) always deemed to be unfair (31 banned practices);
- (b) misleading (actions or omissions);
- (c) aggressive; or
- (d) generally unfair, which effectively means failing to act in accordance with reasonable expectations of acceptable trading practice.

## **The average consumer and vulnerable targeted consumers**

Excluding the 31 banned practices which are unfair in all circumstances, the Law seeks to take into consideration the effect the commercial practice has on the behaviour of the average consumer. The average consumer is considered to be reasonably well informed, reasonably observant and circumspect. However, where businesses target specific groups of consumers such as children or vulnerable people, the impact the commercial practice has, is to be assessed from the perspective of the average member of that group. This will help protect the more vulnerable consumers who may be targeted within the community.

### (a) 31 Banned practices

Included within the Schedule of the Law is a ‘blacklist’ of 31 unfair commercial practices which are always deemed to be unfair.

Trading Standards Officers are currently powerless to take action against traders in these circumstances. This Law will therefore give them the mandate to investigate and take appropriate action to reduce instances of consumer detriment.

Examples of banned practices include –

- a person acting in a business capacity making a false claim of membership to a trade association by displaying their name or logo or making a false claim to be a signatory to a code of conduct.

- elderly consumers at home who may be targeted by tradesmen making an unsolicited visit claiming the need for urgent household repairs and maintenance. It would be an offence under this law to conduct a personal visit to the consumer's home and ignoring the consumer's request to leave and not return.

As the 31 banned practices are considered unfair in all circumstances and are prohibited, there is no need to consider the likely effect on consumers.

(b) Misleading actions and omissions

The law prohibits misleading actions and misleading omissions (as detailed in Articles 4 and 5), which cause or are likely to cause the average consumer to take a different decision.

A practice can mislead by action or omission or both. These prohibitions ensure traders supply consumers with the information they need to make informed decisions and do so in a clear and timely manner.

**Misleading actions**

Under Article 4, actions are misleading if they contain false information or the information is displayed in a way that is deceiving, and the average consumer takes, or is likely to take, a different decision as a result.

An example of a misleading action is where a business is making a false claim about a previous price in their sale. This information could mislead the average consumer into believing they were achieving a real saving when this is clearly not the case.

Traders therefore have a responsibility for ensuring that their pricing practices do not mislead consumers, and potentially breach the Law. 'Guidance for traders on pricing practices' is available on [www.gov.je](http://www.gov.je) and is written to reflect compliance with this legislation.

This Law will therefore provide a legal backstop if a trader neglects their responsibilities in not exercising professional diligence.

The types of information that may be considered as misleading is wide, including such things as –

- the main characteristics of the product – for example the specification;
- the price or the manner in which it is calculated;
- the need for a service, part, replacement or repair;
- the nature, attributes and rights of the trader – such as qualifications.

**Misleading omission**

Under Article 5, a misleading omission occurs when a trader hides material information or provides it in an unclear, unintelligible, ambiguously or untimely manner.

What information is required will depend on the circumstances, for example what the goods and services are, and where and how they are offered for sale. This may range from a very small amount of information for simple products, to more information for complex products. The limitations of the medium used to communicate is also taken into consideration.

Examples of misleading omissions include –

- a trader omitting to mention that a contract has to run for a minimum period, or that the consumer has to go on making purchases in future;

- a trader advertising mobile phones for sale. If the phones were second hand and/or had been reconditioned, this would be material information, which would need to be made clear to consumers before they made a decision to purchase or not.

(c) Aggressive practices

Article 6 prohibits aggressive commercial practices that intimidate or exploit consumers, restricting their ability to make free or informed choices.

In order for an aggressive practice to be unfair it must cause, or be likely to cause, the average consumer to take a different transactional decision.

A commercial practice is aggressive if –

- it significantly impairs, or is likely to significantly impair, the average consumer's freedom of choice or conduct in relation to the product through the use of harassment, coercion or undue influence and it thereby causes them to take a different transactional decision.

To decide whether a practice breaches this Law, account shall be taken of –

- timing, location, nature or persistence;
- use of threatening or abusive language or behaviour;
- exploitation by the trader of any specific misfortune or circumstance that impairs the consumer's judgement in order to influence their decision with regard to the product;
- any onerous or disproportionate non-contractual barrier imposed by the trader where a consumer wishes to exercise rights under the contract (for example, rights to terminate the contract or switch to another product or trader);
- any threat to take action that cannot legally be taken.

Examples of aggressive practices include –

- a doorstep trader pressures an elderly consumer to pay in cash for home repairs immediately. He insists on giving the consumer a lift to the bank to withdraw the money. This could amount to coercion or undue influence;
- a debt collector pressurises existing borrowers/debtors to repay a debt, for example, by contacting debtors at unreasonable times (such as late at night) or at unreasonable locations (such as at work when they have been requested not to).

(d) General duty not to trade unfairly

Article 3 introduces a prohibition of unfair commercial practices, which effectively means failing to act in accordance with reasonable expectations of acceptable trading practice.

The general duty prohibits practices that -

- contravene the requirements of professional diligence, and  
(professional diligence is defined as the standard of special skill and care that a trader may reasonably be expected to exercise towards consumers, which is commensurate with either honest market practice in the trader's field of activity or the general principle of good faith in the trader's field of activity);

- materially distort or is likely to materially distort the economic behaviour of the average consumer or average member of a targeted group, with regard to the goods or services.

### **Offences, penalties and defences**

A breach of the Law means that a criminal offence may have been committed and the maximum penalty on conviction is set at Level 3 on the standard scale which is a fine of £10,000.

In common with most types of consumer protection legislation Article 8 provides for a statutory defence available to any person. They would have to show that the commission of the offence was due to –

- a mistake;
- reliance on information given by another person;
- the act or default of another person not under the trader’s direction or control;
- an accident; or
- another cause beyond their control.

In addition, they must show that they took all reasonable precautions and exercised all due diligence to avoid committing the offence, including by any person under their direction or control.

### **Enforcement**

The Law will be enforced by ‘authorized officers’ as defined in Article 1 and in effect this will fall under the remit of Trading Standards Officers. When considering enforcement action, officers will always have regard to the principles of proportionality, accountability, consistency and transparency in line with their existing enforcement policy.

### **Additional mechanisms – injunctions and undertakings**

As well as criminal sanctions there are also alternative enforcement mechanisms which are available to ensure efficient and effective compliance.

Article 17 enables the Attorney General to apply for an injunction in the Royal Court against any person who appears to be responsible for a breach of the Law.

Article 18 will also be a very useful alternative enforcement tool as it introduces the concept of a trader providing an ‘undertaking’ that they will comply with the Law. It may be applied where a trader has engaged, is engaging or is likely to engage in conduct which may, if proved, constitute an offence under other provisions set out in the Law.

The key benefit is that if a trader acknowledges that they have engaged in an unfair practice and agrees to cease the activity it can be dealt with in an efficient and relatively informal cost effective manner.

### **Commencement**

If adopted, the Law will come into force 7 days after it is registered.

### **Collective responsibility under Standing Order 21(3A)**

The Council of Ministers has a single policy position on this proposition, and as such, all Ministers, and the Assistant Ministers for Economic Development, Tourism, Sport and Culture, are bound by the principle of collective responsibility to support the proposition, as outlined in the Code of Conduct and Practice for Ministers and Assistant Ministers ([R.11/2015](#) refers).

### **Financial and manpower implications**

The Economic Development, Tourism, Sport and Culture Department will enforce this Law within the existing 2018 – 2019 MTFP allocated resources.

Implementation will be a formative process and Economic Development, Tourism, Sport and Culture Department may need to go to Central Contingency outside of this period if it is shown that additional resources are required.

### **Human Rights**

The notes on the human rights aspects of the draft Law in the **Appendix** have been prepared by the Law Officers' Department and are included for the information of States Members. They are not, and should not be taken as, legal advice.

## APPENDIX TO REPORT

### Human Rights Notes on Draft Consumer Protection (Unfair Practices) (Jersey) Law 201-

These Notes have been prepared in respect of the Draft Consumer Protection (Unfair Practices) (Jersey) Law 201- (the “**draft Law**”) by the Law Officers’ Department. They summarise the principal human rights issues arising from the contents of the draft Law and explain why, in the Law Officers’ opinion, the draft Law is compatible with the European Convention on Human Rights (“**ECHR**”).

**These notes are included for the information of States Members. They are not, and should not be taken as, legal advice.**

The draft Law would confer protection on Jersey consumers against unfair commercial practices. The draft Law defines unfair commercial practices and prohibits their practice, in addition to providing authorised officers with powers of inspection, and the Court with injunctive powers, to address such practices.

#### Article 6 ECHR – the right to fair trial

Article 6 ECHR provides for the right to a fair trial and, in the safeguards encapsulated by that provision, is the presumption of innocence in criminal proceedings (Article 6(2) ECHR). Article 6(2) ECHR is engaged by Article 8 which provides for defences to the various offences set out in Article 7 (e.g. recklessly or knowingly engaging in an unfair commercial practice; engaging in an unfair commercial practice which is misleading). Those defences are based around a reverse burden of proof, i.e. that it is for the trader concerned to show that there was a reasonable excuse for the commission of the offence (e.g. a mistake or accident).

Article 6(2) ECHR does not prohibit statutory provisions which transfer the burden of proof to the accused to establish the defence provided the overall burden of establishing guilt remains with the prosecution. In addition, any rule shifting the burden of proof must be confined within reasonable limits which take into account the importance of what is at stake and maintain the rights of the defence. A question which is typically asked in determining this issue is whether the burden imposed on the accused relates to something which is likely to be within his knowledge or to which he has ready access. In the case of the various defences set out in Article 8(1) the legal burden of proof properly falls on the accused because all information relevant to the defence would be known to the trader accused and not to the prosecutor (i.e. whether the trader placed reliance on information supplied to the trader by another person; whether the trader made a mistake). Balanced against the need to protect consumers from unfair commercial practices and the limited penalty under Article 7(2) (a level 3 fine), there is no incompatibility with the ECHR arising from Article 8.

#### Article 8 ECHR – right to private and home life

Article 8 ECHR is engaged by the power in Articles 11 and 12 for authorised officers to enter premises with or without a warrant. The Article 8 ECHR right to respect for

the home applies to business premises, in addition to personal dwellings, and a person may rely on Article 8 ECHR to establish a right to respect for its business premises. Inspections carried out under Article 11 will focus on business premises and as a result Article 8 ECHR will be engaged by the exercise of entry powers under the draft Law.

Any interference with the Article 8(1) ECHR right must be justified under Article 8(2) ECHR, meaning it must be (a) in accordance with the law; (b) in pursuit of one of the legitimate aims set out in Article 8(2) ECHR; and (c) necessary in a democratic society. ‘Necessity’ requires the identification of a pressing social need and the existence of “relevant and sufficient” reasons to justify the interference at issue. A measure will only be proportionate to the legitimate aim if supported by sufficiently persuasive reasons.

The nature of the interference constituted by the power to enter premises in Article 11 would be deemed to be ‘in accordance with the law’; that power is contained in a provision which will have a basis in domestic law and which can be viewed as sufficiently precise and accessible, therefore being foreseeable. The purpose of the Article 11 power is to ensure that inspectors are able to ascertain whether or not an offence under the Law is being or has been committed. Those offences relate to unfair commercial practices which have the potential to manipulate commercial goods markets and which could have a financial impact on consumers, so the rationale for the Article 11 power can be categorised within the ‘interests of the economic well-being of the country’ and the ‘protection of the rights of others’ qualifications in Article 8(2) ECHR.

‘Necessary in a democratic society’ requires there to be a pressing social need for the interference in question and that the interference is proportionate to the legitimate aim pursued. In the present case, enabling entry onto premises is ‘necessary’ for ensuring that offences can be detected as that is, in practice, the only means by which authorised officers can perform the required inspections. Ensuring fair commercial practices and protecting consumer confidence are a ‘pressing social need’ and, balanced against those legitimate aims, the interference with the Article 8 ECHR right constituted by the power to enter premises is proportionate, in principle.

An important aspect in determining what is ‘necessary in a democratic society’ is the identification of procedural safeguards which mitigate the exercise of powers interfering with the Article 8(1) right. Safeguards ensure that a state remains within its margin of appreciation in fixing the applicable regulatory framework. The European Court of Human Rights (“**ECtHR**”) has enunciated a list of safeguards which provide adequate protection against abuse of the Article 8 right, one of which was the requirement for the law to contain explicit and detailed provisions about how the powers interfering with Article 8 ECHR could be exercised.

In the draft Law, the purpose for the exercise of the Article 11 power is clearly stated as being for ascertaining whether or not an offence under the Law is being or has been committed. Linking the entry power to a specific purpose should in theory temper any frivolous or unnecessary exercise of the power. In addition, there are a number of other safeguards against excessive operation of the power: excluding the application of the power from personal dwellings; stating that the power may only be exercised at reasonable hours; and requiring evidence of the authority of authorised officers if required to do so. Moreover, an additional safeguard, in terms of the legislation detailing the extent of the entry power, is provided in Article 13 which makes it clear that an authorised officer may enter premises alone or with other persons and equipment if deemed necessary.

Article 12 provides that the Bailiff may grant a warrant permitting an authorised officer to enter premises in cases where, amongst other things, entry onto premises has or will be refused. The requirement for a warrant in these circumstances is an additional safeguard against abuse of the Article 8(1) ECHR right. It should, however, be noted that the existence of the residual safeguards which are provided for in Article 11 are critical even in cases where a warrant is granted. That is because, even where the use of an investigatory power must be authorised by warrant, to be compatible with Article 8 ECHR, the power must also be subject to specific limits and safeguards controlling the way in which it may be exercised and preventing arbitrary or excessive use. It is considered that the safeguards which are provided in the draft Law are appropriate in view of the extent of the entry power contained in Article 11.

#### Article 1 of the First Protocol (“A1P1”) – Protection of property

A1P1 provides for the protection of ‘possessions’ and there are 2 aspects of the draft Law which will engage that right. The first is the power to seize items, provided for in Article 21 of the Police Procedures and Criminal Evidence (Jersey) Law 2003 (the “**2003 Law**”), and to retain items, as provided for in Article 24 of the 2003 Law (both incorporated by reference in Article 11(3)(b) of the draft Law). The second is the power in Article 17(2) for the Court to grant an injunction or other order to secure compliance with the Law. It is worth noting here that A1P1 expressly mentions ‘legal persons’ so it will cover the property rights of companies and other incorporated bodies, such as those businesses that might be subjected to an inspection or injunction under the draft Law.

In A1P1 terms, the seizure of property ancillary to the enforcement of domestic legislation, such as the draft Law, has been treated in case law as a control of use of property. There will also be a control of use for the purposes of A1P1 to the extent that the Article 17(2) injunction power impacts on the circulation or marketing of a trader’s goods. For a measure constituting a control of use to be justified it must be in accordance with law and for ‘the general interest’. The measure must also be proportionate to the aim pursued.

In the context of A1P1, a general interest has been found in measures enabling the seizure of goods taken in relation to legal proceedings, and for reasons relating to legality such that compliance by an entity with certain laws has been held to constitute a legitimate general interest objective. The power to seize goods and to impose injunctions provided in the draft Law is imposed to meet objectives that can be aligned closely to these recognised interests. Entry onto premises and seizure is necessary to detect the commission of offences and injunctions are required to prevent traders from continuing illegal practices which, in turn, are required to ensure that consumers are protected from unfair commercial practices. It should be appreciated that, where property rights are concerned, states have a considerable margin of appreciation in determining the existence of a general public concern and in implementing measures designed to meet it, so in providing a power to seize goods or impose injunctions which amount to an interference with property rights but which is required in pursuance of an identifiable public interest, the States would be afforded a degree of deference.

A further strand of justification for a ‘control of use’ under A1P1 is the need for measures to be in ‘accordance with the law’. This requires the law to be sufficiently precise and foreseeable, and it is fair to conclude that the draft Law would satisfy this requirement. The nature of the interferences constituted by the power to seize goods and impose injunctions would be deemed to be ‘in accordance with the law’; those

powers are contained in provisions which will have a basis in domestic law and which can be viewed as sufficiently precise and accessible, therefore being foreseeable.

Proportionality requires a fair balance to be struck between the means employed in furtherance of the general interest identified and the protection of fundamental rights. The requisite balance will not be struck if the person concerned has had to bear an “individual and excessive burden”. In the present context, a power to seize goods in pursuance of the aim of detecting the commission of offences and to impose injunctions is entirely proportionate to the general interest of preventing unfair commercial practices.

Abuse of the seizure and retention powers is safeguarded against by the existence of a number of safeguards: the powers must be exercised for the purpose of ascertaining whether or not an offence has been committed or for the purposes of an investigation (Article 21(2), (3) and Article 24(2) of the 2003 Law); the seizure power may only be exercised by an authorised officer who is on the premises lawfully (Article 21(1) of the 2003 Law); access to and the opportunity to copy seized items must be permitted (Article 23 of the 2003 Law) and items which may be photographed or copied may not be retained (Article 24(4) of the 2003 Law). A further safeguard against excessive interference with the A1P1 right which might arise from the seizure power is Article 16 of the draft Law which provides that the Minister shall be liable in specified circumstances to pay compensation to any person having an interest in seized goods, in respect of any loss or damage caused to that person by reason of that seizure or detention. The provision for payment of compensation is a welcome aspect of the provisions surrounding the entry and inspection powers, as it will help to mitigate the most excessive cases of interference with the A1P1 right.

The seizure power and the power to impose injunctions in the draft Law are justifiable in principle but these powers must be exercised in a proportionate manner in practice, based on the nature of the items seized or the particular circumstances in question and the specific public interest engaged.

## Explanatory Note

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This draft Law would confer protection on Jersey consumers against unfair commercial practices, which are defined in and prohibited by *Article 3*.

The Law would apply in all transactions (except auction sales or sales by competitive tender) where one party “deals as a consumer”, a concept defined by *Article 2(6) to (7)* and adopted from similar provision in Article 2 of the Supply of Goods and Services (Jersey) Law 2009, but for the purposes of this Law also including contracts for the supply of services, as well as those for the sale or hire-purchase of goods.

Particular examples of unfair commercial practices are specified in the Schedule, and these are deemed by Article 3(2) to be always unfair. The prohibition extends to commercial practices which are actively misleading (as defined in *Article 4*) such as those which, by containing false information and thus deceiving the average consumer as to one of the elements specified in Article 4(3), cause the consumer to take a decision (e.g. entering into a purchase transaction) which the consumer would not otherwise have taken. Misleading omissions (defined in *Article 5*) would also amount to unfair commercial practices, as would aggressive commercial practices involving coercion, harassment or undue influence which significantly impairs the average consumer’s freedom of choice or conduct with regard to the product in question (*Article 6*).

*Article 7* would create offences of engaging in unfair commercial practices, and in the case of a commercial practice which is listed in the Schedule or which is a misleading action or omission or is aggressive, the offence is one of strict liability. A person guilty of such an offence would be liable to a fine of level 3 on the standard scale (currently a maximum of £10,000, under the Schedule to the Criminal Justice (Standard Scale of Fines) (Jersey) Law 1993). *Article 8* would provide defences for traders including due diligence, mistake, and reliance on information supplied by another person. *Article 9* would impose liability on officers of corporate and other bodies.

*Articles 10 to 16* would deal with powers of investigation, including the power of an authorized officer (defined in *Article 1(1)* as any person appointed as an inspector pursuant to Article 2 of the Weights and Measures (Jersey) Law 1967) to make test purchases (*Article 10*), and to enter premises and seize and detain goods, either without warrant (in the circumstances specified by *Article 11*) or under a warrant from the Bailiff (*Article 12*). A person who obstructs an authorized officer would be guilty of an offence under *Article 14* and liable to a fine of level 3 on the standard scale; a person failing to give assistance or to produce information requested would similarly be guilty of an offence and liable to a fine of level 3.

Where an authorized officer subjects goods which are seized or detained to any test, *Article 15* would impose a duty to inform the owner of the goods of the results of the test, and under *Article 16* the Minister for Economic Development, Tourism, Sport and Culture would be obliged to pay compensation where loss or damage arises from such seizure and detention but no offence has been committed.

*Articles 17 to 19* would make additional provision as to enforcement of this Law, by means of injunctions or other orders to be obtained from the Royal Court by the Attorney General under *Article 17*, or by undertakings to be given to the Chief Inspector (as defined in the Weights and Measures (Jersey) Law 1967) under *Article 18* and which could be publicized by that officer under *Article 19*.

*Article 20* would provide that agreements may not be void solely because of a breach of a provision of this Law.

*Article 21* would provide for the title by which this draft Law may be cited and for its commencement 7 days after it is registered.



Jersey

## DRAFT CONSUMER PROTECTION (UNFAIR PRACTICES) (JERSEY) LAW 201-

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Jersey

## **DRAFT CONSUMER PROTECTION (UNFAIR PRACTICES) (JERSEY) LAW 201-**

**A LAW** to confer protection on consumers against unfair commercial practices; to create offences of contravening the prohibitions against such practices, and to impose penalties for those offences; to confer powers to investigate instances of alleged unfair commercial practices, and to require undertakings to restrict such practices; and for connected purposes

*Adopted by the States* [date to be inserted]

*Sanctioned by Order of Her Majesty in Council* [date to be inserted]

*Registered by the Royal Court* [date to be inserted]

**THE STATES**, subject to the sanction of Her Most Excellent Majesty in Council, have adopted the following Law –

### **1 Interpretation**

(1) In this Law –

“average consumer” is to be understood in accordance with paragraphs (2) to (4);

“authorized officer” means an inspector within the meaning of the Weights and Measures (Jersey) Law 1967<sup>1</sup>;

“business” includes a trade, craft or profession and the activities of any public administration;

“Chief Inspector” has the meaning given by Article 2 of the Weights and Measures (Jersey) Law 1967;

“commercial practice” means any act, omission, course of conduct, representation or commercial communication (including advertising and marketing) by a trader, which is directly connected with the promotion, sale or supply of a product to or from consumers, whether occurring before, during or after a commercial transaction (if any) in relation to a product;

“goods” includes –

(a) corporeal movables –

- (i) except money, and
- (ii) including water, gas and electricity only if they are put up for sale in a limited volume or set quantity;
- (b) industrial growing crops, and things attached to or forming part of land that are agreed to be severed before sale or under a contract of sale; and
- (c) an undivided share in goods;

“inducement” means an act which causes or is likely to cause the average consumer to take a transactional decision the consumer would not have taken otherwise;

“invitation to purchase” means a commercial communication which indicates characteristics of the product and the price in a way appropriate to the means of that commercial communication and thereby enables the consumer to make a purchase;

“Minister” means the Minister for Economic Development, Tourism, Sport and Culture;

“premises” includes any place and any stall, vehicle, aircraft, ship or boat (and any other description of vessel used in navigation);

“product” means any goods or services, and may include –

- (a) digital content (that is, data produced and supplied in digital form);
- (b) immovable property;
- (c) rights and obligations; and
- (d) a product of the kind described in paragraph (5);

“professional diligence” means the standard of special skill and care which a trader may reasonably be expected to exercise towards consumers which is commensurate either with –

- (a) honest market practice in the trader’s field of activity; or
- (b) the general principle of good faith in the trader’s field of activity;

“public administration” means –

- (a) any of the 12 parishes;
- (b) an administration of the States (including a department of the States); and
- (c) a body having functions under any enactment;

“trader” means a person acting for purposes relating to that person’s business, whether acting in person or through another person acting in the trader’s name or on the trader’s behalf;

“transactional decision” means any decision taken by a consumer (whether to act, or to refrain from acting) concerning –

- (a) whether, how and on what terms to purchase, make payment in whole or in part for, retain or dispose of a product; or
- (b) whether, how and on what terms to exercise a contractual right in relation to a product;

“unfair commercial practice” has the meaning given by Article 3.

- 
- (2) In determining the effect of a commercial practice on the average consumer where the practice reaches or is addressed to a consumer, account shall be taken of the material characteristics of such an average consumer, including the consumer's being reasonably well informed, reasonably observant and circumspect.
  - (3) In determining the effect of a commercial practice on the average consumer –
    - (a) where a commercial practice is specifically aimed at a particular group of consumers (such as children); or
    - (b) where –
      - (i) certain characteristics such as age, physical or mental infirmity or credulity make a group of consumers particularly susceptible to a commercial practice or to the underlying product, and
      - (ii) the economic behaviour only of that group of consumers is likely to be distorted by the practice in a way that the trader can reasonably foresee,

the impact of the commercial practice is to be assessed from the perspective of the average member of that group.
  - (4) In applying paragraph (3)(b), no regard is to be had to the common and legitimate advertising practice of making exaggerated statements which are not meant to be taken literally.
  - (5) Where a trader demands payment from a consumer in full or partial settlement of the consumer's liabilities or purported liabilities to the trader, the product which the trader offers to supply is the full or partial settlement of those liabilities.

## 2 Application

- (1) This Law applies to any unfair commercial practice which takes place before, during or after a transaction in which one person deals as a consumer in relation to any product.
- (2) This Law applies without derogation from, and in addition to –
  - (a) the Consumer Safety (Jersey) Law 2006<sup>2</sup>;
  - (b) the Distance Selling (Jersey) Law 2007<sup>3</sup>; and
  - (c) the Supply of Goods and Services (Jersey) Law 2009<sup>4</sup>.
- (3) This Law –
  - (a) applies (subject to paragraph (4)) to a Minister of the States and any public administration; and
  - (b) binds the Crown (subject to paragraph (5)), but does not apply to Her Majesty in her private capacity.
- (4) A contravention by a Minister or by a public administration of any provision of this Law shall not impose criminal liability on the Minister or public administration, but –

- 
- (a) the Royal Court may, on the application of the Attorney General, declare unlawful any act or omission of a Minister or public administration that contravenes a provision of this Law; and
  - (b) this Law applies to States' employees (as defined by Article 2 of the Employment of States of Jersey Employees (Jersey) Law 2005<sup>5</sup>) as it applies to other persons.
- (5) A contravention by the Crown of any provision of this Law shall not impose criminal liability on the Crown.
- (6) For the purposes of paragraph (1), one party to a contract of sale of goods or for the supply of services, or to a hire-purchase agreement, deals as a consumer in relation to another party to the contract or agreement if –
- (a) the other party enters the contract or agreement in the course of a business; and
  - (b) the one party neither enters the contract or agreement in the course of a business nor holds himself or herself out as doing so,
- and the goods or services under the contract or agreement are of a type ordinarily supplied for private use or consumption.
- (7) However, on a sale by auction or by competitive tender the buyer is not in any circumstances to be regarded as dealing as a consumer for the purposes of this Law.
- (8) Except in the case referred to in paragraph (7), it is for those claiming that a party does not deal as a consumer to show that that party does not so deal.

### **3 Prohibition of unfair commercial practices**

- (1) Unfair commercial practices, as further defined by paragraphs (2) to (4), are prohibited.
- (2) A commercial practice listed in the Schedule is always unfair.
- (3) A commercial practice is unfair if –
  - (a) it is contrary to the requirements of professional diligence; and
  - (b) it materially distorts or is likely to materially distort the economic behaviour, with regard to the product, of –
    - (i) the average consumer whom it reaches or to whom it is addressed, or
    - (ii) the average member of the group of consumers, where the commercial practice is directed to a particular group.
- (4) In particular, and without derogation from paragraph (3), a commercial practice is unfair if –
  - (a) it is misleading as described in Article 4 or 5; or
  - (b) it is to be regarded as aggressive under Article 6.

**4 Commercial practices which are actively misleading**

- (1) A commercial practice, other than an omission, is misleading if it falls within paragraph (2) or paragraph (4).
- (2) A commercial practice falls within this paragraph if –
  - (a) it contains false information and is therefore untruthful or in any way, including overall presentation, deceives or is likely to deceive the average consumer in relation to one or more of the elements listed in paragraph (3); and
  - (b) it is an inducement.
- (3) The elements mentioned in paragraph (2) are –
  - (a) the existence or nature of the product;
  - (b) the main characteristics of the product, such as –
    - (i) availability,
    - (ii) benefits,
    - (iii) risks,
    - (iv) execution,
    - (v) composition,
    - (vi) accessories,
    - (vii) after-sale customer assistance and complaint handling,
    - (viii) method and date of manufacture or provision,
    - (ix) delivery,
    - (x) fitness for purpose,
    - (xi) usage,
    - (xii) quantity,
    - (xiii) specification,
    - (xiv) geographical or commercial origin,
    - (xv) results to be expected from use,
    - (xvi) results and material features of tests and checks carried out on the product;
  - (c) the extent of the trader's commitments, the motives for the commercial practice and the nature of the sales process;
  - (d) any statement or symbol in relation to direct or indirect sponsorship or approval of the trader or the product;
  - (e) the price or the manner in which the price is calculated, or the existence of a specific price advantage;
  - (f) the need for a service, part, replacement or repair;
  - (g) the nature, attributes or rights of the trader or his agent, such as –
    - (i) identity and assets,
    - (ii) qualifications, status, approval, affiliation or connection,
    - (iii) ownership of industrial, commercial or intellectual property rights, or

- (iv) awards and distinctions;
  - (h) the consumer's rights, including (but not limited to) any rights the consumer may have under the Supply of Goods and Services (Jersey) Law 2009<sup>6</sup>;
  - (i) any risks the consumer may face.
- (4) A commercial practice falls within this paragraph if, in its factual context, taking account of all its features and circumstances, it is an inducement and involves –
- (a) any marketing of a product, including comparative advertising, which creates confusion with any products, trade marks, trade names or other distinguishing marks of a competitor; or
  - (b) non-compliance by the trader with commitments contained in codes of conduct by which the trader has undertaken to be bound, where –
    - (i) the commitment is not aspirational but firm and capable of being verified, and
    - (ii) the trader indicates in a commercial practice that the trader is bound by the code.

## **5 Misleading omissions**

- (1) A commercial practice is misleading if, in its factual context, taking account of all its features and circumstances and the limitations of the medium used to communicate it –
- (a) the commercial practice omits material information; or
  - (b) the trader –
    - (i) hides material information, or provides it in an unclear, unintelligible, ambiguous or untimely manner, or
    - (ii) fails to identify the commercial intent of the commercial practice (if not already apparent from the context),
- and the commercial practice is thereby an inducement.
- (2) For the purposes of paragraph (1)(a), where the medium used to communicate the commercial practice imposes limitations of space or time, such limitations and any measures taken by the trader to make material information available to consumers by other means shall be taken into account in deciding whether information has been omitted.
- (3) In this Article, “material information” –
- (a) means information that the average consumer needs, according to the context, to take an informed transactional decision;
  - (b) includes information required to be given under Articles 5 and 6 of the Distance Selling (Jersey) Law 2007<sup>7</sup> and such other required information as the Minister may prescribe by Order; and
  - (c) where the commercial practice is an invitation to purchase, includes the matters listed in paragraph (4).

- 
- (4) In the case of an invitation to purchase, the following information is to be regarded as material, if not already apparent from the context –
- (a) the main characteristics of the product, to the extent appropriate to the medium used to communicate the invitation to purchase and to the product;
  - (b) the identity of the trader, such as a trading name, and of any other trader on whose behalf the trader is acting;
  - (c) the geographical address of the trader and of any other trader on whose behalf the trader is acting;
  - (d) the price of the product, inclusive of taxes or (where the nature of the product means that the price cannot reasonably be calculated in advance) the manner in which the price is calculated;
  - (e) where appropriate, all additional freight, delivery or postal charges or (where such charges cannot reasonably be calculated in advance) the fact that such charges may be payable;
  - (f) arrangements for payment, delivery, performance, and complaint handling policy, where these depart from the requirements of professional diligence;
  - (g) the existence of a right of withdrawal or cancellation, for products and transactions involving such a right.

## **6 Aggressive commercial practices**

- (1) A commercial practice is to be regarded as aggressive if, in its factual context, taking account of all its features and circumstances –
- (a) by harassment, coercion, or undue influence it significantly impairs, or is likely to significantly impair, the average consumer's freedom of choice or conduct with regard to the product; and
  - (b) it is thereby an inducement.
- (2) In determining whether a commercial practice uses harassment, coercion or undue influence, account shall be taken of –
- (a) the timing, location, nature or persistence of the practice;
  - (b) the use of threatening language or behaviour;
  - (c) the exploitation by the trader of any specific misfortune or circumstance of such gravity as to impair the consumer's judgement, of which the trader is aware, to influence the consumer's decision with regard to the product;
  - (d) any onerous or disproportionate non-contractual barriers imposed by the trader where a consumer wishes to exercise rights under the contract, including rights to terminate the contract or to switch to another product or another trader;
  - (e) any threat to take any action which cannot legally be taken.
- (3) For the purposes of this Article –
- (a) "coercion" includes the use of physical force; and

- (b) using “undue influence” means exploiting a position of power in relation to the consumer so as to apply pressure, even without using or threatening to use physical force, in a way which significantly limits the consumer’s ability to make an informed transactional decision.

## **7 Offences and penalties**

- (1) A trader is guilty of an offence if –
  - (a) the trader engages in a commercial practice knowing, or being reckless as to whether, the commercial practice is unfair in the sense given by Article 3(3); or
  - (b) the trader engages in an unfair commercial practice which is –
    - (i) a commercial practice listed in the Schedule,
    - (ii) misleading as described in Article 4 (other than a commercial practice falling within Article 4(4)(b)),
    - (iii) a misleading omission under Article 5, or
    - (iv) to be regarded as aggressive under Article 6.
- (2) A person who is guilty of an offence under paragraph (1) is liable to a fine of level 3 on the standard scale.
- (3) For the purposes of paragraph (1)(a), a trader who engages in a commercial practice without due regard to whether the practice contravenes the requirements of professional diligence is deemed to do so recklessly, whether or not the trader has reason for believing that the practice might contravene those requirements.
- (4) The States may by Regulations amend paragraph (1) and the Schedule.

## **8 Defences of due diligence and innocent publication**

- (1) In any proceedings against a trader for an offence under Article 7, it is a defence for the trader to prove –
  - (a) that the commission of the offence was due to one of the following matters, namely –
    - (i) a mistake,
    - (ii) reliance on information supplied to the trader by another person,
    - (iii) the act or default of another person, not being a person under the trader’s direction or control,
    - (iv) an accident, or
    - (v) another cause beyond the trader’s control; and
  - (b) that the trader took all reasonable precautions and exercised all due diligence to avoid the commission of such an offence, including by any person under the trader’s direction or control.

- 
- (2) A trader may not seek to rely on the defence provided by paragraph (1) by reason of a matter in either sub-paragraph (a)(ii) or (iii) without leave of the court to do so, unless –
    - (a) the trader has served on the Attorney General a notice in writing giving all such information identifying the other person concerned or assisting in the identification as was in the trader's possession; and
    - (b) that notice is served no later than 7 clear days before the date of the hearing.
  - (3) In any proceedings against a trader for an offence under Article 7 committed by way of publication of an advertisement, it shall be a defence for the trader to prove that –
    - (a) the trader is a person whose business it is to publish or arrange for the publication of advertisements;
    - (b) the trader received the advertisement for publication in the ordinary course of business; and
    - (c) the trader did not know and had no reason to suspect that publication of the advertisement would amount to an offence under the provision to which the proceedings relate.
  - (4) In paragraph (3) "advertisement" includes a catalogue, a circular and a price list.

## **9 Liability of officers etc.**

- (1) Where an offence committed by an entity listed in paragraph (2) is proved to have been committed with the consent or connivance of any person specified in the case of that entity in paragraph (3), the person shall also be guilty of the offence and liable in the same manner as the entity to the penalty provided for that offence.
- (2) The entities mentioned in paragraph (1) are –
  - (a) a limited liability partnership;
  - (b) a separate limited partnership;
  - (c) an incorporated limited partnership or other body corporate.
- (3) The persons to whom liability for an offence may attach in accordance with paragraph (1) are –
  - (a) in the case of a limited liability partnership, a person who is a partner of the partnership;
  - (b) in the case of a separate limited partnership or an incorporated limited partnership –
    - (i) a general partner, or
    - (ii) a limited partner who is participating in the management of the partnership;
  - (c) in the case of a body corporate other than an incorporated limited partnership, a director, manager, secretary or other similar officer of the body corporate; or

- (d) any person purporting to act in any capacity described in subparagraphs (a) to (c).
- (4) Where the affairs of a body corporate are managed by its members, paragraphs (1) to (3) shall apply in relation to acts and defaults of a member in connection with the member's functions of management as if the member were a director of the body corporate.

#### **10 Power of authorized officers to make test purchases**

An authorized officer may –

- (a) enter into an agreement to secure the provision of a product; or
- (b) make a purchase of any goods,

for the purpose of ascertaining whether or not an offence under this Law is being or has been committed.

#### **11 Power of authorized officers to enter premises without warrant**

- (1) An authorized officer may enter any premises, other than premises used only as a private dwelling, at all reasonable hours, for the purpose of ascertaining whether or not an offence under this Law is being or has been committed.
- (2) If required to do so, an authorized officer exercising the power conferred by paragraph (1) must produce evidence of his or her authority.
- (3) The power conferred by paragraph (1) includes –
  - (a) power to inspect any product; and
  - (b) the same powers of seizure, access and copying, and retention, as are conferred on a police officer by Articles 21 to 24 (except Article 24(3)) of the Police Procedures and Criminal Evidence (Jersey) Law 2003<sup>8</sup>, and in the application of those provisions for the purposes of this Law –
    - (i) for any reference to a police officer there shall be substituted reference to an authorized officer,
    - (ii) for the references in Article 23(3) to the Force or the Honorary Police there shall be substituted reference to the Chief Inspector, and
    - (iii) for the reference in Article 24(5) to the police there shall be substituted reference to the Chief Inspector.
- (4) Where goods are seized from a vending machine, the person to be informed of such seizure shall be the person whose name and address are stated on the machine as being those of the proprietor of the vending machine or, if there is no such name and address, the occupier of the premises on which the machine stands or to which it is affixed.

**12 Warrant to enter premises**

- (1) If the Bailiff is satisfied that there are reasonable grounds for an authorized officer to believe that there are on any premises goods or documents inspection of which is necessary for the purpose mentioned in Article 11(1), and that –
  - (a) entry to the premises has been or will be refused;
  - (b) the premises are unoccupied or the occupier is temporarily absent, and the case is one of urgency; or
  - (c) an application for admission would defeat the purpose of the proposed entry,the Bailiff may grant a warrant permitting an authorized officer to enter the premises.
- (2) A power of entry by virtue of a warrant granted under paragraph (1) shall include the same powers as mentioned in Article 11(3).
- (3) A warrant granted under paragraph (1) shall continue in force for 30 days.

**13 Assistance and equipment of authorized officers**

An authorized officer entering premises by virtue of Article 11 or 12 may take with him or her such other persons and equipment as he or she may consider necessary.

**14 Offences of obstructing etc. investigation by authorized officers**

- (1) A person who intentionally obstructs an authorized officer acting in execution of powers conferred by Article 11 or 12 is guilty of an offence and liable to a fine of level 3 on the standard scale.
- (2) A person who –
  - (a) fails to give such an officer any assistance which that officer may reasonably require; or
  - (b) when required to produce any document or give any other information, produces a document or gives information which is false in a material particular, knowing the document or information to be false in that particular,is guilty of an offence and liable to a fine of level 3 on the standard scale.

**15 Duty to inform as to results of tests, etc.**

- (1) This Article applies where any goods –
  - (a) purchased by an authorized officer under Article 10; or
  - (b) seized and detained by an authorized officer under Article 11 or 12,are submitted to a test, and the test leads to the institution of any proceedings under this Law.
- (2) Where this Article applies –

- (a) the officer shall inform –
  - (i) the person from whom the goods were purchased, or
  - (ii) where the goods were purchased by way of a vending machine, the person mentioned in Article 11(4),of the result of the test; and
- (b) if it is reasonably practicable to do so, persons against whom proceedings are instituted shall be given the opportunity to have the goods tested on their own behalf.

## **16 Compensation where no fault**

- (1) Where an authorized officer exercises any power to seize and detain goods under Article 11 or 12, the Minister shall be liable to pay compensation to any person having an interest in the goods in respect of any loss or damage caused to that person by reason of that seizure and detention, provided that –
  - (a) either –
    - (i) there has been no contravention, in relation to the goods, of any provision of this Law, or
    - (ii) the exercise of the power is otherwise unreasonable in the circumstances or carried out in bad faith; and
  - (b) the loss or damage is not attributable to any neglect or default by the person having an interest in the goods.
- (2) Any dispute as to the right to, or amount of, any compensation payable under paragraph (1) shall be determined by a single arbitrator appointed by the parties.
- (3) If the parties cannot agree on the appointment of an arbitrator within a reasonable period, any party may apply to the Judicial Greffier who shall appoint an arbiter.
- (4) The decision of an arbitrator appointed under this Article shall be binding upon the parties to the arbitration.

## **17 Orders to enforce this Law**

- (1) The Attorney General may apply to the Royal Court for an injunction (including an interim injunction) or other order, against any person who appears to the Attorney General to be responsible for a contravention of a provision of this Law.
- (2) The Royal Court, on an application under this Article, may grant an injunction or other order, on such terms as it thinks fit, to secure compliance with a provision of this Law.

## **18 Undertakings**

- (1) This Article applies where it appears to the Chief Inspector that a person has engaged, is engaging or is likely to engage in conduct which would, if proved, constitute an offence under Article 7.

- (2) Where this Article applies, the Chief Inspector may accept an undertaking from the person that the person will not, as the case may require –
  - (a) continue or repeat the conduct;
  - (b) engage in such conduct in the course of the person's business or another business; or
  - (c) consent to or connive in the carrying out of such conduct by a body corporate with which the person is connected.
- (3) Having accepted an undertaking under this Article, the Chief Inspector –
  - (a) may notify the Attorney General of the terms of the undertaking and the identity of the person who gave it; and
  - (b) may accept a further undertaking from the person to publish the undertaking, or may arrange for publication in accordance with Article 19.
- (4) A person is “connected” with a body corporate for the purposes of paragraph (2) if the person is –
  - (a) a director, manager, secretary or other similar officer of the body corporate or a person purporting to act in such a capacity; or
  - (b) a person who is an associate of the body corporate or has a controlling interest in the body corporate.

#### **19 Publication of undertakings, etc.**

- (1) The Chief Inspector may arrange for the publication, in such form and manner as he or she considers appropriate, of details of –
  - (a) an undertaking given to that officer by or on behalf of any person as to compliance with this Law;
  - (b) an application made by the Attorney General for an injunction or other order for the purposes of enforcing this Law; and
  - (c) an undertaking given to, or injunction or other order made by, the Royal Court in proceedings on such an application.
- (2) The Chief Inspector may arrange for the dissemination, in such form and manner as he or she thinks fit, of information and advice concerning the operation of this Law.

#### **20 Validity of agreements**

An agreement shall not be void or unenforceable by reason only of a contravention of, or an offence under, this Law.

#### **21 Citation and commencement**

This Law may be cited as the Consumer Protection (Unfair Practices) (Jersey) Law 201- and shall come into force 7 days after the day on which it is registered.

**SCHEDULE**

(Article 3(2))

**COMMERCIAL PRACTICES WHICH ARE ALWAYS UNFAIR****1 Misleading commercial practices**

The following misleading commercial practices are in all circumstances considered unfair –

- (a) claiming to be a signatory to a code of conduct when the trader is not;
- (b) displaying a trust mark, quality mark or equivalent without having obtained the necessary authorization;
- (c) claiming that a code of conduct has an endorsement from a public or other body which it does not have;
- (d) claiming that a trader (including the trader's commercial practices) or a product has been approved, endorsed or authorized by a public or private body when that is not the case, or making such a claim without complying with the terms of the approval, endorsement or authorization;
- (e) making an invitation to purchase products at a specified price without disclosing the existence of any reasonable grounds the trader may have for believing that the trader will not be able to offer to supply, or to procure another trader to supply, those products or equivalent products at that price for a period that is, and in quantities that are, reasonable having regard to the product, the scale of advertising of the product and the price offered ("bait advertising");
- (f) making an invitation to purchase products at a specified price and then –
  - (i) refusing to show the advertised item to consumers,
  - (ii) refusing to take orders for it or deliver it within a reasonable time, or
  - (iii) demonstrating a defective sample of it,with the intention of promoting a different product ("bait and switch");
- (g) falsely stating that a product will only be available for a very limited time, or that it will only be available on particular terms for a very limited time, in order to elicit an immediate decision and deprive consumers of sufficient opportunity of time to make an informed choice;
- (h) undertaking to provide after-sales service to consumers with whom the trader has communicated prior to a transaction in a language which is not an official language of the country where the trader is located and then making such service available only in another language without clearly disclosing this to the consumer before the consumer is committed to the transaction;
- (i) stating or otherwise creating the impression that a product can legally be sold when it cannot;

- (j) presenting rights given to consumers in law as a distinctive feature of the trader's offer;
- (k) using editorial content in the media to promote a product where a trader has paid for the promotion without making that clear in the content or by images or sounds clearly identifiable by the consumer;
- (l) making a materially inaccurate claim concerning the nature and extent of the risk to the personal security of the consumer or the consumer's family if the consumer does not purchase the product;
- (m) promoting a product similar to a product made by a particular manufacturer in such a manner as deliberately to mislead the consumer into believing that the product is made by that same manufacturer, when it is not;
- (n) establishing, operating or promoting a pyramid promotional scheme where a consumer gives consideration for the opportunity to receive compensation that is derived primarily from the introduction of other consumers into the scheme rather than from the sale or consumption of products;
- (o) claiming that the trader is about to cease trading or move premises, when the trader is not;
- (p) claiming that products are able to facilitate winning in games of chance;
- (q) falsely claiming that a product is able to cure illnesses, dysfunction or malformations;
- (r) passing on materially inaccurate information on market conditions or on the possibility of finding the product with the intention of inducing the consumer to acquire the product at conditions less favourable than normal market conditions;
- (s) claiming in a commercial practice to offer a competition or prize promotion without awarding the prizes described or a reasonable equivalent;
- (t) describing a product as 'gratis', 'free', 'without charge' or similar if the consumer has to pay anything other than the unavoidable cost of responding to the commercial practice and collecting or paying for delivery of the item;
- (u) including in marketing material an invoice or similar document seeking payment which gives the consumer the impression that the consumer has already ordered the marketed product, when that is not the case;
- (v) falsely claiming or creating the impression that the trader is not acting for purposes relating to the trader's trade, business, craft or profession, or falsely representing oneself as a consumer;
- (w) creating the false impression that after-sales service in relation to a product is available in a place other than the one in which the product is sold.

## 2 Aggressive commercial practices

The following aggressive commercial practices are in all circumstances considered unfair –

- (a) creating the impression that the consumer cannot leave the premises until a contract is formed;
- (b) conducting personal visits to the consumer's home ignoring the consumer's request to leave or not to return except in circumstances and to the extent justified, under Jersey law, to enforce a contractual obligation;
- (c) making persistent and unwanted solicitations by telephone, fax, e-mail or other remote media except in circumstances and to the extent justified, to enforce a commercial obligation;
- (d) requiring a consumer who wishes to claim on an insurance policy to produce documents which could not reasonably be considered relevant to whether the claim was valid, or failing systematically to respond to pertinent correspondence, in order to dissuade a customer from exercising the customer's contractual rights;
- (e) including in an advertisement a direct exhortation to children to buy advertised products or persuade their parents or other adults to buy advertised products for them;
- (f) demanding immediate or deferred payment for or the return or safekeeping of products supplied by the trader, but not solicited by the consumer ("inertia selling"), except where a product is a substitute supplied –
  - (i) in accordance with information given to the consumer before a contract was concluded, as provided by Article 5(2) of the Distance Selling (Jersey) Law 2007<sup>9</sup>, or
  - (ii) in performance of a contract, where the conditions in Article 17(7) of that Law are satisfied,

and this sub-paragraph shall apply in addition, and without prejudice, to the operation of Article 20 of that Law;

- (g) explicitly informing a consumer that if the consumer does not buy the product or service, the trader's job or livelihood will be in jeopardy;
- (h) creating the false impression that the consumer has already won, will win, or will on doing a particular act win, a prize or other equivalent benefit, when in fact –
  - (i) there is no prize or other equivalent benefit, or
  - (ii) taking any action in relation to claiming the prize or other equivalent benefit is subject to the consumer paying money or incurring a cost.

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- 1 *chapter 05.925*
  - 2 *chapter 05.100*
  - 3 *chapter 05.130*
  - 4 *chapter 05.800*
  - 5 *chapter 16.325*
  - 6 *chapter 05.800*
  - 7 *chapter 05.130*
  - 8 *chapter 23.750*
  - 9 *chapter 05.130*