

Protecting businesses and consumers from unfair commercial practices

Responses to discussion paper questions

Your submission may respond to any or all of the questions from the discussion paper. There is an additional box at the end for any other comments you may wish to make.

Text boxes will expand as you complete them.

Issue 1: Unfair business-to-business contracts

1 What types of unfair business-to-business contract terms are you aware of, if any? How common are these?

Business-to-business contracts may be significantly favourable to one party and to the disadvantage of the other. An example is termination clauses: one party may have “without cause” termination rights whereas the other party may have very limited rights and potentially be locked in for several years.

Whether this is “unfair” or not depends on the circumstances: if the contract has been negotiated and there is equality of bargaining power then it can be presumed to be a consensual arrangement and should not be regarded as unfair; if, on the other hand, the contract has not been negotiated (e.g. because it is one party’s standard form) or there is some other aggravating factor (e.g. inequality of bargaining power), then the contract should be capable of being found to be unfair.

2 What impact, if any, do these unfair contract terms have?

Such contract terms have similar effects to the effects in the consumer space (e.g. a party locked into a contract purely for the other party’s commercial benefit).

3 Is government intervention to address unfair business-to-business contract terms justified? Why/why not?

Yes – in the circumstances identified above.

Issue 2: Unfair business-to-business conduct

4 What types of unfair business-to-business conduct are you aware of, if any? How common is this type of conduct?

Please refer to Issue 1 above.

5 What impact, if any, does this conduct have?

6 Is government intervention to address unfair business-to-business conduct beyond existing legislative protections justified? Why/why not?

Issue 3: Unfair business-to-consumer conduct

7 What types of unfair business-to-consumer conduct are you aware of, if any? How common is this type of conduct?

8 What impact, if any, does this conduct have?

9 Is government intervention to address unfair business-to-consumer conduct beyond existing legislative protections justified? Why/why not?

Objectives

10 Do you agree with our proposed high-level objectives and criteria for assessing any potential changes to the regulatory framework governing unfair practices? If not, why not?

Option 1: Introduce a high-level protection against unfair conduct

11 Should a high-level prohibition against unfair conduct be introduced? Why/why not?

It seems appropriate that, in the most egregious cases, a high-level prohibition should be in place. As we have already noted, however, this needs to be balanced, especially in relation to business-to-business arrangements, and particularly those where the parties are large corporate entities that can determine whether what may appear to be an “unfair” term is worth accepting for other trade-offs.

12 What are the advantages and disadvantages of Options 1A, 1B, and 1C (Refer to Annex 1 for more information)? Which option, if any, do you support?

It would make sense to align with the Australian approach, given our single economic market. Consequently, Option 1A seems the most sensible approach.

13 If unconscionable conduct were prohibited (Option 1A), should a definition of unconscionability be included in statute, and if so, how should it be defined?

Unless it can be shown that the Australian law is deficient, a definition is unnecessary (as per Schedule 2, clause 20 of the Competition and Consumer Act 2010, which interprets unconscionable as “the meaning of the unwritten law”).

14 Is it appropriate to require businesses to act in good faith (as per Option 1C – see Annex 1)? Are there situations in which doing so could have negative economic outcomes?

There is a risk in introducing a broad requirement of “good faith” across the economy, imposing a duty to require businesses to act in good faith in all instances. Given the inherent subjectivity of a concept of “good faith”, even if defined, uncertainty about the scope of such a duty could result until case law provides guidance. The imposition of a positive obligation on businesses to act with professional diligence in all cases could hinder the ability of commercial parties with similar levels of bargaining power (and similar levels of knowledge about the transaction or who can make enquiries about the transaction) from negotiating contractual arrangements.

15 Are there any other variations on Option 1 that we should consider?

16 If a version of Option 1 is selected, should it also extend to matters relating to the contract itself?

17 Should any protection against unfair conduct apply to consumers only, consumers and some businesses (and if so, which ones?), or all consumers and businesses?

This depends on which Option could be introduced to provide protection against unfair conduct. As outlined above in response to question 14, Option 1C may hinder the ability of commercial parties from negotiating contractual arrangements.

Option 2: Extend unfair contract terms protections to businesses

18 If the UCT protections are extended to businesses, do you agree that the current consumer UCT provisions should be carried over without major changes? If not, why not?

19 If the UCT protections are extended to businesses, should the FTA’s ‘grey list’ for consumer UCTs be carried over ‘as is’? Are there any existing examples of unfair terms that should be removed from the list, or any new examples that should be added?

20 Should the protections against UCTs apply to consumers only (as at present), consumers and some businesses (and if so, which ones?), or all consumers and businesses?

The extension of the current UCT protections in the FTA to business to business contracts (as set out on pages 12-14 of the Discussion Paper) needs to be carefully considered to ensure that the ability of businesses to contract freely between themselves is not unduly impeded.

We note that MBIE has stated that it does not see a strong case for protecting larger, better resourced businesses from unfair contract terms without there being an element of unfair conduct. Larger businesses may in some circumstances have no choice but to enter into standard form contracts with suppliers where there is only one or only a small number of suppliers providing such goods or services (particularly where the goods or services are specialised or limited). In instances where there is extreme asymmetry of negotiating power, it may be appropriate for even large business to be protected from such terms. An example would be information service providers who mandate gratuitous indemnity provisions even though the maximum conceivable risk from use of their services is negligible.

21 If the protections against UCTs are extended to businesses, should a transaction value threshold be introduced, above which the protections do not apply? If so, what should the threshold be?

If businesses are unable to negotiate changes to standard form contracts, then the imposition of a transaction value threshold would only afford protection to businesses where the contract related to goods or services above a certain amount. This would not address the situation where businesses had no choice but to enter into arrangements with a supplier in circumstances where there were limited suppliers of such goods or services in NZ and such goods or services were essential to the business. The value of such an arrangement may not be high in dollar terms but the effect of UCTs could have a significant impact on that business.

22 Should there be penalties for breaching any new provisions regarding UCTs, and should there be civil remedies available, even if unfair terms have not previously been declared by a court to be unfair? How should any penalties and remedies be designed?

Other options

23 Are there other options to address unfair conduct or unfair contracts that we should consider? If so, what are these?

Options packages

24 Do you have a preferred options package? If so, which is your preferred package, and why?

Impact analysis

25 Do you agree with our assessment of the impact of each package against the criteria? If not, why not? Do you have any further evidence on the costs and benefits of this option?

Other comments

26 Do you have any other comments?

Consideration of the outcome of the evaluation of the effectiveness of the unfair contract term provisions applying to consumer contracts must take place before any regulatory response to protecting businesses from unfair commercial practices is to be finalised. A separate worthwhile activity would be to consider the current regime that is in place for business to consumer dealings vs any proposed regime for business to business commercial practices. This will facilitate alignment between the regimes for business to consumer and business to business contractual arrangements.