



**Consumer
Focus**
Campaigning for a fair deal

Waiting to be heard

**Giving consumers the right of redress
over Unfair Commercial Practices**

Lola Bello

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Summary

On 26 May 2008 the Consumer Protection from Unfair Trading Regulations came into force. The Regulations ban a variety of unfair commercial practices by businesses in their dealings with consumers, and allow criminal and civil sanctions for non-compliance.

Criminal or civil proceedings for lack of compliance with the Regulations can be brought by enforcement agencies such as the Office of Fair Trading and Trading Standards. However, consumers do not have a direct right of redress or civil right of compensation. This means that where a consumer suffers loss as a result of unfair commercial practices, he or she is not entitled to seek compensation under the CPRs.

This report sets out compelling arguments for such a direct right of redress. Consumer research commissioned for this report suggests there are large numbers of unfair commercial cases in the market place. 64 per cent of our sample have fallen victim to an unfair commercial practice within the last 24 months. We also know that these illegal practices result in measurable and high-value losses. Based on our research, we estimate annual consumer detriment of £3.3 billion. As a point of legal and moral principle, we believe that consumers who suffer loss should have the opportunity to obtain compensation through the courts from those who caused it.

Although data from the Office of Fair Trading shows that there has been some public enforcement activity under the CPRs, it pales in comparison to the amount of consumer detriment highlighted in our research. This significant enforcement gap is a direct result of the inherent limitation of public enforcement agencies and their limited resources. Enforcement agencies should not have a monopoly on taking action against such illegal acts; rather public and private enforcement should work in tandem. Further, consumers want and expect a direct right of action under the CPRs. More than 78 per cent of our sample thought that having a private right of redress was a good idea in principle.

Some commentators argue that consumers already have a direct right of redress as the CPRs overlap extensively with pre-existing private law where such a right is available. However, a detailed legal analysis commissioned for this report highlights gaps within the current regime. Further, the legal framework is too complex for consumers to navigate and there are benefits in making multiple redress routes available. Our analysis suggests that alleged unintended consequences that might result from introducing a direct right of redress are overstated, and that these problems can be overcome.

Finally, the report puts forward a short and long term solution for change. In the short term, the Government should use the powers under the Regulatory Enforcement and Sanctions Act 2008, Part 3 to make a statutory order empowering enforcement agencies to impose sanctions such as the return of payment to consumers.

Our long term solution recommends that the Government presses ahead with plans to simplify and codify relevant common law and legislations under a Consumer Bill of Rights. This work should address the gaps in existing legislation, remove complexities and provide a coherent set of rights to consumers, with a private right of redress conferred across the piece.

Introduction

The Consumer Protection from Unfair Trading Regulations 2008 (CPRs) represents one of the most significant advances in consumer protection for a generation by creating a general duty on businesses not to trade unfairly¹. The Regulations prohibit unfair commercial practices in general, misleading practices, aggressive practices, and 31 (blacklisted) practices which are prohibited in all circumstances.

However, neither the EU Directive² nor the implementing of domestic Regulations confers a private right of redress on consumers who have suffered financial loss as a result of a breach of the Regulations. The Directive left it open to Member States to introduce such a mechanism should they so wish. Unfortunately, unlike Ireland, the UK Government declined to do so. This report sets out the case for a right to direct consumer redress and suggests a practical way forward.

The question of whether to introduce a private right of redress has prompted much policy debate. In its submission to the House of Lords in March 2008³, the Government recognised that there were a number of advantages associated with a direct right of redress for consumers, among which was the recognition that although consumers had some existing remedies in English law, these rights existed in a piecemeal fashion across statute law and common law.

The Government also recognised that having a private right of redress would enhance consumer rights and compliance with the law. Nevertheless, it noted potential disadvantages with conferring such a right on individuals and stated that there may be no added value to an individual right, as it is not particularly easy to identify areas where redress is not currently available. The Government also noted that there might be adverse unintended consequences, particularly to the law of misrepresentation and undue influence.

Following further pressure from consumer organisations, the Government referred the matter to the Law Commission for consideration. In November 2008, the Law Commission issued preliminary advice to what is now the Department for Business, Innovation and Skills (BIS) on whether the Regulations should give a right of redress to consumers, where they have suffered from an unfair commercial practice.

¹ Directive 2005/29/EC; The Consumer Protection From Unfair Trading Regulations 2008.

² The directive does not preclude Member States from conferring a private right of redress on its consumers.

³ Appendix 3: draft consumer protection from unfair trading regulations 2008; draft business protection from misleading marketing regulations 2008: explanatory information

The Law Commission stated its overall conclusions as follows:

'The Idea of a new private right of redress has its attractions. If a simple right could be drafted, it would make it easy for consumers to complain to traders who have acted unfairly.

On the other hand, the insertion of a few lines into the CPRs could create more problems than it would solve. The average consumer, with a small claim against a trader, could point at the right and might get the redress they seek. However, the right could equally be relied upon by well informed and legally advised consumers who wish to litigate over high-value items, such as houses and investments. An attempt to solve one problem could create others.

Having created a new right, the current law would have to be considered. In some areas it could provide greater protection from the new rights. The present law could be maintained, but this would undermine the simplicity of the new regime. Alternatively, the old rights could be abolished, but this might have the effect of reducing consumer protection⁴.

Therefore, there is recognition that a private right of redress could benefit consumers, but the issues are not straightforward. In July 2009, the Consumer White Paper reaffirmed the Government's view that the law could be improved without introducing a new private law right of action⁵.

The Government's next steps are as follows:

- The Law Commission (in consultation with the Scottish Law Commission) will be invited to advise on a possible restatement and simplification of the law on misrepresentation, incorporating developments in case law to make it more transparent and accessible to business and consumers. They will also be asked to look at the law on duress in order to clarify whether aggressive commercial practices under the CPRs should be automatically classed as a form of illegitimate pressure. The overall effect will be to ensure that business liability under public and private law is aligned as far as possible.
- Compensation pilots will test to what extent the powers similar to those in the Regulatory Enforcement and Sanctions Act 2008 can be applied to breaches of the CPRs, and compensation awarded to consumers.

⁴ A private right of redress for unfair commercial practices? Preliminary advice to the Department of Business, Enterprise and Regulatory Reform, November 2008.

⁵ HM Government, *A Better Deal for Consumers. Delivering Real Help Now and Change for the Future*, 2009.

About this report

Consumer Focus is of the view that consumers should have a private right of redress under the CPRs. We have prepared this paper to inform the future work of the Law Commission and gather evidence that makes a compelling case for the need for change.

In the sections that follow, we present:

- The results of consumer research on the extent of unfair commercial practices in the economy and consumer attitudes towards the idea of a private right of redress under the CPRs.
- Evidence of enforcement action under the CPRs in the first year.
- A summary of analysis prepared by a leading legal academic on whether a private right of redress in the areas covered by the CPRs is already possible under existing laws. This includes a rebuttal of the arguments against a private right of redress.

In addition to this report, the full consumer research report and academic analysis is published separately on the Consumer Focus website.

Consumer detriment

The debate about whether consumers should be given the right to take their personal grievances under the CPRs directly to court is often convoluted with a debate about the enabling legal framework which allows consumers to exercise such rights. While we agree that the enabling legal framework must be given careful consideration, we do not believe that issues of legal technicalities should preclude consumers from accessing justice. When a trader is unjustly enriched as a result of his or her unfair trading, it is consumers who bear the financial loss.

In March 2009, Consumer Focus commissioned Harris Interactive and an independent consultant to carry out research⁶ into the extent of unfair commercial practices. The research sought to determine whether there was evidence of need, and consumer demand for, a private right of redress under the CPRs.

The following sections highlight the detriment suffered by consumers, providing evidence on the extent, commonality and costs associated with breaches of the CPRs.

Research method and evidence

1,867 people in England, Scotland and Wales responded to an online invitation to participate in the survey. Of this sample, 1,145 people qualified for the main interview by virtue of having experienced an unfair commercial practice. 743 said they had experienced 'misleading, dishonest or aggressive sales and marketing practices' in the last 24 months – broadly, these represented the prohibited practices in the Regulations. A further 402 said they had been a victim of at least one of twelve of the 31 banned practices that we tested for. The results in this report are based on 1,051 interviews, as the others were over quota and their responses were discarded.

The sample was representative of the population of Great Britain. In addition to the standard demographic breakdown, we sought to identify the experience of consumers who identify themselves as vulnerable. We asked whether they thought their age, health problems, poor financial circumstances or other personal issues made them more vulnerable than others when dealing with dishonest or aggressive traders. This is important, not least because the CPRs make specific provision in relation to vulnerable consumers.

It would have been impractical to cover all 31 of the banned unfair commercial practices. Therefore we selected the 12 listed in the table below, which we believed would be among the most comprehensible for consumers. In addition, the respondents had an opportunity to mention those not listed in the questionnaire.

⁶ The full research report can be found on our website www.consumerfocus.org.uk

Table 1

<p>Trader not being who they said they were: You used a trader who claimed one or more of the following: they had quality or trust marks when they hadn't, belonged to a trade association when they didn't or were approved by a public or private body (eg, council) when they were not.</p>
<p>Offer must end Monday: You rushed into buying something because a trader falsely said that the product would only be available for a limited time or that the favourable terms (for example, no deposit or low finance rates) would end soon.</p>
<p>Miracle products: You bought a product that a trader falsely claimed was able to cure illness, dysfunction or malformation – for example, a lotion to restore hair.</p>
<p>Fake goods: You bought a product because the trader misled you into believing that the product was a well-known brand or produced by a well-known manufacturer.</p>
<p>Closing down sale: You rushed into buying a product that you might not have bought because the trader falsely said they were about to close or move.</p>
<p>Targeting children: A direct exhortation to children to buy advertised products or persuade their parents or other adults to buy advertised products for them.</p>
<p>Pyramid selling: You were encouraged to join a scheme that promised huge returns for a small investment and all you had to do was enrol a number of other people.</p>
<p>Absolutely free: Seen/been told about a product which was described as free but when it came to it you had to pay something (over and above delivery costs).</p>
<p>You are the lucky winner: Been told that you have won something or will win something if you phone up or return a coupon, only to be asked to pay something or find that the prize doesn't exist.</p>
<p>Intimidation: Being coerced into buying because you felt you could not leave the premises or a presentation without doing so. For example, sales presentations at hotels where intimidating doormen are positioned next to doors in order to give the impression that no-one can leave before buying.</p>
<p>Sales people overstaying their welcome in your home: Where a trader ignored your request to leave or not return and you ended up buying/signing up to something to get rid of them or because you felt pressurised.</p>
<p>Persistent sales calls: You received persistent calls, faxes, emails or texts and ended up buying/signing up to something to get rid of them or because you felt pressurised.</p>

Extent of unfair commercial practices

A key finding of the research is that unfair commercial practices – as recognised by respondents to the survey – are widespread. At the screening stage, 61 per cent of the sample reported experiencing an unfair commercial practice within the last 24 months. This is equivalent to 28.3 million consumers in Great Britain. Of the 1,051 respondents that comprised our main sample, 64 per cent said they had fallen victim to an unfair commercial practice within the last 24 months. The remainder of the survey data reported is based on this latter sample.

The research did not seek to precisely measure how many different UCPs a consumer had experienced in the last 24 months. However, the 1,051 consumers interviewed went on to provide information about 2,187 UCPs, indicating that on average each fell victim to two different unfair commercial practices.

The most common unfair commercial practices

Among the banned UCPs tested, the most common is consumers being told that they are a winner of a prize or competition (55 per cent). Consumers subsequently found out that the prize either did not exist or came at a price. Persistent and unwanted sales calls are also a common problem, with more than a third (36 per cent) of consumers falling victim to this UCP.

Vulnerable people were significantly more likely to have been a victim of 4 of the 12 UCPs: *offer must end Monday, closing down sale, trader not being who said they were and miracle products*.

Table 2

Type of UCP experienced

UCP	Those experiencing UCP	Of total population
You are the lucky winner	55%	31%
Persistent sales calls	36%	20%
Absolutely free	21%	12%
Offer must end Monday	20%	11%
Closing down sale	15%	9%
Trader not being who said they were	9%	5%
Sales person over-staying their welcome	8%	5%
Fake goods	8%	5%
Intimidation	7%	4%
Miracle products	7%	4%
Pyramid selling	7%	4%
Targeting children	4%	2%
Other	9%	5%
Total	*	*
<i>Weighted Sample:</i>	<i>All (1,051)</i>	<i>All (1,867)</i>

The research also gives an insight into whether the UCPs were a rare or common occurrence. The research found that consumers are more likely to become multiple victims of certain types of UCPs such as targeting children, persistent sales calls and thinking they have won something. However, consumers were likely to fall victim to certain UCPs on only one occasion in the following areas: buying fake goods, being intimidated into buying, joining a pyramid scheme and sales people over-staying their welcome.

Misleading packaging

One of the 31 banned practices under the CPRs is the promotion of a similar product made by another manufacturer, in such a manner as to deliberately mislead the consumer into believing that the product is made by the same manufacturer when it is not. Research by the British Brands Group in February 2009⁷ suggests that misleading and confusing packaging is of concern to shoppers. A significant number have been affected by misleading packaging in the past, either being confused by the packaging or misled by the branding of two grocery items which look similar, or accidentally buying the wrong item because the design was similar to the item they wanted to buy. 38 per cent of shoppers said they had been confused or misled by the packaging of grocery products that looked similar and 33 per cent said they had accidentally bought the wrong product because of its packaging.

Financial loss incurred by consumers

Consumers were asked to estimate how much each UCP had cost them financially. The total amount of losses incurred was just over £264,000, while the average loss per UCP was £175. As could be expected, the extent of the losses varies widely by UCP, from £50 to £800.

The UCPs and financial loss incurred falls into four groups:

- **An average loss under £100** – you are the lucky winner, absolutely free and intimidation
- **An average loss of £100 to £199** – fake goods, closing down sale, targeting children and persistent sales
- **An average loss of £200 to £400** – offer must end Monday, other UCP and sales people overstaying their welcome in a consumer's home
- **An average loss of £400 or more** – trader not saying who they were, miracle products and pyramid selling. However, it is worth noting that for the latter two the results are polarised, ie, on a substantial number of occasions there was no loss but where loss was incurred it was high

The table below shows that while some UCPs are not widespread, they can be serious in terms of the amount of financial loss incurred. The opposite is true of UCPs such as 'you are a lucky winner' and 'absolutely free'. Although these two practices are common, they are less costly to consumers falling victim to them. However, it must be noted that this may be precisely what unscrupulous businesses are counting on; low levels of loss are less likely to lead to consumer complaints or action, including consequent actions by enforcement agencies, which may not see it as a substantial problem to tackle. In the meantime, collectively, consumers continue to lose out and unscrupulous businesses continue to profit from illegal acts.

We estimate that total annual consumer detriment in the GB economy as a result of unfair commercial practices is £3.3 billion⁸. This figure is an extrapolation based on a total loss reported by our sample of £264,000 during a 24-month period.

⁷ A study into the impact of similar packaging on consumer behaviour, 1 February 2009.

⁸ Details of how the figure has been calculated are included in the full research.

Table 3**Loss/cost of being a UCP victim**

	Mean (£)	Total (£)	Median* (£)	% £0	Weighted Sample
Trader not who they said they were	880	52,588	101-500	24	62
Offer must end Monday	317	37,606	51-100	25	149
Persistent sales calls	122	36,310	0	71	360
Other UCP	288	23,750	0	53	96
Miracle products	643	21,645	11-50	7	39*
Lucky winner	48	22,796	0	66	538
Sales people overstaying welcome	407	21,131	0	65	60
Pyramid selling	486	15,712	51-100	34	38*
Closing down sale	129	10,143	11-50	38	91
Fake goods	119	7,256	11-50	20	66
Absolutely free	51	7,043	0	52	155
Targeting children	115	4,228	1-10	32	41*
Intimidation	81	3,547	0	53	50

*The middle range of losses falls into this band

Research conclusions

Our research demonstrates that UCPs are widespread. 28.3 million consumers believe they have experienced a UCP in the last two years at an overall cost of £3 billion. There are some UCPs which result in high levels of financial loss, while others seem to particularly affect vulnerable consumers. This is the size of the task that public enforcement agencies must meet.

In the next section, we examine the experience of public enforcement.

Enforcement of Unfair Commercial Practices

The CPRs have now been in force for more than a year. In order to assess if a private right of redress is needed, it is useful to explore the experience of public enforcement.

This section describes the role of public enforcement in ensuring that businesses comply with the CPRs. It outlines the limitations of enforcement agencies in pursuing or seeking justice for consumers, and argues that a direct right of redress would be a complementary addition to the current enforcement regime.

During the Government's consultation on how the CPRs should be implemented, enforcement agencies supported giving consumers a direct right of redress.

How the CPRs are currently enforced

In England, Scotland and Wales, Local Authority Trading Standards Services (TSS) and the Office of Fair Trading (OFT) have a duty to enforce the CPRs. These agencies bear the day-to-day responsibility of enforcing breaches of the Regulations. Enforcement agencies can take civil enforcement action in respect of any breach of the CPRs as Community and/or domestic infringements. Breach of an enforcement order could be contempt of court which could lead to up to two years imprisonment and or an unlimited fine.

As well as civil infringements, the CPRs also contain criminal offences. Prosecutions will generally be conducted by the OFT and TSS. In Scotland, prosecutions are conducted by the Crown Office and Procurator Fiscal Service on behalf of the Lord Advocate.

The criminal offences apply to the contravention of the requirements of the general prohibition, misleading actions (except 5(3) (b) code commitments), and misleading omissions (including the omissions of specified information in invitations to purchase), aggressive practices and specific banned unfair commercial practices apart from numbers 11 and 28. The criminal offences above are strict liability offences, apart from contravention of the requirement of professional diligence (general prohibitions), which requires *mens rea* (a guilty mind) on the part of the trader to be shown, for example knowledge or recklessness.

Experience so far

The OFT collects statistical data from trading standards departments on the enforcement of consumer protection legislation. For the purposes of this report, Consumer Focus requested data from the OFT on the number of complaints received about breaches of the CPRs across England and Wales, the nature of these complaints and how the potential infringements had been progressed.

According to the number of cases recorded on the OFT's website, action has been taken or started in 224 cases, by 50 different trading standards departments, in response to a possible breach of the CPRs. Of these court actions were proposed⁹ in 23 cases. In more than 45 cases, enforcement agencies sought, received and/or obtained formal undertakings from traders to desist their unfair commercial practices. Enquires were continuing in 51 cases and informal assurances to discontinue the practice were sought and received in about 10 cases. The OFT inform us that there will also have been informal approaches that were successful in stopping the practice, therefore negating the need to use formal powers.

Our conclusion is that local enforcement agencies have not been inactive in seeking to use the new powers at their disposal. However, while it is an encouraging start, the level of activity must be compared to the scale of consumer detriment revealed by our research. This highlights the size of the enforcement gap because consumers are not able to take action on their own behalf.

The role and limitations of public enforcement

Public agencies play an important role in enforcing the CPRs. One of the attractions of administrative control is that it keeps some consumer protection matters out of the courts, thereby reducing cost and delay. Further, research commonly shows that consumers are often unaware of their rights and even when they are, they are reluctant to go to court. Public agencies are better able than individuals to mobilise the evidence needed to win a case. Finally, an active enforcement approach may dissuade a trader from engaging in unfair practices in the first place.

However, these advantages are no substitute for a direct right of redress for many reasons. When enforcement agencies impose a financial penalty on a business, this money goes to the public purse rather than directly to those consumers affected. The key advantage of a private right of redress is that the person who suffers a loss may be able to get direct recompense.

Enforcement agencies operate under certain resource constraints. Like most institutions, they have limited resources and often have to manage across competing priorities. Indeed, enforcement action cannot possibly be taken in respect of each and every infringement, and agencies may make a strategic decision not to pursue certain types of cases, for example repeated breaches where the financial loss to consumers is low.

⁹ Court action proposed means that the enforcer had decided to proceed to court. It was also highlighted to Consumer Focus that sometimes the trader will offer undertakings at that late stage and that may cause deferment, so a number of the 23 cases noted above may indeed not proceed to court.

As highlighted in a recent study on representative actions and restorative justice by the University of Lincoln¹⁰, most enforcement agencies see their role as achieving business compliance with the rulebook rather than to obtain compensation for consumers. This cultural focus influences the means and tools that enforcers use to achieve their objectives. As we explore later, the Regulatory Enforcement and Sanctions Act creates a framework for the Government to legislate in order to give enforcers the use of administrative powers, including one which would allow them to secure financial redress for consumers.

In the recently published Consumer White Paper, the Government announced compensation pilots that will test to what extent the powers similar to those in the Regulatory Enforcement and Sanctions Act 2008 can be applied to breaches of the CPRs, and compensation awarded to consumers. We will monitor how or if enforcers decide to use these powers in practice.

Conclusion

Public agencies have successfully begun to use the CPRs as an enforcement tool, although the scale of enforcement activity pales when compared to the size of consumer detriment. The practical reality is that many infringements may go undetected or persist because enforcement agencies do not prioritise them or have limited resources.

¹⁰ A Representative Actions and Restorative Justice: A report for the Department of Business Enterprise and Regulatory Reform (BERR) December 2008.

The case for a Private Right of Redress

The CPRs are important rules which have significantly enhanced the consumer protection regime. It is important that consumers are able to rely on these rights when things go wrong; however, the absence of a private right of redress limits their ability to do so.

Below, we set out our arguments for a private right of redress under four headings:

- The moral and compliance argument
- Consumer demand
- Relying on pre-existing private law is unsatisfactory
- Gaps in the pre-existing law that the CPRs would fill

The Law Commission expressed concern that the introduction of a private right of action may inadvertently affect companies or persons who were not intended to be covered by the CPRs. We conclude this section by considering potential unintended consequences.

The issues surrounding the interplay between the CPRs and pre-existing private law are complex. To inform our analysis, we commissioned Professor Hugh Collins of the London School of Economics and Political Science to provide advice on these issues. Professor Collins' full report is available on our website.

The moral and compliance argument

The right to redress is a key consumer principle which Consumer Focus supports with vigour. One of its key components is the ability to personally challenge a legal wrong. This is a matter of principle. No-one can speak better about harm than those affected. As a matter of legal and moral principle, it is only right that the voices of those who suffer are heard, not through an intermediary (unless so chosen by the victims), but directly, from those who bear and suffer the consequences of the loss.

Merely having consumer protection laws is not enough to effect compliance or indeed empower consumers. Consumers ought to be confident that when laws are broken, infringers are brought to justice and importantly that those directly affected are given an avenue to air their grievance and seek compensation for their loss. To do this, the law generally gives consumers a right of redress and relies on effective compliance tools to enforce laws.

In the UK, sanctions to promote and enhance compliance have historically been civil and criminal in nature, and these have been entrusted to designated enforcement agencies. We have highlighted the limitations of enforcement agencies above, but it is equally important to note that stimulating compliance with laws and regulations calls for complementary mechanisms or tools, one of which is a direct right of redress for consumers.

A private right of redress would provide an additional method to encourage traders to comply with the Regulations. The limited reach of public enforcement will not be lost on businesses intent on breaking the rules. Legitimate business should have nothing to fear from a properly defined private right of redress. Indeed, it would benefit them as its absence allows unscrupulous rivals the opportunity to undercut and undermine them. Our case is simple: where businesses act unfairly within the terms of the Regulations, they should face the reasonable prospect of action. At the moment they know that the overwhelming likelihood is of inaction, so poor behaviour by unscrupulous businesses remains unchanged.

Consumer demand

Some argue that simply because consumers are given a right of redress under the CPRs, does not mean that consumers would exercise these rights. We do not accept the premise of this argument as a matter of principle and, in any case, evidence suggests that consumers would make use of a private right of redress.

Our consumer research indicated widespread incidence of UCPs that could potentially give cause for action. Our data suggests that 57 per cent of UCP victims took no action. While inertia plays some role, other common reasons for inaction suggest a feeling of helplessness among consumers that their efforts would be in vain (see panel).

For example, 40 per cent felt they would be unsuccessful, 33 per cent did not know where to turn for help and 21 per cent felt the law could not help them. Even so, 34 per cent of victims did approach the trader and 58 per cent of these managed to obtain a satisfactory resolution of their complaint in the end, even if it took some of them two or three attempts.

It could be argued that those who did nothing because they felt the law couldn't help them and those who didn't obtain a satisfactory outcome may wish to consider legal action. In fact, 78 per cent of consumers in our survey supported the idea of a private right of redress in principle.

In addition, a quarter of consumers say they would have sued in the cases they described in this survey if they had the opportunity. This is likely to overestimate the true picture given consumers' known reluctance to take legal action. Nevertheless, the numbers are sufficient to suggest a significant consumer demand for a private right of redress.

The research data highlights the various reasons why consumers take no action:

- 40 per cent took no action because they felt it would be unsuccessful
- 33 per cent took no action because they didn't know where to go for help
- 31 per cent took no action because they felt it was too much hassle
- 25 per cent took no action because they felt it was not worth complaining about
- 21 per cent took no action because they felt the law couldn't help them
- 20 per cent took no action because they were unsure of their rights
- 14 per cent took no action because they were uncertain about the cost of action
- 9 per cent took no action because they didn't want to cause trouble
- 7 per cent took no action because they didn't want to involve lawyers

Relying on pre-existing private law is unsatisfactory

There is a common argument that pre-existing private law affords consumers many of the rights contained in the CPRs, via common law, the law of tort, contract law or indeed legislation. Since a private right of redress is available to consumers through these routes, it is argued that an additional private right under the CPRs is unnecessary. However, this seems to be an argument against the necessity of the CPRs themselves. After all, if existing law meaningfully protected the interests of consumers then CPRs would be rendered redundant.

Many offences provide for more than one route of redress. The fact that one avenue exists should not preclude the existence of others. Where appropriate, multiple avenues promote consumer confidence and provide choice. It allows consumers to take account of their situation and choose an appropriate action according to their circumstances. This is a sign of a healthy consumer protection framework and should be welcomed.

Further, most people who are familiar with the common law of contract, tort and restitution understand that rules governing this body of law have developed over several centuries and offer remedies that are uncertain and complex. As it stands, it can be argued that only the most competent of lawyers can offer satisfactory advice to consumers about their rights in the minefield of common and statute law. In particular, the laws relating to misrepresentation, duress and undue influence are complex. This is partly why the Government has undertaken to consult on simplifying the law¹¹. We would welcome a review in this area.

These complexities are compounded by the fact that the rules were developed to deal with disputes between businesses, so they lack a focus on the need for consumer protection, particularly in the context of today's mass market. Indeed, the Government acknowledged some of these points in its response to the consultation on the implementation of the Unfair Commercial practices Directive: *'the Government agrees with many consultation responses that providing a private right of redress in relation to the UCPD could clarify existing consumer's rights. It would also enhance consumers' rights in the areas where the Directive provides new or improved protections – eg, in relation to aggressive commercial practices – and should stimulate traders to greater compliance with the law'*¹².

Gaps in existing law that the CPRs would fill

Professor Collins' comparison of the CPRs and existing laws shows there are gaps in our domestic laws which the CPRs would fill, particularly in relation to the law of misrepresentation and aggressive practices. In particular, there is no private right of redress under the existing law for some of the 31 banned practices. Some of the gaps in our existing private law are explored below.

¹¹ In May 2008, The Department for Business, Enterprise and Regulatory Reform published a paper titled; Consumer Law Review; A call for evidence. This project sought to obtain views on how the consumer protection landscape could be simplified. A subsequent White Paper is expected to be published this summer.

¹² Professor Collins's paper

Misrepresentation

Misrepresentation is a contract and tort concept that generally means a false statement of fact is made by one party to another, with the effect of inducing that party into the contract. For example, under certain circumstances, false statements or promises made by a seller of goods regarding the quality or nature of the product that the seller has, may constitute misrepresentation. A finding of misrepresentation allows for a remedy of rescission and sometimes damages, depending on proof of fault.

Under the CPRs, it is an offence for a business to provide false or misleading information which induces the average consumer to make a transactional decision that he or she would not have otherwise taken.

Under existing Common law, if businesses make false statements along the lines described above there is scope for recompense on the grounds that the statement was a promise contained in the contract (a warranty) or a pre-contractual misrepresentation¹³.

However, the concept of a misrepresentation normally excludes ambiguous statements, statements that are literally true but misleading, statements about the law, immaterial statements, statements of opinion and statements about future facts such as predictions, plans for future action or promises to perform an action in future. However, under certain circumstances these types of misrepresentation are included within the ambit of the CPRs, mainly because consumer protection laws recognise the need to cleanse the market of unreliable information which not only causes detriment to consumers but distorts the market.

Illustrations of gaps in the law of misrepresentation

Misleading but true statements: Under existing private law, misrepresentation does not generally extend to statements that are literally true, but misleading. However, the Regulations can be applied even though the statement is literally true. An example of a statement which is literally true but misleading was highlighted in the case of *Robertson v Diccico*, where the defendant advertised a used car as beautiful but the car suffered from corrosion and was not roadworthy. This case was taken under the old Trade Description Act 1968 and was decided in favour of the consumer. The court found that although the external appearance of the car was indeed beautiful, it was misleading.

Under the existing law of misrepresentation, there will most likely be no remedy in such circumstances, as the statement was true. However, this would probably be a breach of the Regulations as it extends to true but misleading statements. It would be a breach, so long as an average consumer who is reasonably informed, reasonably observant and circumspect would have or is likely to have been misled by the statement.

If a private right of redress were introduced, it would extend the current protection provided by private law against misleading statements. While it may be argued that a consumer could seek redress under the Sales of Goods Act 1979 s.14 (eg, the trader would have breached the implied terms of satisfactory quality and fitness for purpose under the Act), there are certain circumstances in which the consumer would lack a remedy for breach of contract, either because no contract was concluded or because the contract did not include an express or implied term broken by the trader.

¹³ Please see Professor Hugh Collins's report; A Private Right of Redress for Unfair Commercial Practices for further discussion about the scope of warranties and pre contract misrepresentation.

Statements of Law: Under the CPRs some statements about the law are listed as relevant commercial practices. These include practices involving statements about the consumer's rights or the risks they may face¹⁴. However, under the law of Misrepresentation a statement of law is not generally regarded as a statement which can be relied upon for the purposes of a claim for misrepresentation¹⁵. The common law is likely to regard such statements as those which the consumer should not place much faith on their accuracy. So that for example, where a trader tells the consumer that he has a right to cancel a contract for a period of time after a sale, but the consumer doesn't, the consumer would have no recourse under the law of misrepresentation. However, such statements would be a breach of the CPRs.

Misleading Omissions: The Regulations also prohibit the omission or hiding of material information and providing information in a manner that is unclear, unintelligible, ambiguous or untimely. Under the Common law there is no general duty to disclose material information or liability for non-disclosure, but instead there are a limited number of rules (such as breach of implied terms, negligent misstatement, equitable duties and pre-contractual misrepresentation footnote) that indirectly compel disclosure of information in particular circumstances.

Aggressive practices

The CPRs prohibit aggressive commercial practices. These prohibitions are aimed at practices which are tantamount to harassment, coercion or undue influence. Under the Common law a victim of an aggressive practice may be able to use the doctrines of duress and undue influence to rescind the transaction. Further, intimidation may also fall within the scope of the tort of harassment. However, the important point to note regarding the common law protection is that the scope of the doctrines of duress and undue influence is hard to determine. For instance, although under common law an illegitimate act performed by one party which causes the other party to consent to the contract could lead to rescission of the contract, it is difficult to state the scope of the concept of an 'illegitimate act'. Likewise, the scope of the law of undue influence is hard to determine. Not only is the scope of the concept of aggressive practices for the purpose of the CPRs clearer, is it also broader than the provision under common law.

During consultations leading up to the Directive and the Regulations, one particular area of concern was the position of vulnerable consumers who were preyed upon by unscrupulous traders.¹⁶

¹⁴ Regulations 5(4)(k)

¹⁵ unless there is reasonable reliance, as where a lawyer is giving professional advice.

¹⁶ 'The National Consumer Council (our predecessor organisation) made a particular issue of oppressive doorstep selling. The organisation told the story of an elderly lady who was visited, without invitation or appointment, by doorstep salesmen. They sold her a bed for £3,000 with various gadgets which were entirely inappropriate to her medical condition and far too complex for her to use. They stayed in her home for five hours, until she signed the contract. I do not think that many elderly, frail ladies would be able to resist signing, if only to get rid of such ghastly people.' Mr Waterson, House of Commons Standing Committee B, 23 April 2002, Column 228.

Example: a trader arranges to pay a visit to the home of an elderly woman to ‘demonstrate’ an expensive item of furniture, such as a chair or a bed, which might offer relief from back pain or some other ailment. Once in the door, the trader would decline to leave until a contract of purchase had been signed. In effect the consumer, being fearful that the trader would never leave her home, found that the only way to get rid of him was to sign the contract to purchase an item that she could ill afford.

Although the consumer does have a limited right to cancel such a contract during a period of seven days,¹⁷ the consumer might not do so for fear of the trader returning. Such a commercial practice seems likely to contravene the Regulations, perhaps being an example of the concept of undue influence in the Regulations, which though not being sufficient to influence the transactional decision of an average consumer would restrict the freedom of choice of the target group of frail and elderly consumers.

It is hard to detect an illegitimate act that would suffice for the purpose of the common law of duress. Nor does the behaviour of the trader fit easily into the category of presumed undue influence, for the consumer has not reposed trust in the trader. It is possible, however, that the consumer might be able to obtain rescission of the contract on the ground of ‘actual undue influence’. It would be difficult to bring the case within the statutory tort of harassment for the purpose of a claim for compensation for economic loss or anxiety because the conduct only occurred once.

Existing private law does not protect against some of the banned 31 banned practices

Schedule 1 of the Regulations contains descriptions of 31 commercial practices which are in all circumstances considered as unfair. In these instances, the enforcement authorities do not need to demonstrate that an average consumer is likely to have been induced to take a transactional decision that otherwise would not have been made. These commercial practices are treated as criminal offences¹⁸ and civil injunctions are available in all instances.

Some of the listed practices arguably fall outside the general offences of misleading conduct, misleading omissions and aggressive practices, although probably they lie within the general prohibition against conduct that falls below the standard of professional diligence. It is, however, important to note that some of the listed practices fall outside the three general offences and there may not be an existing private right of redress under the common law.

¹⁷ The Cancellation of Contracts made in a Consumer’s Home or Place of Work etc Regulations 2008, SI 2008/1816, Reg. 7 (reforming, extending and revoking The Consumer Protection (Cancellation of Contracts Concluded Away from Business Premises) Regulations 1987 SI 1987/2117) made under power conferred by Consumers, Estate Agents, Redress Act 2007 s.59.

¹⁸ With the exception of examples 11 and 28

We outline these gaps below.

Forbidden practice 9:

A statement or other indication to the effect that something can be sold legally when it cannot

If a consumer purchases a product on this basis and subsequently finds out that he or she cannot sell the product, the statement amounts to a misrepresentation of law. It was noted above that as a general principle such statements cannot be relied upon for the purpose of a claim for misrepresentation. There is a possibility, therefore, that a consumer who has relied upon such an inaccurate statement might not be able to rescind the contract for misrepresentation or to enforce the contract in some other way on the ground of illegality.

Example: A consumer seeks a strong herbicide to destroy a large bed of nettles in her garden. She approaches a commercial trader in herbicides who recommends and sells her a powerful chemical. Before she uses it, however, she discovers that the product is banned in the UK because of fears of its possible side-effects on wildlife.

Under the common law of misrepresentation, the claim for rescission might be rejected on the grounds that any implied statement that the sale of the chemical was lawful was a statement of law that cannot be relied upon. The consumer might, however, overcome this point by arguing that that she was innocent about the legal position and that her reliance was reasonable in the circumstances.¹⁹

Alternatively, the consumer might seek to reject the goods for breach of an implied term under the Sale of Goods Act 1979. The consumer could argue that the goods are not fit for purpose because of the risk to wildlife. The difficulty with this claim is that it involves the enforcement of an illegal contract, which is, in general, not permitted.²⁰

Finally, the consumer might seek to recover their money under the law of restitution. Restitution is permitted in a number of circumstances, including where the purpose of the illegality was to protect a class of persons of which the consumer was a member,²¹ where the consumer was a victim of fraud,²² and where the consumer voluntarily repudiates the illegal purpose of the transaction in good time.²³

Although one might expect a common law court to be sympathetic to the wish of the consumer to rescind the transaction and recover their money, this brief statement of the relevant legal principles reveals that they might encounter considerable technical difficulty. If a private right of action could be based upon the Regulations, the innocent consumer should more straightforwardly be able to rescind the contract on the ground of a misleading action or omission.

¹⁹ *Shelley v Paddock* [1980] QB 348, CA; *Mohamed v Alaga & Co* [2001] 1 WLR 1815, CA.

²⁰ *Eg, Re Mahmoud and Ispahani* [1921] 2 KB 716.

²¹ *Kiriri Cotton Ltd v Dewani* [1960] AC 192.

²² *Harse v Pearl Life Assurance Co* [1904] 1 KB 558.

²³ *Taylor v Bowers* (1876) 1 QBD 291.

Forbidden practice 11:**Concerns advertorials, which is where an apparently objective laudatory statement about a product contained in the media is, in fact, a promotion paid for by a trader**

If, as a result of reading the advertorial, a consumer purchased a product from the trader directly, it seems likely that the contract could be rescinded for misrepresentation on the grounds that the false statement in the media was effectively made through an agent by the trader. But where the consumer does not purchase the product directly from the trader, but rather through a retailer, the consumer would have no remedy against the retailer. Providing a private right of redress under the Regulations should plug this gap in protection for consumers against advertorials. A suitable remedy for the consumer would be rescission of the contract. If it were too late to rescind the contract, a remedy in damages could be awarded, perhaps amounting to the difference in the price paid compared to the market price for rival products.

Example: A consumer who is planning an exotic holiday reads a story in a magazine written by someone described as a ‘travel expert’ that extols the virtues and excellent value for money of a particular hotel in the Caribbean. The consumer books a holiday at the hotel and has an enjoyable time, but then realises that the hotel is more expensive than its competitors and that the story in the magazine was, in fact, paid for by the hotel.

In the absence of false statements of fact in the magazine story, the consumer does not have a remedy in fraud or negligent misstatement against the hotel or the travel expert. If a private right of redress were awarded under the Regulations, the consumer should be able to obtain damages for the difference in price between the hotel and its competitors.

Forbidden practice 30:**Prevents a trader from telling consumers that their job or livelihood will be in danger if the goods or services are not purchased**

This prohibition applies to true statements of this kind as well as false ones. If the statement is false, the consumer enjoys the remedies for pre-contractual misrepresentation under existing private law. If the statement is true, however, there is no misrepresentation. Nor is it easy to discern the kind of illegitimate conduct required for duress (unless breach of the Regulations is regarded as sufficient). No doubt these statements are usually false, but if true, a consumer who made an expensive purchase they could ill afford under the influence of the trader’s claim, would probably not be able to rescind the contract under present law. A reform that granted the consumer a private right of redress for breach of this forbidden practice would therefore fill a gap in private law. In particular, it would avoid the need for the consumer to prove that the statement was false in order to rescind the contract.

Forbidden practice 31(b):

Concerns a trader creating a false impression that a consumer has won a prize, when to claim the prize is subject to the consumer paying money or incurring a cost

For instance, a consumer is informed on using a scratch card included in a magazine that they have won a prize of £5, which they can claim by calling a particular phone number. But to call the number involves a premium rate which invariably exceeds the cost of £5. The scratch card states the cost of the premium rate but does not explain that the process of making the claim will mean that the cost of the call will necessarily or almost inevitably exceed £5. It is possible that this forbidden practice will normally be covered by the prohibition on material omissions, but the trader's literature may be sufficiently detailed to exclude that possibility. Under the common law, in the absence of a misrepresentation, the consumer has no remedy for compensation for the cost of the telephone call. A reform that granted the consumer a private right of redress for this forbidden practice would therefore fill a gap in private law.

Forbidden practices 5 and 6 in Schedule 1: 'bait' and 'bait and switch' tactics in marketing

These marketing practices are aimed at persuading consumers to enter the shop, then using persuasive sales talk to induce a transactional decision that otherwise might not be made. For instance, a trader advertises a product at a low price, but when a consumer tries to purchase the goods, the trader claims truthfully that it is out of stock or that the goods are defective, and then encourages the consumer to purchase a similar item with a higher profit margin for the trader. In most instances using these tactics, the trader will probably need to make a misleading statement or a misleading omission. For instance, the advertisement of the goods implies that the trader has stock in sufficient numbers and quality to meet a reasonable level of demand. But if the trader merely refuses to show the consumer the advertised product or refuses to take an order for it for delivery within a reasonable time, the trader may avoid committing one of the general offences. Nor would there be a remedy for the consumer under the existing private law in the absence of a misrepresentation. As a private right of redress under a reform of the law, the consumer might seek rescission or cancellation of the contract, having realised subsequently that they had been induced to enter a transaction they had not really intended to make. A remedy for compensation might apply to the wasted expenditure of travelling to the shop, having been enticed by the bait advertising. The fact that the purchased item was more expensive than the advertised one would not be a basis for compensation in itself.

Unintended consequences: would a private right of redress open the floodgates?

A central argument against giving individuals a private right of redress under the CPRs is the fear that such a right would open the floodgates to litigation and extend liability to an indeterminate number of people. This section explores these alleged unintended consequences. More importantly, it describes the safeguards built into the CPRs which limits these unintended consequences. This section also argues that in certain instances, the extension of a legal obligation to specific persons or bodies is justified and necessary.

Courts and policy makers often devise a range of tests and principles which place limits on the number of people eligible to bring legal actions and those who may be held liable for infringements of rules or legislations. Few would argue against the merits of such control mechanisms. Our legal system already contains effective mechanisms to prevent frivolous or vexatious claims, including cost shifting rules and active case management by judges. We have seen no evidence that these mechanisms would not prevent frivolous or vexatious claims made under the CPRs. The burden of proof should lie with those who oppose a private right of action to demonstrate that such claims would be made.

In its preliminary advice to the Government, the Law Commission used two examples to illustrate where a private right of redress may have unintended consequences (see panel). In the first example, relating to estate agency, there is a valid case for the CPRs to capture the circumstances put forward. The scale of liability should be of secondary consideration to the size of loss suffered by consumers. In the second example, relating to price comparison websites, we do not think it likely that the courts would find in favour of the consumer. This illustrates the role of judiciary to exercise discretion in interpreting the provisions to ensure the Regulations are applied proportionately.

Court records and consumer research indicates that consumers do not currently take businesses to court in great numbers. Despite the evidence of consumer demand revealed by our research, there is no reason why this should significantly change in the future. However, the argument that people should be denied access to redress because there are a likely to be large number of valid claims is perverse. If there is a risk that a large number of similar claims would overwhelm the courts, then surely the answer is to introduce more efficient court procedures, via collective redress, to deal with this.

There are also provisions contained within the CPRs that would limit the scope of redress. Firstly, because the Regulations are aimed at marketing practices, many kinds of statements available to a large section of the public would not fall within the scope of the CPR. Secondly, under the Regulations, a commercial practice must be 'directly' connected with the promotion, sale or supply of a product to or from consumers²⁴. This provision limits the range of liabilities in two ways; the statement must be connected with marketing (promotion, sale or supply) and it must be directly connected, not indirectly connected. Therefore, a false statement in company accounts by a firm of accountants would not qualify as a commercial practice, since it is not directly connected with the marketing of the business or the shares of the company.

Example 1

A website run by an estate agent contains some misleading information about a house for sale, for instance that it is connected to the main drains. A consumer relies upon this inaccurate statement when purchasing the house.

Under the common law, the consumer would probably find it difficult to claim compensation (eg, for the difference in value of the house with and without main drains) on the grounds that the website did not create a special relationship between the parties (the situation would be different if the estate agent provided this in person to the consumer with a view to inducing the transaction). Under the Regulations, the question would be whether the content of the website was directly connected with the marketing of the house. Although the statement is clearly connected to the marketing of the house, the question is whether or not the general entry on the website is 'directly' connected. It is possible in these circumstances that the Regulations might create a broader range of liability than the common law of negligent misstatement.

It is Consumer Focus' view that in the example described above a legal obligation should extend to such cases. Estate agents benefit financially from the sale of properties, which they market and directly promote increasingly via websites. As consumers are generally reliant on the information provided, and remedial action could prove costly, it is only right and fair that such agents should be obligated to provide as far as is reasonable information that is not misleading.

²⁴ Regulations 2(1)

Example 2

Another example given by the Law Commission is a price comparison website, under which, for instance, a company offers quick price comparisons for motor car insurance. Having used this website to purchase car insurance, the consumer discovers that the information provided was inaccurate, for instance that the price quoted for one insurance company was overstated and that it would have been cheaper to purchase from another. Can the consumer claim compensation for the difference in price?

Under the common law, again the consumer would experience difficulty in establishing a 'special relationship', though this might be possible given that the price comparison company requires the consumer to disclose considerable amounts of information about the risk to be insured. Under the Regulations, the question would again be whether or not the website was 'directly connected' with the marketing of car insurance to the consumer, a condition which does seem to be satisfied. Moreover, we would not wish to see an extension of such obligations to such price comparison websites as they do not seek to directly promote a particular product.

Conclusion

The CPRs have significantly enhanced the consumer protection regime, but their effect is blunted by the absence of a private right of redress. As a matter of legal and moral principle, victims of illegal practices should be able to challenge the alleged perpetrators of these activities in a courtroom. Giving consumers access to justice would also serve to strengthen deterrence against illegal business activity and complement the efforts of public enforcers.

We are unconvinced by arguments that consumers can effectively already use rights of action under existing law. Our legal analysis shows there are gaps in the current law that the CPRs would fill, in relation to the law of misrepresentation, aggressive practices and some of the 31 blacklisted practices.

Further, the existing law is a complex minefield which consumers would be hard-pressed to navigate. Finally, our consumer research indicates that consumers would use a private right of redress should they be given the opportunity.

It is important to ensure that a new private right of action does not have unintended consequences. However, the CPRs already contain provisions which restrict liability and our legal system is well equipped to safeguard against vexatious or spurious litigations.

Our proposed way forward

Consumer groups have consistently argued for a private right of redress under the CPRs. On the surface, the most desirable solution would seem to be to give consumers a private right of redress immediately so they could take a business to court themselves. However, the CPRs do not confer such a right on consumers and to do so would require an amendment to the Regulations.

It would also be necessary for drafters of such an amendment to consider how this new right sits with other relevant laws, so that there are no added layers of complexities. This is unlikely to be practically possible in the short-term.

After careful policy consideration of the options available, we put forward two solutions for change, outlined below. The optimum solution from a consumer's perspective is a long term project to simplify and codify existing private law, so there is coherent redress for consumers across the body of consumer protection legislation. This is an option put forward by Government in its Consumer Law Review.

The second solution would be to provide limited redress to consumers in the interim. This solution would allow enforcement agencies to compel businesses to restore loss to consumers who have suffered financial loss.

The long term and optimum solution for consumers: simplify and codify the law

A reform programme which simplifies and codifies the consumer protection legal framework is overdue. The Consumer White Paper acknowledged that, while the UK has a generally well-established and mature framework of consumer legislation, the law is 'complex, fragmented and inflexible'²⁵. It announced a long term project to enshrine consumer protections, both old and new, under a Consumer Bill of Rights.

The Consumer Bill of Rights should aim to give consumers a consistent direct right of redress across the consumer protection landscape. In the context of this report, it should ensure that consumers enjoy an extension of existing rights of redress in particular areas of unfair commercial practices, where at present no private law remedy is available or no remedy in damages is available. A reform of this nature would involve statutory changes to the private law doctrines of duress and undue influence, and misrepresentation. It might also require adjustments to other aspects of the law of tort.

If a private right of redress was conferred on consumers without the codification and simplification of the current landscape, there would invariably be overlaps between definitions and scope of terms, and it may also prove difficult to understand whether the new rights replaced or supplemented existing private law.

The first question to consider is whether the definitions of unfair commercial practices contained in the Regulations should be used to replace the pre-existing private law rules or merely supplement them.

²⁵ HM Government, *A Better Deal for Consumers. Delivering Real Help Now and Change for the Future*, 2009.

For instance, the Regulations contain a definition of ‘misleading actions’ which overlaps considerably with the current private law of misrepresentation, but differs in some respects.

The choice available is either to replace the current law rules that define a misrepresentation with the slightly broader concept of misleading actions or to leave the existing private law rules alone, but merely to add a supplementary cause of action of private redress for misleading actions.

The route of creating a supplementary cause of action has the advantage of not requiring a disturbance of the existing private law; but it has the disadvantage of not taking the opportunity to reform the current law, which has become confused. Indeed, a supplementary claim would, unfortunately, add another layer of complexity to the law.

In addition, there are further questions about whether the reform of private law should extend to business transactions. For instance, the law of misrepresentation could be extended to include omissions of material information in all negotiations leading to transactions, or it could be limited to apply only to cases where a business fails to supply material information to a consumer. In effect, consumers would have superior rights of redress to businesses and professionals who had been subject to similar misleading marketing practices²⁶.

Whether the reform could apply only to certain kinds of remedies should be considered. It could be limited to claims for damages or include rescission of contracts as well. The approach could be differentiated, so that, for instance, the law of duress could be extended to all aggressive practices, as defined in the Regulations, but the normal remedy would be limited, as at present in private law, to rescission of the contract. In relation to the law of misrepresentation, in contrast, where remedies in damages are frequently available already, the private right of redress could include compensation as well as rescission.

In addition, the new legislative framework should enable and empower consumers to bring collective action. We know that groups of consumers are often affected in the same way by illegal acts. Our research also shows that in some cases consumers consider the financial loss too low to warrant action. This means that a large group of people are losing small amounts of money and enriching unscrupulous traders. These traders know that the possibility of action by the consumer and enforcement agency is low, and if there is no threat of deterrent there is no incentive to desist from the action. Thus, CPRs are unlikely to effect the cultural change that is needed. The possibility of a group action is one way to provide for a deterrent and encourage compliance with the law. We call for both an individual right of action and the possibility of collective actions in this area.

Short term solution: Using Civil Sanctions under the Regulatory Enforcement and Sanctions Act 2008

The following solution provides a short term and supplementary solution to the problem of a lack of redress under the CPRs. It is a short term solution because it does not afford direct redress to consumers. Consumers would still have to rely on the actions of enforcement agencies to obtain redress for financial loss. However, it is supplementary because even after the proposed simplification of consumer law it would continue to offer those consumers who do not wish to personally pursue a claim, some recourse to financial compensation.

²⁶ Please see Professor Hughes’ paper at annex.... for further discussion.

Under the Regulatory Enforcement and Sanctions Act 2008 Part 3, by statutory instrument a minister may make provision for an existing regulatory agency to use a 'civil sanction' through a non-criminal procedure.

Among the civil sanctions that may be introduced is 'a requirement to take such steps as a regulator may specify, within such period as it may specify, to secure that the position is, so far as possible, restored to what it would have been if the offence had not been committed.'²⁷ It is possible that such a restoration to the prior status quo might involve the repayment of money to a consumer.

In the context of unfair commercial practices, it would be possible to use these statutory powers to confer on regulators, such as local trading standards officers, the power to impose on a rogue trader a civil sanction such as rescission of the contract and the return of any payment to the consumer.

Another type of civil sanction under the Act is an enforcement undertaking. Where the designated regulator reasonably believes that an offence has been committed, it may be empowered by statutory instrument to accept an enforcement undertaking instead of pursuing a criminal prosecution.

'The action specified in an enforcement undertaking must be:

- (a) action to secure that the offence does not continue or recur;
- (b) action to secure that the position is, so far as possible, restored to what it would have been if the offence had not been committed;
- (c) action (including the payment of a sum of money) to benefit any person affected by the offence;
- (d) action of a prescribed description'²⁸

This provision makes clear that rescission of any contract and compensation to the victim of an offence, including a consumer, could be part of an enforcement undertaking. Under the Act, if the business complies with the enforcement undertaking, it avoids any criminal prosecution,²⁹ but there is no independent sanction for failure to comply with the enforcement undertaking. Although this legislation does not envisage giving consumers a personal right of redress for breach of regulations in general, it clearly recognises a civil remedy as a possible tool for regulators in relation to certain types of offences.

In the context of the Regulations against unfair commercial practices, it would be possible by statutory instrument to give the power to local trading standards officers and the Office of Fair Trading to accept enforcement undertakings given by businesses that they will desist from a particular unfair commercial practice and refund consumers who have wasted their money.

Such an alternative to criminal prosecution or the threat of prosecution might be an attractive option for many businesses. The business could admit fault and pay compensation, but avoid the stain to its reputation of criminal sanctions. These civil sanctions clearly recognise the value of restorative justice. The enforcement action of these civil sanctions, however, would always be initiated and controlled by a public authority (no doubt usually after a complaint by a consumer) rather than commenced directly by the consumer against the rogue trader. Strictly speaking, therefore, these civil sanctions do not amount to a private right of redress.

²⁷ Section 42(3)(c).

²⁸ Section 50(3).

²⁹ Section 50(4).

Conclusions and recommendations

This report recognises that the CPRs are a significant and positive contribution to the consumer protection landscape. For the first time, traders are under a general obligation to trade fairly. This obligation offers protection against new and emerging unfair practices, while ensuring that the Regulations continue to be applicable to existing and emerging markets and practices.

However, these protections remain incomplete if consumers cannot seek direct redress. It has been shown that it does not suffice to argue that there are other avenues of redress for consumers, eg, via existing private law. These avenues are overly complicated and in some cases limited in scope when compared to what the CPRs afford.

This report has argued that effective compliance requires a diverse range of tools. An important compliance tool is the empowerment of consumers to directly seek justice for a wrong suffered. Indeed it can be said that the absence of such a tool is an anomaly and blight on our legal process. Moreover, empowering consumers would complement and supplement the important role public enforcement plays in this field.

Our consumer research demonstrates that unfair commercial practices are widespread and cause substantial financial detriment. We know that some consumers wrongly believe they have a direct right of redress under the CPRs and most want direct redress. This is, perhaps, one of the most important findings in this report.

After all, once all the technical legal arguments have been made and dissected, it is ordinary people who want and need the right to seek compensation for losses suffered. It is ordinary people who fall victim to a trader saying they are a registered plumber when they're not, costing them money when the work is substandard or causes additional damage. It is ordinary people who fall victim to being told they have won prizes only to discover they have spent a disproportionate amount on phone or postage fees to follow up their 'win'. The law has recognised the need to eliminate these unfair practices from the market place. What is now required is the power for consumers to seek and obtain direct redress. We therefore recommend that the Government adopt the solutions below:

1. In the interim and as a matter of urgency we wish to see the use of the powers under the Regulatory Enforcement and Sanctions Act 2008, Part 3 (as outlined above). This Act empowers a minister to make a statutory order empowering enforcement agencies, such as local trading standards officers, to impose on a rogue trader a civil sanction such as rescission of the contract and the return of any payment to the consumer. This means that, in limited cases, consumers may obtain direct compensation for losses suffered.
2. The Government should press ahead with plans to simplify and codify consumer protection under a Consumer Bill of Rights. The simplification and codification of our relevant common law and legislation should aim to address the gaps in existing legislation, remove complexities and provide a coherent set of rights to consumers, with a private right of redress conferred across the piece. This programme of work should also ensure that the rights at domestic level match or exceed those provided for in the CPRs. This is the optimum solution for consumers.

Waiting to be heard

Giving consumers the right of redress
over Unfair Commercial Practices

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Written by Lola Bello, Consumer Focus

Edited by Denis Tingay, Consumer Focus

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Consumer Focus

4th Floor
Artillery House
Artillery Row
London SW1P 1RT

Tel: 020 7799 7900

Fax: 020 7799 7901

Media Team: 020 7799 8005 / 8006