



PROTECTING BUSINESSES FROM UNFAIR COMMERCIAL PRACTICES



→ INTRODUCTION

The government is considering whether the protections for businesses against unfair commercial practices should be strengthened and we want to hear from you.

Submissions are due by 9am on 25 February 2019. You can email us your views via competition.policy@mbie.govt.nz

Please note that we intend to upload submissions to our website, and submissions will be subject to the Official Information Act 1982. If your submission contains information that is confidential or you otherwise do not want it to be published, please let us know.

WHAT ARE UNFAIR COMMERCIAL PRACTICES?

What is 'unfair' is highly subjective. However, it can broadly be grouped into two categories:

- **Unfair contract terms** may include contract terms which shift risk from one party to another, make it difficult for a party to terminate a contract, or are otherwise very one-sided.
- **Unfair conduct**, which relates to things other than a contract itself. This may include businesses using pressure tactics, deceptive conduct, or the way in which a contract is enforced.

Unfair commercial practices are a problem because they can:

- Reduce the extent to which businesses trust each other
- Increase costs for businesses
- Restrict competition across the economy
- Make it harder for businesses to grow and thrive.

Because of this, there are already laws that protect consumers from a range of unfair practices. For example:

- the Fair Trading Act prohibits harassment, coercion, and misleading and deceptive conduct
- the Commerce Act prohibits anti-competitive agreements and mergers, and other anti-competitive conduct by powerful firms.

However, we do not think it is the role of government to protect businesses from every transaction that they might ultimately regret. We also want to make sure that measures to protect individual businesses do not stop businesses from competing fairly with each other, or from negotiating firmly with their customers and suppliers.

IS THERE A PROBLEM?

We surveyed a range of (mostly small) businesses in June 2018 to find out about whether their relationships with their suppliers and businesses were fair and healthy.

Despite the existing laws around unfair commercial conduct, a significant proportion of businesses reported experiencing unfair conduct or contract terms. In particular:

- 45 per cent of businesses reported being offered contracts that they considered contained 'unfair' terms in the past year. These included terms that limited the liability of one party, terms that allowed one party to unilaterally vary the contract, and extended payment terms.
- 47 per cent felt that they had otherwise been treated unfairly. The most common complaints were businesses not complying with an existing contract, misleading or deceptive behaviour, and businesses making demands over and above what was agreed in a contract.

Many of these businesses reported being negatively affected by these practices. This included cash flow issues, increased costs, reduced sales, reputational damage, disrupted supply, wasted time, and increased stress. While not all of these concerns will need a response from government, we think that these results indicate that there might be a gap in the protections available to businesses, particularly small ones.

Question 1:

Have you been offered an 'unfair' contract or otherwise been treated unfairly by a supplier or business customer in the last few years? If so, please tell us what happened.

OPTIONS TO ADDRESS UNFAIR COMMERCIAL PRACTICES

If additional protections are needed, we think there are two main options to increase the protections for businesses against unfair contract terms and unfair conduct. These options are not mutually exclusive; both options could ultimately be selected.

Option 1: Protect businesses from unfair conduct

There are various ways that a protection could be designed, including prohibiting conduct that is 'unconscionable' (based on Australian law), 'oppressive' (based on consumer credit law); or 'unfair' (based on European law). Regardless of the exact wording, the basic effect of the protections would be to target the worst conduct by businesses towards other businesses. They would be unlikely to affect everyday interactions and transactions between businesses.

Overseas, the protections have been used in relation to, for example:

- A supermarket which failed to pay agreed prices to suppliers, made persistent demands for additional payments from suppliers, imposed penalties that were not previously negotiated, and threatened to remove products from shelves.
- An online business directory which pressured and misled businesses into entering contracts, refused to cancel contracts which customers did not intend to enter into, and harassed staff by chasing debts that didn't exist.

Question 2:

Should the government introduce additional protections for businesses against unfair conduct? Why/why not?

Option 2: Protect businesses from unfair contract terms

This option would mean that in standard form ('take it or leave it'-style) contracts, businesses would not be able to include terms that:

- would cause a significant imbalance in the parties' rights and obligations arising under the contract;
- are not reasonably necessary; and
- would cause detriment if they were enforced.

These protections would not apply to the main subject matter or upfront price of the contract.

Introducing these protections would impact on a wide range of business contracts and there could be some costs for businesses in reviewing and amending their contracts. However, because the protections would not apply to the main subject matter of the contract, the upfront price, or terms that are reasonably necessary, we do not think that they would significantly restrict the types of arrangements that businesses are able to enter into with each other.

Overseas, the protections have been used in relation to, for example:

- A potato wholesaler which entered into exclusive supply contracts with potato farmers for a specified volume of fresh potatoes each season. These contracts were entered into at the time of planting, but the wholesaler did not determine the price it would pay until the potatoes were ready for harvest. The contracts allowed the wholesaler to unilaterally determine the price it pays farmers for potatoes, and allowed the declaration of potatoes as "wastage" without proper review.
- Contracts for office space that were automatically renewed unless the customer opted out, allowed the provider to unilaterally increase the contract price or terminate contracts, unreasonably limited the provider's liability, and permitted the provider to keep a customer's security deposit if a customer failed to request its return.
- An ATM provider whose contracts with small businesses included automatic renewal for six years, long minimum notice periods for cancellation, unilateral fee increases, and first right of refusal should businesses seek to change providers at the contract's conclusion.

Question 3:

Should the government introduce protections for businesses against unfair contract terms? Why/why not?

Design of the protections

If either of the above options is introduced, decisions will need to be made about:

- whether the protections should apply to all businesses, or small businesses only (and if so, what counts as "small");
- whether the protections should only apply to transactions below a certain monetary threshold; and
- how any new protections will be enforced, and the penalties for breaching the law.

Question 4:

If new protections are introduced, do you have any views about how the protections are designed?