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**GETTING THE DEFINITION OF ‘CONSUMER’ RIGHT –  
WORRYING ABOUT THE SMALLER ONES IN FIJI**

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### ***Abstract***

This paper argues that the definition of consumer in Fiji should be broadened to include the micro and small enterprises (MSEs). A survey conducted by the National Centre for Small and Micro Enterprises Development in Fiji provides a deep insight into the operation of MSEs in Fiji. The survey findings reveal that MSEs are vulnerable and could be easily exploited by larger companies in the market. One of the ways in which MSEs could be protected is by providing them with the consumer-level protection. This paper argues that MSEs are eligible for consumer protection because like consumers, they also have poor bargaining power, less expertise in making an informed purchasing decision and significant difficulties in seeking remedies against the large suppliers. The paper further contends that the definition of consumer must not only be widened in the general consumer protection law but in the consumer credit legislation and with respect to unfair contract terms too. The arguments against the proposal to broaden the definition are that all businesses, regardless of their size, should be treated the same, there are other relevant laws for the protection of business-consumers and that it would put extra burden on the suppliers, many of whom are small businesses themselves. The paper ends with a draft definition of consumer which includes domestic consumers, micro businesses, whether purchasing for business use or re-sale and small businesses purchasing for business consumption.

### ***Word length***

The text of this paper (including substantive footnotes and excluding abstract, table of contents, other footnotes and bibliography) comprises approximately 10,829 words.

### ***Subjects and Topics***

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## *I Introduction*

Everyone is a consumer, aren't they? However, surprisingly, not everyone is protected as a consumer by the consumer protection legislation of any country. The inequality in consumer protection stems from the differences in the *purpose* for which goods or services are bought.<sup>1</sup> People purchase goods for a variety of purposes - personal consumption or domestic use, business use or even for re-sale. Unfortunately, most consumer protection laws treat as consumers only those persons who buy goods or services for personal, domestic or household consumption. A typical definition of a consumer excludes purchases made for business purposes or for resale.<sup>2</sup>

One could argue that this is appropriate because business-consumers<sup>3</sup> should be treated differently from domestic consumers. However, some business-consumers, especially the micro and small business-consumers, are just as vulnerable as the domestic consumers and therefore, need the same level of protection as domestic consumers.<sup>4</sup>

Micro and small enterprises (MSEs) constitute a significant percentage of businesses in all countries,<sup>5</sup> thus their success is mandatory for the economic welfare of the country. They

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<sup>1</sup> For instance, the Consumer Rights Act 2015 of the United Kingdom defines a consumer as “an individual acting for *purposes* that are wholly or mainly outside that individual's trade, business, craft or profession.” In Ontario Consumer Protection Act 2002, a consumer is defined as “an individual acting for personal, family or household *purposes* and does not include a person who is acting for business *purposes*.”

<sup>2</sup> See above n 1.

<sup>3</sup> A business-consumer is a business buying goods for use in the business. For instance, a lawyer who buys a coffee maker for use in the law office is a business-consumer.

<sup>4</sup> In developing countries, even medium-sized enterprises and the government can be just as vulnerable as domestic consumers when purchasing goods or services.

<sup>5</sup> In the United Kingdom, MSEs make up 99% of all businesses, which is a total of 5.2 million businesses: *Protection of Small Businesses When Purchasing Goods and Services: Call for Evidence* (Department for Business Innovation and Skills, March 2015) at 3. Looking at India, according to the 2006-07 Census of Micro, Small and Medium Enterprises, there were 1.49 million micro enterprises and 76,000 small businesses in the registered sector. In the unregistered sector, there were 19.84 million micro enterprises and 35,000 small businesses. MSMEs in India are defined on the basis of investment in plant and machinery. A micro enterprise is defined as one that has investment in plant and machinery up to Rs. 2.5 million while a small enterprise is one that has investment from Rs. 2.5 million to Rs. 50 million: Micro, Small and Medium Enterprises Development Act 2006. See *Annual Report 2015-16* (Ministry of Micro, Small and Medium Enterprises, 2016). In New Zealand, small and medium-sized enterprises (SMEs) make up 97% of the businesses. Also, 90% (421,823) of all enterprises employ five or less people and 69% (323,935) of all enterprises have no paid employees, illustrating that smaller businesses are significant in numbers: *SMEs in New Zealand: Structure and Dynamics 2011* (Ministry of Economic Development, September 2011) at 5.

play an important role in creating employment, increasing the Gross Domestic Product and generally promoting economic development.<sup>6</sup> However, MSEs, like consumers, have poor bargaining power, less expertise in making effective purchasing decisions and scarce financial resources to pursue litigation in the event of being misrepresented or misled by the seller.<sup>7</sup> Despite their close resemblance with the consumers, MSEs are not regulated by consumer laws. This may seem like a trivial issue but it has far reaching implications for the overall economy, given the importance of MSEs for the economic success of a country.

Some countries have realised this discrepancy in consumer protection laws and taken steps to reform their consumer protection laws by widening the definition of consumer to include micro and small businesses. Australia is one country which has expanded the definition of consumer in the Australian Consumer Law.<sup>8</sup> As far as the Pacific Islands are concerned, this issue has never been considered. Hence, this research paper analyses this issue in the context of Fiji.

This paper argues that the definition of consumer in Fiji should be broadened to include the MSEs. In doing so, it begins in Part II, by providing a background of MSEs in Fiji, which indicates that MSEs face a number of problems which make them particularly vulnerable compared to larger businesses. Part III discusses the rationale for consumer protection, followed by Part IV, which provides the framework of consumer protection legislation in Fiji, including the current statutory definitions of consumer and the defects in these definitions. Part V discusses a few significant issues that need to be considered when broadening the definition of consumer, namely consumer credit, unfair contract terms, the vulnerability of medium-sized enterprises and the government and whether the the definition of consumer should be extended to include only business-consumers or businesses too. Part VI critically analyses the proposal of broadening the definition of consumer, discussing arguments for and against the proposal. The final part of the paper suggests a new definition of consumer that could possibly be adopted by Fiji. The paper concludes that broadening the definition of consumer in Fiji to include micro and small businesses will not only benefit the MSEs but the economy as a whole.

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<sup>6</sup> For instance, MSEs in Fiji contribute to 12% of the Gross Domestic Product, reduce unemployment, and promote economic growth: Geoffrey Smith "SME's contribute \$800 million to the economy" (March 20, 2014) Fiji One <<http://fijione.tv/>>.

<sup>7</sup> See generally Geraint Howells and others (eds) *Handbook of Research on International Consumer Law* (Edward Elgar Publishing Ltd, Glos and Massachusetts, 2010) 11-12.

<sup>8</sup> Australian Consumer Law (ACL) is set out in the second schedule of the Competition and Consumer Act 2010 (previously known as the Trade Practices Act 1974). See Competition and Consumer Act 2010, Schedule 2 (Australian Consumer Law) section 3.

## *II Background of Micro and Small Enterprises in Fiji*

Micro and small enterprises (MSEs) comprise a significant percentage of all businesses in any country and it is no different for Fiji. The Small and Micro Enterprises Development Act 2002 of Fiji defines a micro enterprise as “any enterprise which has a turnover or total assets not exceeding \$30,000 and employs not more than 5 employees.”<sup>9</sup> A small enterprise is defined as “any enterprise which has a turnover or total assets between \$30,000 and \$100,000 and employs between 6 and 20 employees.”<sup>10</sup>

These definitions are problematic due to the use of the word ‘and’. Because the definition requires a business to meet dual requirements for it to be classified as a micro or a small enterprise, a business not meeting one of the requirements may be excluded from both types of businesses. For instance, any business with assets or turnover of \$25,000 but employing 6 employees and any enterprise with assets or turnover of \$40,000 but employing 2 employees would not be classified as either small or micro. Such an anomaly in the legislative definitions could have adverse consequences for the excluded businesses. Therefore, these definitions should be amended so that all MSEs fall under one of the categories and are thus able to benefit from the laws applicable to them. Unless these definitions are amended, all MSEs will not benefit even if the definition of consumer is broadened to include them.

### *A Fiji Bureau of Statistics Economic Survey 2004*

In the 2004 Economic Survey by the Fiji Bureau of Statistics, a total of 7,061 enterprises were surveyed, of which almost half were micro enterprises (48%) and another quarter were small enterprises (24%).<sup>11</sup> The MSEs made up 72% of the businesses surveyed.<sup>12</sup> Unfortunately, no economic survey has been done by any organisation after 2004 which could provide the latest statistics on the total number of MSEs in Fiji. These numbers must have increased in the last decade but in the absence of official data, this will remain an assumption.

MSEs are present in all sectors of the economy from hotel sector, construction and real estate to finance, education, transport, wholesale and retail and manufacturing. To give an

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<sup>9</sup> Small and Micro Enterprises Development Act 2002, section 2.

<sup>10</sup> Section 2.

<sup>11</sup> “Economic Survey 2004” (2004) Fiji Bureau of Statistics <[www.statsfiji.gov.fj](http://www.statsfiji.gov.fj)>.

<sup>12</sup> Above n 11.

idea of the proportions represented by MSEs, below is an analysis based on the 2004 Economic Survey.

According to the 2004 Survey, micro enterprises accounted for 46.1% of businesses involved in the hotel sector, followed by small businesses who made up 35.9%.<sup>13</sup> The transport industry was dominated by micro enterprises who made up 79.9%.<sup>14</sup> In comparison, small businesses formed only 12.8% of the businesses in the transport sector.<sup>15</sup> As far as wholesale and retail was concerned, more than half of the businesses were micro enterprises (57%) while the small businesses comprised another 32.2%.<sup>16</sup> The manufacturing sector had almost equal number of micro and small enterprises, 34.5% and 33.9% respectively.<sup>17</sup> The Survey also revealed that micro enterprises made up 47.4% of the businesses involved in construction and a high of 84% in real estate.<sup>18</sup> On the other hand, small businesses constituted 37.2% of businesses in construction, 44.4% in finance, 40.2% in education and a relatively low of 11.7% in real estate.<sup>19</sup>

#### *B The Reserve Bank of Fiji Comments*

The Reserve Bank of Fiji (RBF) declared that in 2013, small and medium-sized enterprises in Fiji contributed about \$FJ 800 million to the economy, which is about 12% of the Gross Domestic Product (GDP).<sup>20</sup> The Deputy Governor of RBF also remarked that:<sup>21</sup>

Small [businesses] are the answer to our unemployment problem. Our formal sector cannot absorb all our school leavers – this is the same in all developing countries. The employment growth required for our future can come from the small business sector.

This demonstrates that small businesses are important to the economy of Fiji and should be legally protected so that they are successful in running their businesses and eventually

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<sup>13</sup> Above n 11.

<sup>14</sup> Above n 11.

<sup>15</sup> Above n 11.

<sup>16</sup> Above n 11.

<sup>17</sup> Above n 11.

<sup>18</sup> Above n 11.

<sup>19</sup> Above n 11.

<sup>20</sup> Geoffrey Smith “SME’s contribute \$800 million to the economy” (March 20, 2014) Fiji One <<http://fijione.tv/>>.

<sup>21</sup> Smith, above n 20.

contributing to the economic welfare of the country.

*C The National Centre for Small and Micro Enterprises Development Survey 2009*

The Small and Micro Enterprises Development Act of Fiji established the National Centre for Small and Micro Enterprises Development (“NCSMED”)<sup>22</sup> to encourage and promote the creation of small and micro enterprises in Fiji.<sup>23</sup> Since NCSMED’s inception in 2002, it has set up a number of programmes such as business mentoring, business counselling, cluster development, business incubators, technical skills training and others to promote the growth of MSEs in Fiji.<sup>24</sup> It also carries out surveys on the MSEs. In 2009, NCSMED conducted a survey on 164 businesses, who were randomly selected and included registered as well as unregistered businesses.<sup>25</sup> Out of the 164 businesses, 147 were micro enterprises, 11 were small and 6 were medium-sized.<sup>26</sup> The 147 micro enterprises also comprised of 33 “grey market operators,” which are unregistered businesses.<sup>27</sup>

The 2009 NCSMED survey revealed that 32% of the micro enterprise owners had primary education, 49% had secondary education and only 19% had some form of tertiary qualification.<sup>28</sup> On the other hand, 64% of the small business owners had tertiary education.<sup>29</sup> This figure does not seem to give a true picture of the education level of small business operators in Fiji as the sample surveyed was relatively small (only 11 small businesses were interviewed). Those businesses operating in the grey market were also interviewed and it was found that half of the business owners had only primary education,<sup>30</sup> indicating that those in the grey market were very unsophisticated and oblivious to the legal requirements of running a business.

The low level of education of most of the micro and small business operators does not

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<sup>22</sup> Section 3(1).

<sup>23</sup> Section 4(a).

<sup>24</sup> “What do we offer?” (2010) National Centre for Small and Micro Enterprises Development <<http://ncsmmed.org.fj>>.

<sup>25</sup> *Regulatory Impacts on Small and Micro Enterprises Success: Streamlining Legislation and Processes: Fiji 2010: Volume 2(1) Case Studies and Survey Reports* (The National Centre for Small and Micro Enterprises Development, 2010) at 2.

<sup>26</sup> At 2.

<sup>27</sup> At 3.

<sup>28</sup> At 5.

<sup>29</sup> At 5.

<sup>30</sup> At 5.



particularly indicate that these operators cannot or do not know how to run a business. They may be able to run a business but their lack of education can significantly affect their decision making in the face of marketing and sale of products by trained business executives,<sup>31</sup> who work for the benefit of their companies only.

The NCSMED survey also gathered information on the type of business activities that the MSEs were engaged in. It was found that a third of the micro enterprises were market vendors, selling vegetables and/or fish while another third operated retail shops.<sup>32</sup> Another 20% of the micro enterprises were involved in cooked food sales, which meant they either operated small canteens or had small roadside stalls while the remaining 15% were engaged in shoe repairing, transportation (usually taxi business) and hairdressing services.<sup>33</sup> While the business records of these enterprises are not available, it is quite apparent from the nature and the size of these businesses that their purchases of goods for the purpose of use in the business or for transformation into other goods for sale or for re-supplying would be quite similar to that of the domestic consumers, in terms of the quantity and the value of the goods purchased. Consequently, they should be accorded the consumer-level protection.

It is also important to note that when the 164 business owners were asked about the type of help that would have been useful, 90% of the micro enterprises and 85% of the small businesses wanted information on how a business could be set up, while 70% of the micro enterprises and 77% of the small businesses said that information about legislation and regulations would be helpful,<sup>34</sup> indicating that majority of the MSEs had very little to no knowledge about business or consumer laws.<sup>35</sup>

#### *D Case Studies*

During the 2009 survey, NCSMED also interviewed MSEs, who gave an account of how they conducted their business and the difficulties they faced in doing so. Their answers also indicate that one of the main reasons the traditional definition of 'consumer' still exists and

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<sup>31</sup> (27 September 1973) 57 TPB 1013-1014.

<sup>32</sup> Above n 25, at 5.

<sup>33</sup> At 5.

<sup>34</sup> At 8.

<sup>35</sup> According to the *Doing Business Report 2015*, Fiji ranks 81<sup>st</sup> in terms of the ease of doing business compared to Singapore, New Zealand and Hong Kong and China which rank first, second and third respectively: *Doing Business 2015: Going Beyond Efficiency* (World Bank Group, 2015) at 4.

might continue to exist for decades, is the perception that businesses are capable of looking after themselves.<sup>36</sup>

The first case study was about a female owner of a small restaurant in Ba market, in Western Viti Levu. When interviewed, she said she had no knowledge of bank regulations and taxation requirements.<sup>37</sup> She also admitted that she did not use the bank as whatever she earned was spent on business expenses, household expenses and for the medical care of her husband, who suffered from a heart disease.<sup>38</sup> Further, she was denied social welfare assistance for her husband, who required constant medical care; the only reason for the denial of payments being that she was a businesswoman.<sup>39</sup> The unwillingness of a government department to assist a needy person merely because he or she is operating a business does not only showcase the discrimination in granting social welfare payments but indicates that those running a business in Fiji, whether, large, medium, small or micro, are treated the same because of the preconceived idea that a business person is powerful, financially stable and perfectly capable of making effective decisions.

In another case study, a man who had a fruits and vegetables stall in a suburb in Nasinu, about 12 kilometres from Suva City, also stopped receiving monthly social welfare payments after someone made a complaint against him to the effect that he was a businessman.<sup>40</sup> The so-called businessman earns a maximum of \$70 per week from the sale of fruits and vegetables, which is insufficient for an adequate standard of living.<sup>41</sup> Due to frequent flooding, he has stopped growing his own fruits and vegetables. He now buys the products from farmers for re-sale at his fruit stall, which might amount to approximately \$50 per week.<sup>42</sup> These purchases of \$50 do not fall within the scope of the consumer protection legislation because they are for re-sale and not personal consumption or domestic use. It is unfathomable that the consumer laws of Fiji, exclude from their protection, a person like this fruits and vegetables seller, who is perceived to be a

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<sup>36</sup> This reason is also cited in the report prepared by Fletcher, Karatzas and Kreutzmann-Gallasch for the Federation of Small Businesses on whether the small businesses as consumers are sufficiently well-protected in the United Kingdom: Amelia Fletcher, Antony Karatzas and Antje Kreutzmann-Gallasch *Small Businesses as Consumers: Are They Sufficiently Well Protected?* (Economic and Social Research Council, January 2014) at 3.

<sup>37</sup> Above n 25, at 19.

<sup>38</sup> At 19.

<sup>39</sup> At 19.

<sup>40</sup> At 23.

<sup>41</sup> At 23.

<sup>42</sup> At 23.

businessman but is more akin to a domestic consumer due to the value of the goods purchased, a lack of bargaining power and an inability to effectively seek remedies against the producer.

The above analysis of MSEs in Fiji demonstrates that MSEs are as vulnerable as domestic consumers, not only when purchasing goods or services for consumption in business but even when purchasing for re-sale. This raises important issues about how broad the definition of consumer in Fiji should be. As will be discussed later, the current statutory definitions of consumer exclude all businesses from their protection. However, the above analysis suggests that MSEs in Fiji need consumer-level protection. For a better understanding of why businesses or at least business-consumers should be accorded the same protection as domestic consumers, it would be useful to understand the underlying rationale for consumer protection.

### *III Rationale for Consumer Protection*

There are several reasons behind consumer protection. One of the most fundamental reasons for protecting a consumer is the “prevailing asymmetry of information.”<sup>43</sup> A contract must be made between equal parties, who are well-informed. Every time an individual buys goods, he or she is entering into a contract with the supplier or the seller.<sup>44</sup> The problem however, is that the supplier or the seller is well-informed while the buyer may not be in an equally advantageous position.<sup>45</sup> The consumer law, by requiring the seller to provide adequate information to the buyer, whether on the product itself or by other means, enables the consumer to perform his or her role as a contract party more effectively.<sup>46</sup>

A second reason consumers need protection is inequality of bargaining power.<sup>47</sup> Consumers have far less bargaining power than the sellers. Domestic consumers tend to buy goods and services at standard prices, without negotiating the best deal.<sup>48</sup> In contrast,

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<sup>43</sup> Geraint Howells and others (eds) *Handbook of Research on International Consumer Law* (Edward Elgar Publishing Ltd, Glos and Massachusetts, 2010) at 11.

<sup>44</sup> At 11.

<sup>45</sup> At 11.

<sup>46</sup> At 11.

<sup>47</sup> At 12.

<sup>48</sup> Amelia Fletcher, Antony Karatzas and Antje Kreutzmann-Gallasch *Small Businesses as Consumers: Are They Sufficiently Well Protected?* (Economic and Social Research Council, January 2014) at 7.

the large producers are in a much more dominant position to negotiate the best deals due to their economic power and expertise in their line of trade.<sup>49</sup> Due to this unequal bargaining power of the two parties, the intervention of consumer laws for the protection of consumers is absolutely necessary.

Another reason for consumer protection is the inability of consumers to effectively seek remedies against large producers and/or sellers for defective goods.<sup>50</sup> It is incredibly difficult for a small consumer to sue a large company for a defective product due to a lack of financial resources and time. It would not be economically efficient for a domestic consumer to pursue litigation which costs thousands of dollars for a defective product worth only a few dollars. The consumer laws enable consumers to effectively make complaints through the complaints and dispute resolution mechanisms established under the consumer protection legislation. For instance, the Consumer Council of Fiji Act 1976 stipulates that the Consumer Council of Fiji's functions include receiving complaints from consumers regarding matters affecting them as consumers, considering and investigating the complaints and taking appropriate action<sup>51</sup> as well as assisting the consumers who are contemplating initiating or have initiated legal proceedings for a breach of their consumer rights.<sup>52</sup>

The last justification for consumer protection is one that is given by the Australian Senator, Lionel Murphy, when introducing the Trade Practices Bill 1973 into the Senate. He said:<sup>53</sup>

In consumer transactions, unfair practices are widespread. The existing law is still founded on the principle known as *caveat emptor* – meaning 'let the buyer beware'. That principle may have been appropriate for transactions conducted in village markets. It has ceased to be appropriate as a general rule. Now the marketing of goods and services is conducted on an organized basis and by trained business executives. The untrained consumer is no match for the businessman who attempts to persuade the consumer to buy goods or services on terms and conditions suitable to the vendor. The consumer needs protection by the law and this Bill will provide such protection.

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<sup>49</sup> Howells and others, above n 43, at 12.

<sup>50</sup> Brian W Harvey and Deborah L Parry *The Law of Consumer Protection and Fair Trading* (6<sup>th</sup> ed, 2000, Butterworths, London, Edinburgh and Dublin) at 15.

<sup>51</sup> Consumer Council of Fiji Act [Cap 235], s6(2)(h).

<sup>52</sup> Section 6(2)(i).

<sup>53</sup> (27 September 1973) 57 TPB 1013-1014.

Murphy's comments highlight not only the need for consumer protection but the need to increase consumer protection in light of the changing market circumstances and business behaviour, which can be detrimental to a consumer (who is still the same).

#### *IV The Framework of Consumer Protection Legislation in Fiji*

Fiji's consumer protection laws may not be on par with the international consumer laws but they provide some protection to the consumers. One of the first consumer protection laws was in the form of the Moneylenders Ordinance 1938, followed by the Fair Rents Ordinance 1965. After Fiji gained independence in 1970, the Parliament of Fiji passed the Consumer Council of Fiji Act in 1976. Thereafter, it drafted a number of laws which made provisions for the protection of consumer in one way or another.<sup>54</sup> At present, there are 10 pieces of consumer protection legislation in Fiji, each containing some aspect of consumer protection.<sup>55</sup>

In 2010, the Consumer Council of Fiji (CCF) commenced a project to review the existing consumer protection legislation in Fiji.<sup>56</sup> Shirish Deshpande, who was in charge of the project, thoroughly perused the various consumer laws in Fiji and found that the existing consumer laws were "woefully inadequate in protecting consumer interest."<sup>57</sup> He also remarked that consumer protection in Fiji is "fragmented, incoherent and costly"<sup>58</sup> and in dire need of a legislative reform.

Deshpande recommended in his report<sup>59</sup> ("the Deshpande Report") that the various pieces of consumer protection legislations should be consolidated into a single, comprehensive Act, which recognises consumers' rights and responsibilities as well as provides for a

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<sup>54</sup> Amongst these laws were the Fair Trading Decree 1992, Counter-Inflation Act [Cap 73] and Commerce Act 1998, all of which have been repealed and replaced by the Commerce Commission Decree 2010.

<sup>55</sup> These are the Sale of Goods Act [Cap 230], Consumer Council of Fiji Act [Cap 235], Commerce Commission Decree 2010, Consumer Credit Act 1999, Fair Rents Act [Cap 269], Distress for Rents Act [Cap 36], Moneylenders Act [Cap 234], Second-Hand Dealers Act [Cap 238], Small Claims Tribunal Decree 1999 and Real Estate Agent Act 2006.

<sup>56</sup> This project was known as Strengthening Consumer Rights in Fiji and Eliminating Unfair Trade Practices through Advocacy and Enforcement of Consumer Protection laws and was done by a consultant from India, Shirish Deshpande.

<sup>57</sup> Shirish Deshpande *Review Report on Existing Consumer Protection Laws of Fiji: The Way Forward* (Consumer Council of Fiji, March 2012), at 8.

<sup>58</sup> At 8.

<sup>59</sup> The report was titled "Review Report on Existing Consumer Protection Laws of Fiji: The Way Forward".

simple, speedy and cheap mechanism to resolve consumers' complaints.<sup>60</sup> The author concurs with the suggestion of Deshpande and advises that Fiji should initiate the legislative reform of its consumer laws as soon as possible so that the consumer protection law is modern, in line with the other developing countries, a reflection of the current economic situation and one that meets the needs of the local people.

One of the reforms to consumer laws must be the amendment of the definition of 'consumer'. It is suggested that the definition of consumer be broadened to include micro and small businesses. The Deshpande Report did not recommend anything regarding the definition of consumer except that the Sale of Goods Act [Cap 230] of Fiji does not provide a definition of 'consumer' and that it should define the term 'consumer' in the Act.<sup>61</sup> Deshpande did not suggest the definition of consumer; instead he recommended the easy way out, which is to copy and paste the definition from another Act, albeit with necessary changes.<sup>62</sup> This is not the right approach to take in formulating a definition of a 'consumer.'

Defining a 'consumer' in a statute may seem like a trivial matter, but its implications on the people and the economy are profound, as will be discussed below. It is absolutely important to take into account the level of education of the micro and small enterprise owners,<sup>63</sup> the financial position of these enterprises and the level of expertise of the local people in running a small-scale business when defining 'consumer' so that any one who is in a disadvantaged and/or in a vulnerable position, similar to that of a domestic consumer, is adequately protected by the consumer laws of the country.

#### *A The Current Statutory Definitions of a 'Consumer' in Fiji and their Defects*

At present, a 'consumer' is defined in three statutes: the Commerce Commission Decree 2010, the Consumer Council of Fiji Act [Cap 235] and the Consumer Credit Act 1999.

##### *1 Commerce Commission Decree 2010*

The Commerce Commission Decree replaced the Fair Trading Decree 1992, Counter-Inflation Act [Cap 73] and the Commerce Act 1998. It provides the general consumer law

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<sup>60</sup> Deshpande, above n 57, at 4.

<sup>61</sup> Deshpande, above n 57, at 24.

<sup>62</sup> At 24.

<sup>63</sup> Howells writes that "... the level of education in a certain society certainly is relevant when deciding what behavior one should expect from a consumer...": Howells and others, above n 43, at 12.

in Fiji.<sup>64</sup> It defines a 'consumer' as:<sup>65</sup>

a person who in relation to a particular transaction, whether a separate contract or separate transaction within a contract acquires goods or services as a consumer and shall be presumed hereunto unless the contrary is proved.

It is quite obvious from the definition that it is poorly drafted.<sup>66</sup> The United Nations Conference on Trade and Development (UNCTAD) supported National Self-Assessment Report 2015 of Fiji (UNCTAD Report) also criticises this definition as being ambiguous and unclear.<sup>67</sup> The definition is vague because of the use of the word 'consumer' in the definition: "a person who ... acquires goods or services as a *consumer* ..."<sup>68</sup> The drafters failed to actually define a consumer. It is not clear from the definition whether purchases of goods or services for only household, domestic or personal consumption are deemed consumer transactions or those for business use also fall within the ambit of the definition.

The UNCTAD Report suggests that this definition must be extended to include the business to business as well as consumer to business transactions.<sup>69</sup> However, it does not specify which business to business transactions must be included in the definition of consumer - whether transactions of micro and small businesses only or of medium and large enterprises too.

It is inferred that the current definition of consumer in the Commerce Commission Decree is inadequate and needs not only clarification but expansion to include micro and small businesses.

## 2 *Consumer Council of Fiji Act [Cap 235]*

This Act establishes the Consumer Council of Fiji (CCF), stipulates its functions and powers and provides for other ancillary matters. Because CCF conducts research and

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<sup>64</sup> See Part 7: Consumer Protection and Unfair Practices, ss 74-110 and Part 8: Conditions and Warranties in Consumer Transactions, ss 111-118.

<sup>65</sup> Commerce Commission Decree 2010, s4(1).

<sup>66</sup> In fact, many parts of the statute are poorly drafted as criticised by a law firm in Fiji: "Commerce Commission Decree 2010" (21 October, 2010) Munro Leys <[www.munroleyslaw.com](http://www.munroleyslaw.com)>.

<sup>67</sup> *Bipartite Voluntary Peer Review of Competition Law and Policy: Fiji and Papua New Guinea: National Self-Assessment Reports* UNCTAD/DITC/CLP/2015/5/Rev.1 (2015) at 19.

<sup>68</sup> Commerce Commission Decree, s4(1).

<sup>69</sup> Above n 67, at 19.

investigations into matters affecting the interests of consumers,<sup>70</sup> hears and investigates consumer complaints,<sup>71</sup> and supports legal proceedings by consumers, amongst other things,<sup>72</sup> it is essential that the definition of consumer in this statute is wide enough to include not only the domestic consumers but all those that are in a consumer-like position.

The current definition of consumer in this Act is as follows:<sup>73</sup>

a person who buys or takes on hire or lease, or is a potential buyer or hirer or lessee of, goods otherwise than for resale or letting on hire or leasing, and includes a person who uses otherwise than for the purpose of trading or carrying on business, or is a potential user otherwise than for the purpose of trading or carrying on a business of, any service rendered for fee or reward.

It is a traditional definition of consumer, which includes only the natural consumers. It expressly excludes those persons who buy goods or services for resale, letting on hire, leasing or trading or carrying on business. This means that MSEs are currently not protected by the CCF despite their vulnerability. This definition should be amended (as proposed below) to include MSEs so that these vulnerable groups of people can also benefit from the services provided by the CCF.

### 3 *Consumer Credit Act 1999*

This Act, its amendments<sup>74</sup> and regulations<sup>75</sup> aim to remedy the imbalance in power of the consumers and the credit providers.<sup>76</sup> It provides for a number of credit contracts, including hire purchase agreements,<sup>77</sup> loan, mortgage and guarantees documents,<sup>78</sup> consumer leases,<sup>79</sup> bills of sale and credit related insurance contracts.<sup>80</sup>

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<sup>70</sup> Consumer Council of Fiji Act [Cap 235], s6(d).

<sup>71</sup> Section 6(h).

<sup>72</sup> Section 6(i).

<sup>73</sup> Section 2.

<sup>74</sup> Consumer Credit (Amendment) Act 2006 and Consumer Credit (Amendment) Decree 2010.

<sup>75</sup> Consumer Credit Regulations 2009.

<sup>76</sup> Ram Karan *Review of Consumer Credit Act and Regulations...From Consumers' Perspective: A Consumer Council of Fiji Report* (Consumer Council of Fiji, July 2012) at 9.

<sup>77</sup> See Consumer Credit Act 1999, ss 161-167.

<sup>78</sup> See generally Parts 3, 4 and 5.

<sup>79</sup> See Part 10, ss 146-156.

<sup>80</sup> See Part 8, ss 131-138.



This Act defined a consumer as “a person who acquires goods or services for personal, domestic or household purposes.”<sup>81</sup> This definition was amended by the Consumer Credit (Amendment) Act 2006, which added the word ‘natural’ before the word ‘person’.<sup>82</sup> This amendment cleared any doubt that anyone may have regarding the applicability of the Act, making it crystal clear that consumer credit laws in Fiji only apply to natural consumers and not to any businesses.

The question now is – should the consumer credit laws apply to MSEs? This issue will be discussed in detail below, in Part V(A).

It is evident from the above analysis that the current statutory definitions of consumer in Fiji exclude all businesses, regardless of the size of the business, the vulnerability of the business-consumers or the reason for the purchase of goods. This is contrary to the needs of the MSEs as illustrated in II above. It is recommended that the definitions of consumer be widened to provide adequate legal protection to all consumers, whether domestic or business.

## *V Issues in Broadening the Definition(s) of Consumer in Fiji*

Broadening the definition(s) of consumer in Fiji to include MSEs will mean that majority of the businesses will be treated as consumers when making purchases. If done wrongly, it could have unintended consequences for the consumers, suppliers, traders and the overall market. There are a number of issues that need clarification in the process of re-drafting the definition of consumer – which definitions of consumer should be expanded – the definition in the general consumer law only or consumer credit legislation too? How about definition of a consumer with respect to unfair contract terms provisions? How can MSEs be protected when entering into online standard form contracts? Should the definition be widened to include only the MSEs or even medium-sized enterprises and the government in a developing country like Fiji? How broad should the new definition of consumer be? Should it include only business-consumers or businesses? These questions will be dealt with in the succeeding discussion.

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<sup>81</sup> Section 2.

<sup>82</sup> Section 2(c).

## A *Consumer Credit Laws*

It is a bit more controversial when it comes to widening the definition of consumer in consumer credit legislation. As stated earlier, Fiji's Consumer Credit Act applies to natural persons only and not to any kind of business. The question is whether this definition should be widened, considering the vulnerability of MSEs in Fiji.

A look at the UK consumer credit law reveals that UK's Consumer Credit Act 1974 provided protection to natural persons, partnerships of any size and unincorporated bodies, where the credit transactions did not exceed £25,000.<sup>83</sup> The threshold of £25,000 ensured that consumer credit laws applied to smaller businesses only.

However, this was amended by Consumer Credit Act 2006, which removed the £25,000 credit limit<sup>84</sup> but added a business exemption whereby businesses were exempted from the scope of the Act.<sup>85</sup> The definition of individual was also narrowed to include only natural persons, partnerships of three or less and unincorporated bodies.<sup>86</sup> These amendments ensured that the large businesses were excluded from consumer credit protection but sole traders and smaller businesses, who are seen as needing consumer level protection because "their operations are more akin to that of a consumer"<sup>87</sup> continued to be protected.

The United States,<sup>88</sup> the European Union<sup>89</sup> and the New Zealand<sup>90</sup> consumer credit laws do not extend the consumer credit protection to businesses. Australia has taken the same approach in its National Consumer Credit Protection Act 2009 but it recently proposed an extension of the consumer credit protection to small businesses.<sup>91</sup> However, these reform

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<sup>83</sup> Consumer Credit Act 1974, s189(1).

<sup>84</sup> Consumer Credit Act 2006, s 2.

<sup>85</sup> Consumer Credit Act 2006, s 4 (s16B of the revised CCA).

<sup>86</sup> Consumer Credit Act 2006, s 1.

<sup>87</sup> "Consumer Credit Act 2006: Amendments to the Consumer Credit Act 1974" (October 2008) Slaughter and May <[www.slaughterandmay.com](http://www.slaughterandmay.com)> at 4.

<sup>88</sup> Section 1693a(6) of the United States Consumer Credit Protection Act 1968 simply defines a consumer as 'a natural person', thus excluding all businesses from its scope.

<sup>89</sup> Article 3(a) of the European Directive 2008/48/EC on credit agreements for consumers defines a 'consumer' as "a natural person who ... is acting for purposes which are outside his trade, business or profession," thus excluding all businesses from the scope of the consumer credit protection.

<sup>90</sup> Section 11(1) of the Credit Contracts and Consumer Finance Act 2003 stipulates that it is a consumer credit contract if the debtor is a natural person and the credit is to be mainly used for personal, domestic or household purposes, thus excluding all businesses.

<sup>91</sup> National Consumer Credit Protection Amendment (Credit Reform Phase 2) Bill 2012.

proposals were deferred in 2013 since the Bill's release raised concern as to whether the reform could be done more effectively, preferably through a better model than that proposed in Phase 2 of the Bill.<sup>92</sup> Since then, the Bill has not been revived, so currently, the Australian consumer credit legislation excludes small businesses.

As far as Fiji is concerned, it is proposed that the definition of consumer should be widened in the Consumer Credit Act to include the MSEs. It is important to undertake this legislative reform because MSEs in Fiji are relatively inexperienced in credit contracting. The low education level of MSE owners,<sup>93</sup> the inexperience of MSEs in raising finance<sup>94</sup> and their desire to receive more assistance with respect to laws affecting them<sup>95</sup> and how a business could be set up,<sup>96</sup> all indicate that MSEs in Fiji are likely to face considerable difficulties in concluding credit contracts.

To illustrate the problems faced by the MSEs as a result of being excluded from the scope of consumer credit legislation, say a small restaurant owner, Sam, who has not completed his primary education and earns about \$1,500 a month, buys a refrigerator on hire purchase for use in the business. As Sam is the sole owner of the restaurant and has to take care of everything, he forgets to pay one installment. The seller immediately repossesses the refrigerator without serving him a notice in writing. As Sam does not fall within the definition of consumer, he is not protected by s163(1) of the Fijian Consumer Credit Act, which stipulates that repossession can only be done if the hirer has missed two successive payments and a notice in writing has been served on the hirer.<sup>97</sup> He cannot go to the Consumer Council of Fiji either, because he is not classified as a consumer. The only avenue which is open to him is litigation, which requires him to incur unaffordable legal

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<sup>92</sup> Generally, these reform proposals have not received positive feedback. For criticisms of the proposal, see Attachment A of the Submission of the Financial Services Committee of the Business Law Section of the Law Council of Australia on <[www.lawcouncil.asn.au](http://www.lawcouncil.asn.au)>. Also see Francina Cantatore and Brenda Marshall "Businesses are people too? Anomalies in widening the ambits of "consumer" under consumer credit law" (2014) 42(2) ABLR 113.

<sup>93</sup> The 2009 NCSMED survey revealed that 32% of the micro enterprise owners had primary education, 49% had secondary education and only 19% had some form of tertiary qualification: above n 25, at 5.

<sup>94</sup> The 2009 NCSMED survey found that MSEs in Fiji face the following difficulties in raising finance: insufficient collateral, poor documentation, rejection of project proposal, lack of contact in lending institutions and insufficient funds for personal contribution: above n 25, at 7.

<sup>95</sup> Above n 25, at 8.

<sup>96</sup> At 8.

<sup>97</sup> Consumer Credit Act, s163(1).

costs so basically, Sam is denied access to justice merely because he is a small business operator and not a consumer or a large business owner.

To avoid injustices being done to MSE owners like Sam, it is essential that the definition of consumer in the consumer credit legislation is broadened to include them.

### *B Unfair Contract Terms*

Another contentious issue in broadening the definition of consumer is whether the definition of consumer should be widened with respect to unfair contract terms. Unfair contract terms are terms that are more advantageous for one party (the seller) than the other (the consumer) and are common in standard form contracts, which are offered on a 'take it or leave it' basis.<sup>98</sup> While there is no direct evidence of MSEs in Fiji being affected by unfair contract terms, circumstantial evidence does indicate that they may be victims of unfair contract terms.<sup>99</sup> Consequently, it is proposed that provisions on unfair contract terms should be extended to include MSEs.

Investigation into other countries' position has revealed that unfair contract terms have existed in the European Union<sup>100</sup> and the United Kingdom<sup>101</sup> but have not been extended to apply to small businesses. New Zealand recently amended its Fair Trading Act 1986 to include unfair contract terms provisions, but for the protection of consumers only.<sup>102</sup>

Australia is a step ahead as it has passed the Treasury Legislation Amendment (Small Business and Unfair Contract Terms) Bill in November 2015 ("UCT Bill 2015"), extending the unfair contract terms provisions contained in the Australian Securities and Investments Commission Act 2001 ("ASIC Act") and the Competition and Consumer Act 2010 for the protection of consumers to small businesses.<sup>103</sup> The main reasons cited in the UCT Bill

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<sup>98</sup> Ewan McKendrick and Qiao Liu *Contract Law: Australian Edition* (Palgrave, London, 2016) at 403. The Ministry of Consumer Affairs of New Zealand states that "an unfair term is a pre-written term in a standard form contract": "Consumer Law Reform Additional Paper – Unfair Contract Terms" (September 2010) Ministry of Consumer Affairs <[www.consumeraffairs.govt.nz/](http://www.consumeraffairs.govt.nz/)>.

<sup>99</sup> The NCSMED survey has shown that MSEs in Fiji are poorly educated, are inexperienced in documentation and find difficulties in running a business.

<sup>100</sup> Unfair Terms in Consumer Contracts Directive 93/13/EEC (5 April 1993).

<sup>101</sup> Unfair Contract Terms Act 1977 (UK).

<sup>102</sup> Fair Trading Amendment Act 2013, s 14; Fair Trading Act 1986, s 26A.

<sup>103</sup> This new law will apply to standard form contracts entered into or renewed on or after 12 November 2016. It amends the existing provisions by inserting a definition of small business contract as follows:

2015 Explanatory Memorandum for proposing an extension of unfair contract terms provisions to small businesses were that small businesses are as vulnerable as consumers when concluding standard form contracts as they lack the resources and bargaining power to negotiate the terms of the contract; it is financially inefficient for small businesses to obtain legal advice on low-value standard form contracts; standard form contracts put greater risk on the vulnerable party (small businesses), who are not likely to bear the financial costs of the risk if it eventuates and finally, since the unfair terms in the contract will be declared void by the court, the larger businesses will have lesser incentives to include unfair terms in standard form contracts which will eventually boost the confidence of small businesses in entering into standard form contracts.<sup>104</sup>

Unfortunately, the Fijian consumer law does not contain provisions relating to unfair contract terms so extending these provisions to small businesses may seem like a far-fetched idea. The Deshpande Report also pointed out this discrepancy in Fiji's consumer law and recommended that provisions on unfair contract terms should be included in the consumer legislation.<sup>105</sup> The stakeholders have reviewed these suggestions and given mixed comments. While the Solicitor General's office and the Fiji Commerce Commission feel that unfair contract terms provisions should be included in the Consumer Credit Act, the Ministry of Industry and Trade suggest that it should be a part of the Commerce Commission Decree and the CCF believes that it should be included in the proposed Consumer Protection Decree<sup>106</sup> as it affects all aspects in the consumer sphere.<sup>107</sup>

While discussions are being held on how the unfair contract terms provisions could be included in the consumer legislation, attention should also be given to the issue of

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A contract is a *small business contract* if:

- (a) at the time the contract is entered into, at least one party to the contract is a business that employs fewer than 20 persons; and
- (b) either of the following applies:
  - (i) the upfront price payable under the contract does not exceed \$300,000;
  - (ii) the contract has a duration of more than 12 months and the upfront price payable under the contract does not exceed \$1,000,000.

For more information on the amendments, see Treasury Legislation Amendment (Small Business and Unfair Contract Terms) Bill 2015 (Cth) and its Explanatory Memorandum.

<sup>104</sup> Treasury Legislation Amendment (Small Business and Unfair Contract Terms) Bill 2015 (Cth) (explanatory memorandum) at 7-8.

<sup>105</sup> Deshpande, above n 57, at 17.

<sup>106</sup> Deshpande has drafted a Consumer Protection Decree, which would replace a few existing statutes on consumer protection, if adopted by the legislature.

<sup>107</sup> Deshpande, above n 57, at 28.

extending these provisions to MSEs. There is no statistical evidence on the number of MSEs that are affected by unfair contract terms in Fiji but it is apparent from the 2009 NCSMED survey findings discussed above that MSEs in Fiji are in a vulnerable position and can be totally devastated if they unknowingly agree to unfair contract terms in standard form contracts. For instance, only 7% of the 148 micro enterprises surveyed in 2009 used legal services.<sup>108</sup> In contrast, the survey revealed that 54% of the small businesses used legal services.<sup>109</sup> However, this does not reflect the true picture of small businesses as the sample surveyed was very low; only 13 small businesses were surveyed.<sup>110</sup> If a larger sample was used, it is quite certain that this percentage would have been much lower. This information alone shows how easy it is for large businesses to include unfair terms in a contract and exploit the naïve MSEs. Hence, they need the consumer-level protection.

### *C Medium-sized Enterprises and Government*

While there is compelling evidence to suggest that MSEs are in a consumer-like position and therefore need consumer-level protection, there is a bit of uncertainty when it comes to medium-sized enterprises and the government. There is no legislative definition of a medium-sized business but it is usually one that employs between 20 and 50 people or has an annual turnover of between \$100,000 and \$500,000.<sup>111</sup> While it seems that medium-sized enterprises and the government are sophisticated enough to have financial resources, technical expertise and bargaining power to make effective purchasing decisions, it may not be such a perfect scenario for these bodies in a developing country like Fiji. Anecdotal evidence suggests that due to the “business culture” in Fiji, even medium-sized enterprises and the government are likely to be vulnerable when purchasing goods or services unrelated to their normal trade.<sup>112</sup>

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<sup>108</sup> Above n 25, at 6.

<sup>109</sup> At 6.

<sup>110</sup> At 6.

<sup>111</sup> At 3.

<sup>112</sup> Through my personal experience, I have found that even medium-sized enterprises face difficulties in purchasing products that are outside their normal course of trade. It is true that medium-sized enterprises, like large businesses, have the financial resources to employ people with specialised skills. For instance, a law firm has adequate financial resources to employ an Information Technology (IT) professional to purchase software, computers and printers for the law firm. However, if one of the existing staff members has some knowledge of IT, it is highly likely that a professional will not be employed, to save costs. Now, if the staff member (with some knowledge) purchases software, he will be vulnerable, thus requiring consumer-level protection.

However, in the absence of statistical evidence, it cannot be concluded that all medium-sized enterprises and government departments resemble domestic consumers. A survey should be done on these bodies to determine the degree of difficulty faced by them in purchasing goods or services. If the survey results reveal that these bodies are as vulnerable as domestic consumers, they should be included in the definition of consumer too.

#### *D Expansion of the Definition to Businesses or Business-Consumers?*

Another factor that requires serious consideration is how far the extension of the definition of consumer should be. Should the broader definition of consumer include businesses acquiring goods for the purpose of consumption in the business or even when they are purchasing goods for re-sale?

The broadened definition of consumer in section 3 of the Australian Consumer Law<sup>113</sup> only extends to purchases made by businesses for the purpose of consumption in the business.<sup>114</sup> The definition expressly excludes purchases made for the purpose of re-supplying or for using the goods up or transforming them in trade or commerce.<sup>115</sup> This has been rightly criticised by a commentator as “[failing] to protect small business in the context where it may be most vulnerable.”<sup>116</sup> The Australian definition of consumer excludes from its protection all micro and small businesses who buy goods for re-sale. If this definition of consumer was applied in Fiji, it would not protect the fruits and vegetables seller discussed above even though he buys fruits and vegetables worth only about \$50 for re-sale. If a

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<sup>113</sup> (1) A person is taken to have acquired particular goods as a *consumer* if, and only if:

(a) the amount paid or payable for the goods ... did not exceed:

(i) \$40,000; or

(ii) if a greater amount is prescribed for the purposes of this paragraph--that greater amount; or

(b) the goods were of a kind ordinarily acquired for personal, domestic or household use or consumption; or  
(c) the goods consisted of a vehicle or trailer acquired for use principally in the transport of goods on public roads.

(2) However, subsection (1) does not apply if the person acquired the goods, or held himself or herself out as acquiring the goods:

(a) for the purpose of re-supply; or

(b) for the purpose of using them up or transforming them, in trade or commerce:

(i) in the course of a process of production or manufacture; or

(ii) in the course of repairing or treating other goods or fixtures on land.

<sup>114</sup> Competition and Consumer Act 2010, Schedule 2 (Australian Consumer Law) s 3.

<sup>115</sup> Section 3(2).

<sup>116</sup> Aviva YM Freilich “A Radical Solution to Problems with the Statutory Definition of Consumer: All Transactions Are Consumer Transactions” (2007) 33 UW Austl L Rev 108, at 119.

definition aimed at protecting small businesses does not protect a businessman as vulnerable as the fruit and vegetables seller, that definition needs redefining.

The definition of consumer in the Indian Consumer Protection Act 1986 also excludes a person who buys goods for “resale or for any commercial purpose”.<sup>117</sup> However, an explanatory note in the Act provides that “commercial purpose does not include use by a person of goods bought and used by him ... exclusively for the purpose of earning his livelihood by means of self-employment.”<sup>118</sup> Thus, India’s definition of consumer includes all the self-employed persons such as the trishaw pullers, auto-rickshaw drivers, subsistence farmers and pastoralists.<sup>119</sup> However, it excludes thousands of micro and small businesses who purchase goods for re-sale on a small scale, such as the market vendors (those who buy products instead of growing them), convenience store owners, and others. If this definition of consumer was adopted in Fiji, it would include a taxi driver buying taxi (worth about \$25,000) to be used to earn a living but not the fruit and vegetables seller who buys produce (worth about \$50) for re-sale or a small retail business operator.

In contrast, the definition of consumer in the Consumer Rights Act 2015 of the United Kingdom is relatively narrow.<sup>120</sup> A consumer is defined as “an individual acting for purposes that are wholly or mainly outside that individual's trade, business, craft or profession.”<sup>121</sup> This definition of consumer tends to exclude even the businesses buying goods for use in the business such as a lawyer buying a photocopying machine or a refrigerator for use in the office. The Explanatory Notes of the definition of consumer expressly states that a sole trader who buys a printer which is used 95% of the time for business purposes is not a consumer and must use other laws such as the Sale of Goods Act for protection.<sup>122</sup> Hence, in the United Kingdom, the definition of consumer is still traditional.

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<sup>117</sup> Consumer Protection Act 1986, s 2(d).

<sup>118</sup> Section 2(d), Explanation as amended by Consumer Protection (Amendment) Act 2002.

<sup>119</sup> Howells and others, above n 43, at 55.

<sup>120</sup> During the passage of the Bill through Parliament, attempts were made to introduce protection for micro-businesses but the Government rejected those attempts. However, the Government issued a call for evidence in 2015 on whether the current legislative framework for the sale and supply of goods and services to micro and/or small businesses sufficiently protects them. No further action has been taken on the matter: Helen Hart “Do we need a Consumer Rights Act for SMEs or micro-businesses?” (20 October 2015) Lexis Nexis Comet < <http://blogs.lexisnexis.co.uk/comet/>>.

<sup>121</sup> Consumer Rights Act 2015, s 2(3).

<sup>122</sup> Consumer Rights Act 2015 (UK) (explanatory notes).



Having discussed how broad the definition of consumer is in different countries, it is now time to consider what the best definition would be for Fiji. As explained above, the definitions in Australia and India are broader than the current definitions of consumer in Fiji but not broad enough to include all the vulnerable MSEs, who need the consumer-level protection. It is suggested that the definition of consumer in Fiji should be expanded to include the micro businesses who buy goods for consumption in the business and even for re-sale. With respect to small businesses, the consumer protection should only go as far as purchases by small businesses for use in the business. The reasons for these proposals are explained below in the Explanation section (VII (B)).

Consequently, the definition of consumer must be expanded not only in the general consumer protection legislation but with respect to consumer credit and unfair contract terms too, the broadened definition must include only micro and small businesses and not medium-sized businesses and government and that the new definition of consumer should include the micro businesses whether they are buying for business use or re-sale but only the small businesses buying for use in the business. Having clarified these issues, it would be a good idea now to discuss the arguments for and against broadening the definition of consumer.

## *VI A Critical Analysis of the Proposal to Broaden the Definition of 'Consumer'*

As for anything, there are arguments for and against the proposal to broaden the definition of consumer in Fiji to include the MSEs. These arguments will be discussed now.

### *A Arguments for Broadening the Definition of 'Consumer'*

There are several reasons for broadening the definition of 'consumer' to include the MSEs.

One of the leading arguments for broadening the definition of consumer to include the MSEs is based on the rationale for consumer protection. As discussed above, there is a need for consumer protection because consumers have poor bargaining power compared to the suppliers, far less expertise in making an informed decision about buying a product and economic and other difficulties in effectively seeking remedies against the supplier in case of a breach of their consumer rights.<sup>123</sup> Unfortunately, micro and small businesses also

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<sup>123</sup> Howells and others, above n 43, at 11.

face these same difficulties when purchasing goods or services but they are excluded from consumer protection. As per the rationale for consumer protection, the inclusion in the definition of consumer, of MSEs who are in the same position as consumers is justified.

Another justification for expansion of the definition of consumer to include MSEs is that the purchasing saga of MSEs in Fiji from decision-making to difficulties encountered in the purchasing process is similar to that of consumers than the large businesses. The National Chairman of the Federation of Small Businesses in the United Kingdom, John Allan, said that:<sup>124</sup>

Small, and especially micro, firms [do not] have the same capacity to make buying decisions in the way large businesses do. They have much more in common with domestic consumers and we believe it makes sense for the level of consumer protection afforded to micro and small firms to reflect that.

Further, as Fletcher stated "... many smaller firms are relatively unsophisticated as purchasers, and no better able to protect themselves than individual consumers are."<sup>125</sup> Therefore, it is crucial to bring the MSEs within the ambit of consumer law protection.

A corresponding argument is based on the legal principle of "normative coherence", which is also known as the principle of "treating like cases alike".<sup>126</sup> It is argued that if small businesses' behaviour is more like the consumers than the large businesses, it is logical to treat both the small businesses and the consumers as the same under the law.

The last argument in favour of widening the definition of consumer to include the MSEs relates to the importance of MSEs in an economy and therefore the need to adequately protect them. MSEs account for a large number of businesses in Fiji. They play a significant role in creating employment opportunities, enhancing rural economic activities, generating income and contributing to the GDP.<sup>127</sup> They also assist in empowering the youth and the women and in the advancement of the communities generally.<sup>128</sup> When their contribution

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<sup>124</sup> "Small businesses need better consumer protection, says FSB" (12 March 2014) Federation of Small Businesses <[www.fsb.org.uk/](http://www.fsb.org.uk/)>.

<sup>125</sup> Above n 124. This comment was made by Amelia Fletcher, Professor of Competition, Economic and Social Research Council, Centre for Competition Policy in UK.

<sup>126</sup> Fletcher, Karatzas and Gallasch, above n 48, at 14.

<sup>127</sup> *A Complete Overview of the SME Regime in Fiji: Issues, Problems and Possible Solutions: Volume 1* (National Centre for Small and Micro Enterprises Development, 2010) at (iv).

<sup>128</sup> At (iv).

to the economy is so remarkable, it makes it incumbent on the government to provide the best protection possible to help them operate their businesses effectively (which includes providing them with consumer-level protection).<sup>129</sup>

*B Arguments Against Broadening the Definition of 'Consumer'*

While there is a push for broadening the definition of consumer to include micro and small businesses, there are also arguments against this proposition, which will be considered now.

The first argument against expanding the definition of consumer is that it would impose an extra burden on suppliers.<sup>130</sup> In the practical world, suppliers or sellers treat all businesses alike. They do not know the size of their customers. By extending the consumer protection to micro and small businesses only, the suppliers will be compelled to draw a distinction between those businesses which must be treated as consumers and those that must not be. This will not only be burdensome, but a costly affair for the suppliers, who may themselves be small businesses.<sup>131</sup>

The second argument against widening the definition of consumer is that it would impose an extra burden on the State's financial resources. Broadening the scope of the consumer protection to include micro and small businesses would increase the number of persons/businesses using the services of consumer protection bodies, such as the Consumer Council of Fiji, which means that the government will need to allocate greater resources for the running of these consumer protection institutions. It is counter-argued that this increased expense of the government for the benefit of the micro and small businesses is not the government's loss but investment in MSEs. In the long run, adequately protected MSEs will mean better operating businesses, thus more employment opportunities, more business activity and increased economic growth.

A further argument against including micro and small businesses within the definition of consumer is that all businesses, whether small or not, must compete on an equal footing so

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<sup>129</sup> The Consumer Minister of UK, Jenny Willott also said that "[SMEs] are an essential part of our sustainable economic recovery and we should do all we can to support them in growing their business": <[www.fsb.org.uk](http://www.fsb.org.uk)>.

<sup>130</sup> Fletcher, Karatzas and Gallasch, above n 48, at 15.

<sup>131</sup> At 15.

no business should be given special treatment.<sup>132</sup> This is analogous to saying that all children, whether aged three or thirteen, need the same level of protection from their parents. This argument is flawed because businesses cannot be said to be competing on an equal footing when some businesses (usually the large ones) have the ability to make more effective purchasing decisions than the others, have more bargaining power enabling them to strike a better deal, are able to effectively seek remedies in case of breach of their rights and are generally more sophisticated. The competition should be amongst equals and it will be so, when the micro and small businesses, who are more vulnerable than the large businesses, are provided greater protection.

The last argument against widening the definition of consumer to include micro and small businesses is that businesses are protected by other laws such as the Sale of Goods Act.<sup>133</sup> It is actually suggested in the explanatory notes of the definition of consumer in the Consumer Rights Act 2015 of UK that if a sole trader was buying goods, he or she would have to look to the Sale of Goods Act for protections about the quality of the goods.<sup>134</sup> It is true that the Sale of Goods Act provides rules such as goods must correspond with the description, be of merchantable quality, be fit for their purpose and be the same quality as the sample.<sup>135</sup> These rules do protect the micro and small businesses to some extent but they are incapable of providing the level of protection that small businesses need. For instance, the consumer laws of Fiji establish the Consumer Council of Fiji and the Commerce Commission who are tasked with promoting the interests of the consumers and dealing with consumer complaints.<sup>136</sup> The Sale of Goods Act, on the other hand, does not provide for a cheap and effective dispute resolution mechanism, making it incredibly difficult for a sole trader, who does not have the financial and human resources to pursue litigation, to enforce his rights under the Act. The MSEs' resemblance with the consumers justify their inclusion in the definition of consumer despite the existence of other applicable laws.

## VII *Proposed Definition of 'Consumer'*

It is apparent from the preceding discussion that the definition of consumer in the various consumer protection statutes in Fiji must be broadened to bring the micro and small

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<sup>132</sup> John Goldring and others *Consumer Protection Law* (5th ed, The Federation Press, Sydney, 1998) at 27.

<sup>133</sup> Consumer Rights Act 2015 (UK) (explanatory notes).

<sup>134</sup> Above n 133.

<sup>135</sup> Sale of Goods Act [Cap 230], ss 15-17.

<sup>136</sup> See Consumer Council of Fiji Act and Commerce Commission Decree 2010.

businesses within the ambit of the consumer protection regime.

It is proposed that there should be a single definition of consumer for all consumer protection statutes as that will make its application and interpretation easier. The recommended definition of consumer should be adopted in the current Consumer Council of Fiji Act, Commerce Commission Decree 2010 and Consumer Credit Act. At present, there is no legislation or any legislative provisions with respect to unfair contract terms. If Fiji drafts an Unfair Contracts Terms Act or includes unfair contract terms provisions in one or more of the statutes, provisions extending those terms to micro and small businesses should be added as has been done by Australia in their ASIC Act and Competition and Consumer Act 2010. Alternatively, if Fiji implements the recommendations given in the Deshpande Report and adopts the new Consumer Protection Decree (which will consolidate a number of existing consumer protection legislation), the proposed definition should be adopted in the new Decree.

#### *A The New Definition*

(1) A consumer is:

- (a) a natural person who ordinarily acquires goods or services for personal, domestic or household use or consumption; or
- (b) a micro enterprise, as defined by the Small and Micro Enterprises Development Act 2002, who acquires goods or services for personal or any kind of business use; or
- (c) a small enterprise, as defined by the Small and Micro Enterprises Development Act 2002, who acquires goods or services for any purpose except for the goods acquired for the purpose of
  - (i) re-supplying; or
  - (ii) using them up or transforming them, in trade or commerce.

#### *B Explanation*

The proposed definition is explained below in greater detail for a better understanding.

### *1 Scope of the proposed definition*

The proposed definition of consumer is broad enough to include domestic consumers as well as micro and small businesses.

According to subsection (1)(a), all domestic consumers who purchase goods or services for their personal, domestic or household use will be treated as consumers. Everyone who was covered under the traditional definition of consumer will be covered by this provision.

According to subsection 1(b), a micro enterprise is treated as a consumer, regardless of the goods or services being bought for personal or business use. Thus, in practice, all purchases made by micro enterprises will be considered consumer transactions. The phrase “any kind of business use” refers to the use of goods or services for any kind of business purpose from consumption to re-sale or transforming for use in trade. However, a business must fall within the definition of micro enterprise as defined in the Small and Micro Enterprises Development Act 2002 of Fiji to be eligible for consumer level protection (the reason for this will be discussed in (2) below).

Subsection 1(c) includes small businesses in the consumer protection regime, albeit with limitations. With respect to small businesses, all purchases are not treated as consumer transactions. While purchases of goods or services for use in the business are treated as consumer transactions, goods acquired for the purpose of re-sale or for use in trade or commerce are excluded. The reason for this exclusion is that small businesses are not considered vulnerable when buying goods or services for their normal course of trade. For instance, a small business selling handicrafts will be protected by this definition when it buys a computer for use in the business but not when purchasing handicrafts for re-sale. The business operator is assumed to have adequate knowledge of handicrafts to make an informed decision as well as strong bargaining power to get the best deal for the business.

The medium-sized enterprises have been excluded from the definition of consumer because there is no concrete evidence to prove that they are also vulnerable. If any future survey reveals that medium-sized businesses are in a similar position to domestic consumers, the proposed definition could be amended by adding the phrase “or medium” after “small” in (1)(c). This will mean that the medium enterprises will be given the same level of consumer protection as the small businesses.

## 2 *Reference to the definitions of micro and small enterprise in Small and Micro Enterprises Development Act 2002*

The proposed definition of consumer makes reference to the definitions of micro and small enterprise in the Small and Micro Enterprises Development Act 2002. The main reason for this reference is to ensure that any business which is classified as a micro or a small enterprise under the Small and Micro Enterprises Development Act is also treated as such under the consumer law. Making direct references to micro enterprise and small enterprise ensures that consumer protection extends to the intended persons or businesses only.

However, reference to a part of another legislation may not be considered the best practice as it requires the reader to look for another piece of legislation. If this definition is unacceptable for this reason, the alternative approach is to define micro and small enterprise in every statute that contains the definition of consumer. The definition of consumer could then state: “a micro enterprise, as defined in this Act” or “a small enterprise, as defined in this Act”. However, this may not be a good solution as the definition of consumer is likely to be a part of a number of statutes, which means that these definitions will be unnecessarily repeated in different statutes.

Whatever approach is adopted, it is important that the current definitions of micro and small enterprise in the Small and Micro Enterprises Development Act are amended. They are defective as they require a business to have a certain turnover as well as a certain number of employees to be classified as either a micro or small enterprise. This has the effect of excluding those businesses who fail to satisfy the dual criteria for classification.

It is suggested that the definitions of micro and small business should contain “or” instead of “and” so that a business who fulfills one of the criteria is classified as a type of business. The amended definitions of micro and small enterprise should read as follows:

“micro enterprise” means any enterprise which has a turnover or total assets not exceeding \$30,000 *or* employs not more than 5 employees;

“small enterprise” means any enterprise which has a turnover or total assets between \$30,000 and \$100,000 *or* employs between 6 and 20 employees.

Finally, to maintain consistency in classifying businesses as micro or small enterprises, one definition of micro and small enterprise should be used in all statutes.

### 3 *The idea of the new definition of 'consumer'*

The idea of the new definition of consumer is partly taken from the definition of consumer in the Australian Consumer Law.<sup>137</sup> The Australian definition of a consumer includes a domestic consumer and any business which purchases goods or services worth \$40,000 or less.<sup>138</sup> However, it excludes all purchases of goods for re-supplying or for use in trade or commerce.<sup>139</sup>

The proposed definition does not make reference to a monetary limit to determine the consumer transactions as it is in the Australian definition (a monetary limit of \$40,000). There are two main reasons for not using a monetary limit to distinguish consumer transactions from business transactions.

Firstly, the use of a monetary limit in the definition of consumer causes unnecessary complication and confusion. The Australian definition of consumer refers to a monetary limit of \$40,000 and then sets out numerous rules for calculation of this amount.<sup>140</sup> These rules do not only make the interpretation of the definition more difficult, but make it almost impossible for a consumer to read and understand the law without seeking legal advice. The laws should be drafted in a manner that is easily understood by lay-man. In this regard, the new definition of consumer is straightforward, easy to comprehend and easy to apply.

Secondly, the monetary limit of as high as \$40,000 coupled with the exceptions of goods purchased for re-supplying or use in trade or commerce, seems to have unintended consequences. It tends to include within the definition of consumer, all purchases made by even large businesses.<sup>141</sup> For instance, a large business purchasing furniture worth \$35,000 for their new shop, will be treated as a consumer. On the other hand, a micro business purchasing goods worth \$5,000 for re-sale will be excluded. To avoid these discrepancies, and to ensure that it is only micro and small businesses that are given the consumer-level protection, the new definition of consumer makes references to micro and small business rather than the price of goods or services.

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<sup>137</sup> Competition and Consumer Act 2010, Schedule 2 (Australian Consumer Law) s 3.

<sup>138</sup> Section 3.

<sup>139</sup> Section 3(2).

<sup>140</sup> Competition and Consumer Act, Schedule 2 (Australian Consumer Law) s 3(4)-(9).

<sup>141</sup> Freilich, above n 116, at 119.



## *VIII Conclusion*

It is concluded that the definition of consumer in Fiji will be more appropriate and effective if it is expanded to include the micro and small businesses, who are just as vulnerable as domestic consumers when purchasing goods or services. It is proposed that while the micro businesses should always be treated as consumers, whether the purchase of goods is for business use or re-sale, small businesses should be accorded the consumer-level protection for the purchase of goods or services for use in the business only. The definition of consumer should be widened not only in general consumer law but in consumer credit law and unfair contract terms legislation too.

The extension of the traditional definition of consumer to MSEs in Fiji will not only benefit the smaller businesses but the overall economy. Better operational MSEs means more employment opportunities, more production and eventually increased economic growth.

This research paper has proposed a new definition of consumer based on the results produced by the 2009 survey by the NCSMED. However, there is a need for a nation-wide survey of businesses in Fiji so that latest data is available for analysis and decision-making. Information on the number of businesses of each type in Fiji, the activities they are engaged in, the number of people employed by each business group, the contribution of the MSEs to the economy and the difficulties faced by them in purchasing goods or services would be helpful. Using the survey results as evidence, a Bill to amend the consumer law in Fiji should be proposed at the earliest possible.

The economy is the sky, where the large businesses make up the moon and the micro and small businesses are the stars. The moon is outstanding but without the stars, the sky is incomplete and dull. An economy needs its micro and small businesses for the economic growth of the country. Thus, providing MSEs with favourable laws should be the government's priority, and more so when the country in question is a developing country.

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