

Submission by



to the

Ministry of Business, Innovation & Employment (MBIE)

on

**Protecting Businesses and Consumers from Unfair
Commercial Practices Discussion Paper**

25 February 2019

PO Box 1925
Wellington
Ph: 04 496 6562
Mob: 021 375 061

UNFAIR COMMERCIAL PRACTICES – SUBMISSION BY BUSINESSNZ¹

1.0 INTRODUCTION

- 1.1 BusinessNZ welcomes the opportunity to make a submission to the Ministry of Business, Innovation & Employment (MBIE) on the 'Protecting Businesses and Consumers from Unfair Commercial Practices' (referred to as 'the Discussion Paper').
- 1.2 We have on numerous occasions, going back as far as 2006, submitted on the issue of unfair commercial practices. Our view both then and now is that the success or otherwise of consultation is solely determined by clearly identifying the significant problem in need of government intervention.

RECOMMENDATIONS

1.3 It is recommended that:

- a) MBIE is cognisant of both the likely effect of any new regulations relating to unfair commercial practices and their wider implications for similar reviews currently taking place (p.5);**
- b) The Government first examine how existing regulations can be better enforced in order to deal with matters associated with extreme unfair business-to-business conduct (p.10);**
- c) MBIE recognises that without significant evidence of a widespread problem, BusinessNZ does not support the taking of any further steps in the matter of unfair business-to-consumer conduct (p.11);**
- d) The proposed prohibition of unconscionable conduct does not proceed (p.14);**
- e) Neither a prohibition against 'oppressive' conduct nor 'unfair commercial practices' is introduced (p.14);**
- f) That unfair contract term protections are not extended to businesses (p.14);**
- g) Notwithstanding our recommendations above, if one of the packages outlined was to proceed, package 1 should be given first consideration (p. 15);**
- h) The inclusion of small businesses in the definition of consumers receives no further consideration (p.15); and**
- i) The option to apply protections to contracts below a certain transaction value threshold does not proceed (p.16).**

2.0 BACKGROUND

2.0 BusinessNZ has never condoned illegal business actions, although in New Zealand, illegal activities requiring sanctions and penalties are generally minimal. International rankings show New Zealand as one of the least corrupt countries in the world and it has also been near the top of the international rankings as a country with few problematic issues - money laundering, unethical firm behaviour, organised crime and the like. Businesses whose illegal activities would attract the heavy arm of legislation are a very small minority.

¹ Background information on BusinessNZ is attached as Appendix One.

Back to the Future

- 2.1 BusinessNZ has frequently submitted on proposed changes to New Zealand's consumer laws. In particular, it has considered a number of proposed enforcement mechanisms, providing submissions to the Ministry of Consumer Affairs (referred to as 'the Ministry') on the Ministry's 2006 and 2010 discussion papers, as well as follow-up submissions on additional papers on unconscionability. BusinessNZ has also provided submissions on the subsequent Bills.
- 2.2 We believe reviewing legislation is part and parcel of what the Government should do to ensure efficiency and effectiveness, but that it should also ask itself whether there is a legitimate and overwhelming reason for change. It would be fair to say that addressing this issue has been a lengthy and frankly repetitive process and we have consistently made the point there must be clear evidence of a significant problem before any of the changes proposed are enacted. At no stage during the process – now lasting around 15 years – have we had any clear evidence yet despite this, issues apparently already dealt with have now resurfaced. This raises the obvious question - what has fundamentally changed? Despite the MBIE business survey (discussed further below), we remain perplexed as to why these same issues keep coming up when no problem has been clearly identified.

Initial thoughts on the discussion paper

- 2.3 Notwithstanding our broad concerns above, we would like to point out that of all the issues and discussion papers we have read, the current paper endeavours to provide a good understanding of the extent of the 'problem' and a process for gathering more information. It begins appropriately by asking the fundamental question essential to any investigation into the need for changed regulatory practices, namely, *'is there a problem?'* This small, yet key, question has usually been missing from past governments' issues papers and discussion documents.
- 2.4 Furthermore, we agree with a number of the statements in both the Discussion Paper and the two summary sheets, including *'we do not think it is the role of government to protect consumers from every transaction that they might ultimately regret'* and *'measures to protect individual businesses do not stop businesses from competing fairly with each other, or from negotiating firmly with their customers and suppliers'*. Any moves contrary to these would effectively be a road to ruin. Therefore we support MBIE's acknowledgement of such key aspects of standard market behaviour.
- 2.5 But although the Discussion Paper outlines some of the fundamentals of good policy practice, it is worthwhile reiterating what BusinessNZ believes is best policy practice's ideal pathway.
- 2.6 BusinessNZ would go even further with the Discussion Paper's line of questioning as it is crucial that policymakers take a step back and also ask a series of relevant questions. These include – but are not limited to:
 - Is there a problem *in New Zealand* with current consumer law (i.e. are there significant issues of 'market failure' which need to be addressed)?

- If there is a problem, is the problem significant?
- What are the costs and benefits (including unintended costs) of any of the proposed changes outlined in the document?
- What are the potential options for improving outcomes which don't impose significant costs (e.g. by educating market participants)?

2.7 In addition to the bullet points above, three broad issues need to be examined in detail, namely market failure, evidence of a sufficient problem, and the correct path for change (if any) to take.

Market Failure – a possible case for government intervention?

2.8 Before determining whether increased consumer law regulation and other interventions such as enforcement are justified as part of sound policy, it is first necessary to determine on what grounds government might decide to intervene.

2.9 Generally markets work best when left undisturbed by government interventions such as regulation/taxes/expenditures. However, in certain circumstances markets might not perform their functions efficiently possibly justifying government intervention. Therefore, the next issue to consider is does the evidence show a significant problem?

Does the evidence show a significant problem?

2.10 As will be pointed out in various parts of this submission, the Discussion Paper alludes to the fact that any moves towards regulatory outcomes are currently hard to justify as there is a lack of evidence of any significant problem.

2.11 Even if there are grounds for some significant changes to be made to consumer protection law in New Zealand, such changes need to be approached in a systematic way. This means any moves towards widespread government-led regulatory measures must start from the position of minimising distortion and any unintended consequences the intervention could produce.

The Correct Path of Action to Take

2.12 Instead of viewing government-led regulation as the first and only solution to any perceived problem, in BusinessNZ's 'Regulation Perspectives 2', we stipulate nine actions government could adopt to improve the quality of regulation in New Zealand. Of these, the following six actions clearly relate to the issues raised in the paper:

- a) *Define the Problem:* Require all proposals for regulation to include a clear analysis of the problem to be addressed.
- b) *Do a Cost Benefit Analysis:* Require all proposals for regulation to include a cost-benefit analysis by an independent agency that provides a service similar to that of the Productivity Commission.

² <http://www.businessnz.org.nz/file/1053/Regulation%20Perspectives.pdf>

- c) *Travel up the Pyramid*: Consider non-regulatory options first, moving 'up the pyramid' to generic light-handed options, with more stringent options to follow only if clearly warranted.
- d) *Keep it Generic, Light-Handed*: Give preference to light-handed generic regulation.
- e) *Regulate only when Required*: Introduce a new regulation only when justified by a clear case of significant – not minor – market failure.
- f) *Self-Regulation as a Goal, not a Pathway*: Self-regulation should not be introduced as a precursor to future government-imposed regulation; instead it should be allowed to stand on its merits.

We also take the view that the Government should always focus on the quality of regulation, not the quantity. Simply put, a policy to improve regulation is not just a numbers game but rather involves looking at each regulation on its own and making sure it has received adequate scrutiny prior to retention.

- 2.13 Of the six actions listed in 2.12 above, action (c) is a key step when regulatory decisions are made. BusinessNZ would strongly oppose any moves by the Government that automatically led to a 'tip' of the regulatory pyramid outcome. Instead, if action is found to be needed, a base-up approach should be taken.

3.0 STATUS QUO

- 3.0 We agree with chapter 2's opening point in that what is 'unfair' is highly subjective. However, New Zealand already has legislation and common law providing protection against unfair practices.
- 3.1 The chapter provides a useful summary of New Zealand's key protections against unfair practices as well as of current reviews relevant to 'unfair' commercial practices. From our perspective, these reviews outline a number of potentially significant changes which, if instigated, would represent a sizeable push towards increased regulatory settings/frameworks and a definite move up the regulatory pyramid.
- 3.2 Therefore, we would expect MBIE to be cognisant not only of the wider implications of any fresh attempts to deal with unfair commercial practices but also consider how the regulatory landscape would look if most of the various reviews' policy proposals were introduced. Collectively, their effect would be potentially disproportionate to the scale of the problem.

Recommendation: MBIE is cognisant of both the likely effect of any new regulations relating to unfair commercial practices and their wider implications for similar reviews currently taking place.

- 3.3 Looking beyond current 'unfair' practices' legislation, the Discussion Paper is in two parts, the first providing the opportunity to gather further evidence around the perceived problem, the second, giving an early indication of potential solutions. BusinessNZ wishes to outline our views on both these critical areas.

4.0 POTENTIAL ISSUES

Extent of the problem

- 4.0 As a first port of call to examine the extent of unfairness as experienced by individual businesses, we note the findings of a survey of predominantly small businesses conducted by MBIE in mid-2018.
- 4.1 Page 17 indicates the survey was opt-in and had 260 respondents of whom around 200 fully completed the survey. First, in principle, BusinessNZ supports the use of surveys to try and ascertain what issues might be affecting the business community. Therefore, we certainly support MBIE's intention to obtain data about the extent of the problem, and would certainly encourage such information gathering in the future.
- 4.2 We have two significant concerns with this survey and their likely flow-on effects for the consultation process as a whole. First, as mentioned above, the survey was opt-in. It is our understanding the survey was advertised through the business.govt.nz newsletter under the heading '*Is your relationship with suppliers and business customers fair and healthy?*' Therefore, it would automatically induce answers from those who believe they have, in some way, shape or form, a relationship problem with suppliers and business customers, rather than collecting a proper sample. Opt-in surveys operate outside the realm of inferential statistics, meaning there is no theoretical basis on which to conclude they produce valid and reliable estimates of broader public attitudes or behaviour.
- 4.3 Second, and in relation to the previous point, the results of the survey give an impression relationships with suppliers and business customers are in considerable trouble, with close to half of respondents (45%) indicating that in the past year they had been offered contract terms they considered unfair. This gives the impression around half the business community has experienced a problem but is plainly untrue. An issue of that magnitude would be front and centre across almost all business associations in New Zealand, and would be a key area for policy changes BusinessNZ would be seeking to discuss with officials.
- 4.4 We appreciate MBIE has not stated this is a robust and comprehensive survey (in fact we would even struggle to say it is indicative) and we also support MBIE's moves to ascertain further the extent of the problem by asking submitters for examples of such behaviour. And undoubtedly some submissions will provide examples. However, the key point, once any Discussion Paper submissions have been received, is the extent of the problem. Because the survey findings are used throughout the Discussion Paper, there is a perception the issue is much more significant than it is in reality.
- 4.5 And if there is insufficient evidence to make a compelling case, we would expect MBIE, as part of good policy practice, not to proceed with any of the options for reform.
- 4.6 The discussion paper outlines three issues associated with unfair commercial practices, which BusinessNZ would like to discuss.

Issue 1: Unfair Business-to-Business Contracts

- 4.7 In setting the scene, MBIE notes its focus is on prohibiting practices with an overall negative effect on New Zealand's economic performance, stating that '*at an economy-wide level, unfair commercial practices have the potential to ultimately result in lower levels of competition, innovation, and productivity across the economy, with corresponding negative impacts for consumers*'. In principle, BusinessNZ agrees. However, currently, no evidence shows a significant problem warranting change.

4.8 Following on from paragraphs 49-50 that deal with the survey findings in more detail, paragraph 53 states that *'nevertheless, the results outlined above indicated that a relatively high proportion of businesses have experienced what they consider to be unfair contract terms in the past year'*. BusinessNZ completely disagrees with that statement. The results have only provided more specifics for those businesses who in some way believe they have experienced 'unfair' terms. There is no way, due to the survey's methodological disadvantages outlined above, to conclude a high proportion of businesses across the country have experienced unfair contract terms in the last year.

Standard form contracts

4.9 Paragraphs 55-59 discuss the 'take it or leave it' approach of the standard form contracts used by parties with greater bargaining power. We agree such contracts can provide a number of benefits, particularly with regard to the time and resources otherwise needed for repeat transactions. We strongly concur with MBIE it would be infeasible and inefficient to prohibit the use of such contracts entirely.

4.10 However, the Discussion Paper outlines two of the disadvantages of standard form contracts which make it easier to include unfair contract terms, namely:

- The accepting party is likely to pay less attention to the detailed terms of the contract if not involved in drafting them, making it easier to 'hide' unfair terms; and
- The accepting party is less likely to challenge the terms of a contract if aware the contract is standardised.

From our perspective, the first disadvantage is more a matter of any business, of whatever size, not undertaking due diligence when presented with the contract. We can see how a standard form contract could end up not being challenged but proper due diligence to determine any potential pitfalls should be undertaken whether a contract is standardised contract or not.

4.11 We do not see the duplication and multiplication across entire industries of poorly drafted and unfair contract terms as a significant issue. The example given is an extreme one to say the least (the truck shop industry). Instead, we would expect a contract typical of a particular industry (if it were the tip of the iceberg) to indicate a need for industry-specific regulation.

4.12 Overall, we believe any intervention to deal with the prevalence of standard form contracts would most likely cause more harm than good to both businesses, and ultimately, consumers.

Small businesses' vulnerability to unfair contract terms

4.13 BusinessNZ certainly sympathises with the fact that the issue of unfair contract terms is likely to be more pressing for small businesses. However, the resourcing and powers available to smaller businesses across most of their day-to-day operations will almost always put them in an inferior position compared with larger businesses. That is simply the historic climate in which businesses compete. Beyond standard regulatory

compliance thresholds providing different reporting requirements etc. for small businesses, we would be concerned if steps were taken changing the regulatory frameworks for small and large business operations. MBIE should take care not to go down a path where a set of exemptions and laws favouring small businesses essentially provides a type of 'golden gate' preventing their growing into larger businesses.

- 4.14 Therefore, we are heartened by the fact that paragraph 64 points out that 86 percent of small businesses surveyed agreed they generally understood the terms and conditions contained in the contracts they entered into. Going back to the point above, if a small business believes a contract needs legal or financial advice regarding its terms and conditions, it is the responsibility of the business owner(s) to ensure the resources put into obtaining the advice are aligned with the contract's long-run financial worth.

Businesses' response and detriment to unfair contract terms

- 4.15 Taking into account inherent flaws with the survey findings, from our perspective it is actually encouraging to see that 45 percent of businesses asked for alterations or deletion of terms considered unfair while a further 16 percent decided (after we presume a period of due diligence) not to enter into the contract. Also, of those who asked for changes, nearly 50 percent had either all or some of their concerns addressed. To us, this highlights a typical business transaction process, where there is a degree of flexibility and consideration on both sides, rather than an overwhelming 'take it or leave it' approach. BusinessNZ would never expect such statistics to show almost complete concession by larger businesses. That is simply not reality. However, nor do the results show larger businesses inherently unmoved by smaller business concerns.
- 4.16 Also, clearly identifying any detrimental effects can be very difficult as it is often hard to differentiate between true unfair contract practices as opposed to terms with which a business may simply disagree or find not to its liking. This problem is highlighted in paragraph 67, which states that '*examples of this detriment offered by businesses included cash flow issues, increased costs, use of internal resources, reduced output and sales revenue, and reduced profitability*'. However, all these detriments would probably apply to most terms in any contract, whether considered fair or otherwise.
- 4.17 Likewise, the subjective nature of what is considered as 'unfair' also plays out with the list in paragraph 68. In fact, we would argue that the *(a) increase transaction costs, by requiring firms to spend more time doing 'due diligence' on contracts, or seek more legal advice* can actually have some long-term benefit both for the business in question and also for subsequent businesses that may receive a similar contract.
- 4.18 Last, it is obvious businesses that continually impose what are claimed to be 'unfair' contract terms will most likely lose their competitive advantage as other businesses will no longer be able to trust them. As is often the case, public notice of such conditions via the media often has a far more powerful effect than simply legislating across the board for the vast majority of contracts where no problems surface.

Sufficiency of current protections to address unfairness

- 4.19 The fact that the survey is opt-in means its more granular findings provide information on what can only be considered at this stage to be a very small proportion of the total business population. To MBIE's credit, the questions asked for those who did state some type of unfairness is fairly comprehensive, and shows a genuine attempt to dig beyond the initial view of whether part of a contract is considered unfair.
- 4.20 Despite our concerns above, we agree with the counterarguments outlined in paragraph 71, namely:
- a) There is some evidence that businesses are taking action in response to unfair contract terms, and have some success in addressing their concerns;
 - b) It is difficult to understand the impact that unfair contract terms have on the wider economy, as opposed to individual businesses; and
 - c) We want to ensure that businesses are not unduly limited in their ability to contract freely between themselves, and enter into pro-competitive, welfare-enhancing transactions.

Regarding point (a), we would add a further thought. A combination of the opt-in nature of the survey and the fact that 45% asked the business to alter or delete terms considered unfair while around a similar percentage was successful in getting at least some changes made, seems to be more on the side of the private sector sorting out its own issues, as opposed to a need for regulatory intervention.

Issue 2: Unfair Business-to-Business Conduct

- 4.21 Of all the issues raised in the Discussion Paper, BusinessNZ has more sympathy with businesses experiencing unfair business-to-business conduct. Paragraph 75 highlights conduct that on the face of it is certainly against the notion of goodwill between two parties. In particular, we are disappointed to see businesses facing demands over and above the terms agreed in their existing contract, suppliers or business customers not complying with the terms of an existing contract or dealing with firms that refused a supply a good or service, or to purchase a good or service.
- 4.22 Again, as pointed out above, we would be surprised if there were no examples of unfair conduct taking place in some shape or form across the business community. There will always be instances of conduct considered unfair, so it is crucial to differentiate between isolated cases and something more widespread and enduring.
- 4.23 Also, we believe it is important to be careful to understand exactly what can genuinely be considered unfair conduct. For instance, paragraph 76 mentions examples of poor levels of service, poor communication, price demands, late payments and price changes without warning. While one could argue that some of these fit within the notion of unfair conduct, there is also the view that these are either more on the side of general business relationship practices or simply poor business practice. Furthermore, we agree with the subsequent point raised in paragraph 77 that *"not all conduct that businesses perceive as unfair is necessarily problematic from a policy perspective"*. The nuance between reasonable negotiations and undue harassment or coercion outlined in that paragraph is a good example of how one person's view of unfair conduct can be part and parcel of another's business negotiations.

- 4.24 As to what this means for policy development, paragraphs 78 and 79 make the point that if such conduct is deemed grossly unfair it *'is already prohibited to come extent, or, in the case of breach of contract, subject to common law remedies'*. Therefore, while we agree with point (a) in paragraph 79 that the prevalence of this conduct suggests *'businesses are not complying with the law'*, we also accept the second point (point (b)) that *"the threshold at which a specific form of conduct is prohibited under the law is higher than the threshold at which some business feel aggrieved"* and so does not mean regulatory intervention is warranted.
- 4.25 As with the follow-on analysis done for unfair contract terms, we note the proactive way in which businesses that consider they have experienced unfair conduct have responded. In essence, of those that completed the MBIE survey, 4/10 have asked the 'offending' business to change its conduct, while 2/10 have ended their relationship. Again, while we would not expect such figures to indicate full closure due to the subjective nature of what is deemed to be 'unfair', they do show the private sector willing and able to undertake appropriate courses of action.
- 4.26 In principle, BusinessNZ agrees with the statement that *'we think there are sound economic reasons for prohibiting unfair business-to-business conduct, as well as broader 'fairness' justifications'*. We also agree with the point raised in paragraph 85 that that on balance, *'it could be argued that there are stronger justifications for protecting businesses against unfair conduct than unfair contracts'*. However, we think such conduct relates to specific key areas such as demands over and above the terms agreed to in an existing contract or not complying with the terms of an existing contract. Therefore, in reality, such conduct is most likely far more isolated and specific than an example of unfairness as others understand the term.
- 4.27 Given this stance, our initial view is that in considering subsequent government intervention, as a first step, travelling up the regulatory pyramid, discussions should involve how existing regulations can be better enforced, rather than be automatically focused on the need to introduce new regulations.

Recommendation: That the Government first examine how existing regulations can be better enforced to deal with matters associated with extreme unfair business-to-business conduct.

Issue 3: Unfair Business-to-Consumer Conduct

- 4.28 We believe the issue of unfair business-to-consumer conduct is perhaps the least well researched of the three broad issues outlined. While we have concerns about the methodology used for issues 1 and 2 above, the complete absence of any specific data on the extent to which consumers have experienced unfair conduct makes the threshold for any regulatory intervention here higher still.
- 4.29 The Commerce Commission has provided some examples on page 25 but we believe all these are extreme examples and would not be viewed as day-to-day instances of unfair conduct by businesses to consumers.
- 4.30 Paragraph 93 provides the results of MBIE's National Consumer Survey (2016) under the heading *'Consumers' response to unfair conduct'*. However, it acknowledges the problems experienced with goods or services are not necessarily synonymous with

unfair conduct. Nevertheless, from our perspective, the results show some success in resolving business-to-consumer problems at a broad level. Also, we agree with the Discussion Paper that problem resolution is most likely the consequence of dealing with 'reputable' traders.

- 4.31 Regarding the overriding question of whether current protections are sufficient to address unfair business-to-consumer conduct, we believe MBIE has provided a weak argument for further investigation, seemingly directed to extending protections against such conduct. Specifically, we have issues with the statement that '*the examples provided by the Commerce Commission staff suggest that there may nevertheless be some gap in existing protections*'. BusinessNZ would be very surprised if the original legislation has not left a gap and we believe there will continue to be a gap once any changes are made to address perceived concerns. The key question is whether there is currently a significant gap in this area needing further investigation. While fundamentally welcoming MBIE's attempt to gather more information, given the lack of evidence so far, BusinessNZ disagrees with the view further protections are required.

Recommendation: That MBIE recognises that without significant evidence of a widespread problem, BusinessNZ does not support the taking of any further steps in the matter of unfair business-to-consumer conduct.

5.0 OPTIONS FOR REFORM & OPTIONS PACKAGES

- 5.0 In general, we believe the Discussion Paper does a good job of trying to identify the pros and cons of each option considered by MBIE, particularly around the design issues that need to be explored. We also welcome the fact that a number of options are attached to each issue, indicating more than one pathway to policy development (including the recognition that the issues are not mutually exclusive). This is broadly the right approach for a Discussion Paper seeking feedback.
- 5.1 In considering any options as part of the package for reform, as mentioned in our background comments, BusinessNZ strongly adheres to the idea of *travelling up the regulatory pyramid*, that is, considering non-regulatory options first, moving up the pyramid to generic light-handed options and introducing more stringent measures only if clearly warranted.
- 5.2 There are two inevitable consequences from not taking the regulatory pyramid approach. First, putting aside the question of whether changes are required in the first place, no regulatory change should impose more cost on already compliant and best practice businesses in a sector but make little or no difference elsewhere. That would represent a fundamental policy failure given there would be little reward for significant harm.
- 5.3 Second, BusinessNZ is concerned any change could create a 'waterbed effect', with regulatory solutions in one area producing a different problem elsewhere. This effect is alluded to throughout the Discussion Paper, for example, where it considers whether regulations to minimise unfair conduct/contracts may also create increased costs for business, which in turn have flow-on effects for consumers.
- 5.4 Since the Discussion Paper has allocated time to identifying key aspects of policy development, we want to ensure potential changes are looked at in their entirety, taking into account where each sits on the regulatory pyramid model.

Matching evidence with action

- 5.5 Paragraph 102 makes a critical point that BusinessNZ believes is at the heart of our overall comments over the time the unfair conduct/contracts issue has been part of the policy process, namely *'All options are subject to establishing that there are sufficient issues at present to warrant government intervention'*. BusinessNZ cannot stress enough how important this point is so that any options for change are not predicated on marginal issues or problems that can be rectified in other ways.
- 5.6 Again, we are not totally opposed to the possibility of including provisions for unfair conduct or contract terms if there are significant reasons for doing so. However, BusinessNZ would want to see evidence of a clear problem in New Zealand before any consideration is given to the idea of making any change of this kind. Therefore, at this stage we favour the status quo that is, not talking up any proposed option.
- 5.7 Regarding evidence of unfair behaviour, we assume currently there is not enough to trigger the Discussion Paper's options. If this is correct, we would be interested to know at what point MBIE will have sufficient evidence to trigger a recommendation that one or more option should proceed. Given the discussion above, we would expect that trigger point to be reached after significant failures are highlighted, not just the handful examples cited, including offshore situations.

Option 1: Introduce a High-Level Protection Against Unfair Conduct

- 5.8 As mentioned in 4.21 above, BusinessNZ has greater sympathy with businesses experiencing unfair business-to-business conduct but whether this translates into the introduction of specific high-level protection provisions is another matter.
- 5.9 The discussion paper outlines three options for a specific prohibition against unfair conduct:
- Option 1A: A prohibition against unconscionable conduct.
 - Option 1B: A prohibition against conduct that is oppressive.
 - Option 1C: A prohibition against unfair commercial practices based on the approach taken by the European Union.
- 5.10 As paragraph 104 of the Discussion Paper points out, some of these options were previously considered by the Ministry of Consumer Affairs as part of the 2010-2015 consumer law reforms but ultimately not adopted. However, the first option involving a prohibition against unconscionable conduct has actually been examined by the Government going back as far as 2006. BusinessNZ submitted on proposed changes back then, and our concerns at that time are just as relevant today. In fact, we would go as far as to say that after what was actually something like a decade-long analysis of the issue, with no options adopted, we see no evidence of changes occurring that would again bring those options into the spotlight.

Option 1A: A Prohibition against Unconscionable Conduct

BusinessNZ's overall stance on unconscionable conduct

- 5.11 BusinessNZ strongly opposes conduct that is clearly unconscionable or unreasonable. However, we believe the issue of unconscionable conduct is similar to the fairness issue. Because the term unconscionable can be very emotive and open to wide interpretation, we view such behaviour as that which is clearly illegal under current legislation, such as actions contrary to FTA provisions. We believe trying to ascertain

whether the behaviour of one party can be deemed unfair or unreasonable is an extremely subjective exercise. Therefore, we do not support the factors to be taken into account to determine whether unconscionable conduct has taken place.

- 5.12 While the idea of introducing unconscionable conduct into New Zealand legislation has featured a number of times over the last 13 years, from our perspective it is telling that on no occasion has the proposal succeeded, be it from a consumer, SME or the wider business community perspective. At the very least, this indicates that the issue in New Zealand is nowhere near as severe compared with other countries. It also raises the question: if there is no significant degree of evidence of unconscionable conduct over all that time, what has recently changed for the matter to be considered yet again?
- 5.13 BusinessNZ has long held the view that a deal deemed to be unfair by one party is not an automatic indication of unconscionable conduct. Some factors that might be taken into account when ruling on unconscionable conduct could equally be due to 'the victim's' poor process. We believe all parties must be responsible for following best business practice when involved in business transactions. For instance, both parties of their own accord should ensure any documents involved in a business transaction are clearly understood. We also take the view that fundamental business practices such as the willingness to negotiate cannot be deemed insufficient or otherwise by an outside party because it is a core right of any business to determine the course that best meets its own interests.
- 5.14 Overall, we believe that as with unfair terms, introducing unconscionable conduct at either the consumer or business level has the potential to open a Pandora's Box of problems. Previous government papers have pointed out that although the notion of unconscionable conduct has been raised several times over a number of decades, unconscionable conduct can be very hard to prove and the associated amendments to the relevant legislation would have implications beyond the legislation itself.

Details of the discussion paper

- 5.15 The Discussion Paper alludes to the idea that the Australian model for unconscionable conduct has been relatively successful, and could be a possible model for New Zealand. Moreover, Australian case law could be used to reduce the possibility of uncertainty over the prohibition's boundaries. Again, we are concerned that an overreliance on Australia for answers shifts the focus away from establishing the exact situation in New Zealand.
- 5.16 Also, paragraph 161 points out that it could be argued *'that any firm acting fairly and responsibly should have little cause for concern that its conduct would fall foul of a prohibition against unconscionable conduct, and that any concerns about uncertainty should not be overstated given the relatively high threshold for the prohibition under any likely interpretation'*. This is in no way a legitimate reason to introduce such regulations. It is no different from saying that only the most extreme criminals will receive a death sentence, without arguing the merits of whether such punishment should be introduced in the first place.
- 5.17 As outlined above, problem definition is fundamentally key to the introduction of any regulation. While account must be taken of the need to set regulations at the correct level, we would be very concerned if justification for new regulations were focused on offshore case law and thresholds. Regarding the latter, it could also be argued that the regulation threshold would be set at such a high level it would rarely be triggered, creating questions as to why it was introduced in the first place.

5.18 Overall, given the term unconscionable conduct is extremely emotive, the lack of evidence of clear cases of such conduct and a general uncertainty as to the term's meaning, we find no significant merit in the Discussion Paper's proposal to introduce a prohibition.

Recommendation: That the proposed prohibition of unconscionable conduct does not proceed.

**Option 1B: A prohibition against conduct that is 'oppressive', and
Option 1C: A prohibition against 'unfair commercial practices' based on the approach taken by the European Union**

5.19 The paper also asks whether as an alternative to introducing the concept of unconscionability, the broader concept of 'oppression' might be introduced. Again, BusinessNZ would not support this move. While one could view 'oppression' as simply the other side of the coin compared to 'unconscionable conduct', paragraph 167 of the Discussion Paper rightly points out that 'oppression' not only leads to the same problems as unconscionability, but also lowers the threshold for triggering such a claim. Without a clear indication of the problem at hand, together with the uncertainty of what constitutes a reasonable standard of commercial practice, BusinessNZ does not support its inclusion.

5.20 Last, BusinessNZ would in no way support a prohibition against unfair commercial practices based on the European Union approach. The Discussion Paper provides a good summary of the complex and uncertain nature of this option, an option we view as the worst of all worlds in terms of the lack of clarity and the potential for wide-reaching unintended consequences as to its scope.

Recommendation: That neither a prohibition against 'oppressive' conduct nor 'unfair commercial practices' is introduced.

Option 2: Extend Unfair Contract Term Protections to Businesses

5.21 At this point BusinessNZ does not support the extension of unfair contract term protections to businesses. We appreciate the point made in paragraph 124 of the Discussion Paper that the threshold would arguably be higher than the threshold for unfair conduct so would not unduly undermine the ability of businesses to contract freely between themselves. However, without knowing the extent of the problem, we are not in a position to provide a definitive viewpoint on the level at which such provisions should be introduced.

Recommendation: That unfair contract term protections are not extended to businesses.

5.22 Apart from our primary view above, if such options proceeded, we note that paragraph 126 asks whether the 'grey list' that applies in respect to consumer contract terms should also apply to business contract terms, or whether it should in some way be different. Generally speaking, we would not have concerns about a list of business contract terms that were in some way different from consumer contract terms.

Options packages

- 5.23 As paragraph 144 of the Discussion Paper points out, *"there are a number of ways to combine the options outlined in Chapter 5"*. Chapter 6 outlines four potential packages, summarised in table 2 on pages 36/37.
- 5.24 Notwithstanding BusinessNZ's overall views above, if a package was to proceed we would again take the lead from a regulatory pyramid model perspective, which would generally place package 1 as the option that would cause the least amount of potential harm going forward. In contrast, we would view package 4 as the least preferred and having the most potential for unintended consequences on the New Zealand economy.

Recommendation: That notwithstanding our recommendations above, if one of the packages outlined was to proceed, package 1 should be given first consideration.

Other points

Guidance Material

- 5.25 If one or more of these options are to proceed, BusinessNZ strongly agrees with the point made in paragraph 110 of the Discussion Paper that a prohibition should be accompanied by legislative guidance as to what is unfair. The introduction of any such option would undoubtedly create a high degree of uncertainty for the business community. Therefore, guidance through lists and examples might at least partly help mitigate some of the uncertainty.

Who should be protected?

- 5.26 BusinessNZ is opposed to the notion of applying option 2 to a subset of businesses, namely smaller businesses that meet a yet-to-be-determined set of criteria.
- 5.27 As we discussed in paragraph 4.13 above, our primary concern is that if this were to happen, the outcome would be two sets of laws for business, one for small, the other for large. This could confuse and muddy the regulatory arena for many businesses and tilt the playing field in favour of one type of business structure over another, hence stifling competition.
- 5.28 Overall, we see this as a step to create different business rules which in the long run, would undoubtedly cause more problems than it solved.

Recommendation: That the inclusion of small businesses in the definition of consumers receives no further consideration.

Which transactions should be protected?

- 5.29 The Discussion Paper outlines the option of applying the proposed protections only to contracts below a certain transaction value threshold, which could be applied as an alternative to, or in addition to, a limit on the size of the business protected. Given the wide variety of contracts undertaken for various purposes, fundamentally we do not believe having a transaction value threshold makes sense. Putting aside the subjective nature of trying to come up with what the threshold's monetary value should be, a particular monetary value would mean different things to different

businesses. For instance, a \$25,000 contract might cripple one business if it did not proceed, but have little effect on another business.

5.30 Also, any arbitrary rule regarding a specific threshold will always lead to winners and losers, and in some cases create a threshold mark in the eyes of both parties when signing a contract, rather than consideration towards reflecting a true market value.

Recommendation: That the option to apply protections to contracts below a certain transaction value threshold does not proceed.

Appendix One - Background information on BusinessNZ



BusinessNZ is New Zealand's largest business advocacy body, representing:

- Regional business groups [EMA](#), [Business Central](#), [Canterbury Employers' Chamber of Commerce](#), and [Employers Otago Southland](#)
- [Major Companies Group](#) of New Zealand's largest businesses
- [Gold Group](#) of medium sized businesses
- [Affiliated Industries Group](#) of national industry associations
- [ExportNZ](#) representing New Zealand exporting enterprises
- [ManufacturingNZ](#) representing New Zealand manufacturing enterprises
- [Sustainable Business Council](#) of enterprises leading sustainable business practice
- [BusinessNZ Energy Council](#) of enterprises leading sustainable energy production and use
- [Buy NZ Made](#) representing producers, retailers and consumers of New Zealand-made goods

BusinessNZ is able to tap into the views of over 76,000 employers and businesses, ranging from the smallest to the largest and reflecting the make-up of the New Zealand economy.

In addition to advocacy and services for enterprise, BusinessNZ contributes to Government, tripartite working parties and international bodies including the International Labour Organisation ([ILO](#)), the International Organisation of Employers ([IOE](#)) and the Business and Industry Advisory Council ([BIAC](#)) to the Organisation for Economic Cooperation and Development ([OECD](#)).

Please note that the Road Transport Forum (RTF), who is a member of BusinessNZ's Affiliated Industry Group, takes a different stance to BusinessNZ, and will be providing their own submission.