

SUBMISSION

Unfair Commercial Practices Discussion Paper: Submission by Commerce Commission

1. The Commerce Commission (the **Commission**) appreciates the opportunity to make a submission on the Ministry of Business, Innovation & Employment's (**MBIE**) December 2018 Discussion Paper *Protecting businesses and consumers from unfair commercial practices*.
2. This submission is structured into two main parts in support of Options Package 4, adopting Option 1A for both businesses and consumers:
 - 2.1 Part 1: We support a statutory prohibition against unfair commercial conduct and more particularly, Option 1A, a prohibition against unconscionable conduct based on Australian law; and
 - 2.2 Part 2: We support extending to businesses the Fair Trading Act's (**FTA**) current protections relating to unfair contract terms in standard form consumer contracts (**UCTs**). We also submit that prohibitions against UCTs should be privately enforceable and that sanctions and remedies should be made available, in addition to declarations.
3. We consider that these reforms may better align New Zealand consumer protection laws with those currently applying in Australia. However, we also note that both areas of law are presently under review in Australia (and New Zealand in the case of UCTs). In that context, it is relevant for MBIE to monitor developments and, in the longer term, consider whether the work undertaken in Australia warrants further examination of the applicable law in New Zealand.

Summary of Part 1: Unfair Conduct submissions

4. In summary, our submissions in **Part 1** are:
 - 4.1 We support the enactment of a prohibition against unfair conduct, and we supply examples where such a protection may supplement the current law.
 - 4.2 We support such a protection being expressed as a prohibition against "unconscionable conduct", consistent with Australian consumer law.
 - 4.3 The prohibition should apply generally to all traders, and be enforceable by any person including businesses, regardless of the value of the transaction or the size of the business. We expect that proper consideration of the range of relevant factors relied on in Australia when assessing whether conduct is unconscionable would provide a sufficient basis for the application of the prohibition.

- 4.4 Breach of the prohibition should be a criminal offence, as with most other breaches of the provisions of the FTA. Consistent with the existing legislative framework provided by the FTA, breach should expose the trader to criminal penalties, as well as to civil remedies available under the FTA (compensatory and injunctive).

Summary of Part 2: UCT submissions

5. We support MBIE's consideration of a protection against unfair conduct alongside reconsideration of the role, scope and efficacy of the current UCT provisions. Amendment to the UCT protections would provide better and more complete protection for private and business consumers, particularly when combined with a prohibition against unconscionable conduct.
6. In summary, our submissions in **Part 2** are that:
- 6.1 The UCT protection should be extended to also protect businesses, of any size, where an inequality of bargaining position exists.
- 6.2 The UCT protection should be amended to allow private enforcement by affected consumers (including, as above, business consumers).
- 6.3 Breach of the UCT prohibition should give rise to criminal sanctions, as well as to the other FTA civil remedies. In our view, declarations alone are unlikely to operate as an effective deterrent, and do not assist affected consumers where UCTs have caused harm before being declared unfair and/or removed from contracts.
- 6.4 We do not support extending the protection only to 'small' businesses, nor defining such businesses with reference to metrics such as number of employees or turnover. In our view, imbalance in negotiating power is a sufficient test for the application of the prohibition. The protection may apply where there is a material disparity in bargaining position such that one business is able to exert and impose unfair terms of trade on another.

Part 1: Commission supports enacting protection against unfair conduct

7. We support the enactment of a statutory prohibition against unfair commercial conduct in both business to business and business to consumer contexts. We agree with the Discussion Paper that what may be considered 'unfair' conduct is largely subjective and not all conduct that is considered to be 'unfair' necessarily will be harmful to consumers or the economy. In this submission we use the term 'unfair conduct' to refer to that conduct which may be considered both unfair and harmful – conduct falling within the second category referred to in Figure 1 of the Discussion Paper.
8. We also agree that existing legislation and common law provide a range of protections against practices that could be perceived as unfair. However, we consider that some unfair conduct is not currently captured by those laws. We discuss this further below.

Limitations of Part 1 of the FTA “Unfair Conduct”

9. The Commission has made extensive use over the last 30 years of Part 1 of the FTA to address “unfair conduct” (the name of that Part of the FTA). However, aside from recent specific additions to Part 1,¹ our key tool for addressing commercial unfairness has necessarily been the enforcement of prohibitions against “misleading and deceptive conduct”.²

10. The misleading and deceptive conduct provisions are drafted so as to be generally applicable to a range of conduct. For example:

SECTION 9 MISLEADING AND DECEPTIVE CONDUCT GENERALLY³

9 No person shall, in trade, engage in conduct that is misleading or deceptive or is likely to mislead or deceive.

SECTION 10 MISLEADING CONDUCT IN RELATION TO GOODS

10 No person shall, in trade, engage in conduct that is liable to mislead the public as to the nature, manufacturing process, characteristics, suitability for a purpose, or quantity of goods.

11. Provisions relating to coercion and harassment are directed to very specific types of conduct including a course of repeated conduct in the case of harassment and unlawful threats in the case of coercion. The prohibition against UCTs focuses on contractual terms and not conduct surrounding the entry into, or enforcement of, the contract. Other protections provided by consumer credit and consumer guarantees laws are also very specific in their application to features of consumer credit contracts and supplied goods and services.

12. Accordingly, we consider that some unfair conduct is not actionable under existing consumer protection laws and relevant common law (in any event, noting that the Commission is unable to enforce the common law). Some examples follow. These tend to be matters in which either:

12.1 We can challenge some conduct under the FTA but other related unfair conduct does not infringe the FTA and can not be the subject of enforcement action; or

12.2 Some cases cannot proceed at all because, while the conduct complained of may be unfair conduct, there is no actionable misrepresentation, misleading conduct, or other breach of the FTA (or of contract law which could be pursued privately).

13. We agree that many such cases involve the targeting of vulnerable consumers, use of pressure sales tactics, or enforcement of a contract or legal right in a harsh manner. The inability to pursue conduct of this nature can have implications for the size of

¹ Specific recent additions have included prohibitions against unsubstantiated representations (2014 in force) and UCTs (2015 in force.)

² Primarily ss 9-12 and 13.

³ Note that breach of s9 is not a criminal offence.

any penalty, for the ability to provide remedies to affected consumers and for deterring other businesses from engaging in similar unfair conduct.

Examples of Court cases where unfairness could not be pleaded

14. Following are examples of some Court cases in which we challenged misrepresentations, but we might have been able to take action in relation to other conduct under a prohibition against unfair conduct.
15. In *Commerce Commission v Haven Property Investments Limited*⁴ (2011) we brought criminal proceedings under section 14 (1) (b) of the FTA (alleging false representations and other misleading conduct in relation to land) against the promoter of 'rent to own' property schemes in which vulnerable consumers were misled into thinking they were buying properties. In fact, the schemes granted a right to occupy the property under a 30-year instalment agreement. These did not give the occupier legal ownership of the property until the end of the 30-year period. The Judge commented when sentencing the promoter and his companies:

By encouraging vulnerable people in the mistaken belief that they were acquiring home ownership rather than a package of rights and obligations which, on any view, fell far short of that concept, folk were lured into commitments which were a recipe for disasters in which they lost everything they had put into the property they were seeking to acquire – indeed were given to understand they had acquired.
16. Judge L H Moore also commented that the offending contained strong elements of cynicism and the calculated exploitation of people. In this case, it may have been possible to challenge additional aspects of the marketing and contract terms under a provision more broadly prohibiting unfair conduct.
17. More recently, in the *Budget Loans* litigation, which is ongoing, we brought proceedings alleging that Budget Loans and Evolution Finance had misrepresented their rights to repossess debtors' personal effects, and the amounts that debtors owed to these creditors. Justice Simon Moore held, when dismissing the companies' appeal against sentence,⁵ that the companies had given to debt collectors "cynical and extortive" instructions and commented on "how far the companies were prepared to go to extract funds from debtors using repossession as an incentive."
18. However, not all of the companies' conduct was actionable under the current FTA. For example - using examples cited in Court but not forming the basis of charges – there was no misrepresentation when the companies repossessed and dumped personal effects that they knew to be of little or no value. The purpose of the repossessions was not the lawful purpose of defraying the borrower's unpaid debt, but rather, as Justice Moore recorded, the purpose was to send a message to the borrower to pay.

⁴ *Commerce Commission v Haven Property Investments Ltd* DC Auckland CRN-07004501617, 13 October 2011.

⁵ In the District Court the companies were fined \$720,000 and ordered to pay reparations of \$109,000: *Commerce Commission v Budget Loans Ltd* [2018] NZDC 11202.

19. Other cases involving an actionable misrepresentation and/or allegations of unfair contract terms also include an 'upfront price' or 'main subject matter of a contract' that might be considered unfair. These features of the contract, where they appear in standard form consumer contracts, can not be scrutinised because they expressly can not qualify as unfair contract terms. Additionally, the UCT provisions apply only to standard form consumer contracts. Therefore, we agree that a prohibition against unfair conduct could be usefully extended to include the substance of the contract such as price and its main subject matter, as well as aspects of pre-contractual conduct or the contractual arrangements as a whole. We note that the Discussion paper raises this as an aspect of Option 1A.
20. As a final example of a case involving conduct that could fall within the scope of a prohibition against unfair conduct, we prosecuted *Auckland Academy of Learning*⁶ (2017) for misrepresentations made in the course of free 'educational assessments' conducted in consumers' homes while selling educational software. However, the prosecution could not address the sales strategy used by the company, which in sentencing, Judge N J Sainsbury described as "cynical marketing, attacking people who are vulnerable because of their natural concern for their children.... A common theme...is how guilty parents felt that they were somehow failing their children. That they needed to buy this product to somehow make up for that."

Examples where Court action has not been taken

21. In some cases, the trader may have engaged in unfair conduct, but no enforcement action could be taken under existing law.
22. For example, we receive complaints that the sale of over-priced consumer goods by mobile traders is unfair. We are aware of robot vacuum cleaners being advertised for sale at \$2,000, yet available elsewhere for \$100. Another example is a smart-watch advertised at \$499 and available for \$12 elsewhere. A further example is a pair of virtual-reality glasses advertised at \$300 and available elsewhere for \$20.
23. Last year, the Salvation Army gave the example of a mobile trader who was visiting a mental health unit and "signing up nearly all of the clients to some dodgy phone contracts and playstation contracts."⁷
24. As noted above, price expressly can not constitute an unfair contract term under the applicable FTA provision. Often, no consumer credit breach or misrepresentation can be identified in these cases. Traders may not have breached the coercion or harassment provisions of the FTA when selling relevant goods. Nevertheless, their conduct may be unfair conduct because it involves:
 - 24.1 Vulnerable consumers who may be lacking in understanding, options or who are desperate;

⁶ *Commerce Commission v Auckland Academy of Learning Ltd* [2017] NZDC 27148.

⁷ Stuff article 14 June 2018 <https://www.stuff.co.nz/business/money/104655221/theres-just-too-many-dodgy-shady-bloodsucking-leech-businesses-out-there>

- 24.2 Unequal bargaining positions;
 - 24.3 Visiting consumers without easy access to transport and alternative suppliers;
 - 24.4 Exaggerated pricing that is considerably outside the usual commercial range; and/or
 - 24.5 Pressure-selling or opportunistic behaviour.
25. We are also aware of pressure-selling in public settings that is not captured by the existing provisions of the FTA but is nevertheless considered by many to be unfair conduct.
26. The door-to-door selling restrictions in the FTA⁸ apply only where the trader has visited the consumer's home or workplace to make a sale. The restrictions contain important protections for consumers, such as requirements for the trader to communicate specific information and to allow the consumer a 'cooling-off period' within which to cancel the deal.
27. However, we are aware of similar pressure-sales being made in public – where no such protections apply, and where the trader may not have made misrepresentations:
- 27.1 We received complaints about a trader using aggressive sales tactics in shopping malls to sell unusually expensive skincare products, including to vulnerable consumers. The Commission received 44 complaints about the trader in the period between March 2012 and May 2015. Complaints included lack of price labels, misrepresentations of the country of origin, and the use of intimidation and bullying tactics by sales representatives. Sales representatives focussed on vulnerable people, with the majority of complaints to us being made by the elderly, people in a difficult financial situation, those suffering mental distress or mental disorders such as autism. Many complaints were brought by friends and family of the consumers, who often were embarrassed that they had succumbed to the salespeople's peer pressure. Complainants described their experience as "being accosted", "harassment" and "distressing".
 - 27.2 The Australian Competition & Consumer Commission (**ACCC**) succeeded in a case in which it alleged unconscionable conduct against a trader known as Lifestyle Photographers.⁹ The ACCC had pleaded that the business used unfair tactics and undue pressure to sell its photographs, and had targeted vulnerable consumers, charging them up to A\$9,900 for the products. We also received complaints that this trader was approaching young families in malls to buy photographs of their children, without telling them the total cost upfront, and imposing significant cancellation fees once a contract had been

⁸ Part 4A subpart 2.

⁹ *Australian Competition and Consumer Commission v Lifestyle Photographers Pty Ltd* [2016] FCA 1538 (Cth).

entered into. The company was in Australia ordered to pay a pecuniary penalty of A\$1.1 million for its unconscionable conduct. In New Zealand, we were unable to consider the companies' conduct under any equivalent consumer protection law.

- 27.3 We have also investigated trader conduct that falls short of the trader making a false or misleading misrepresentation, but which utilises high pressure negotiation tactics with unsophisticated home owners to obtain real estate for what may be less than fair market value.
28. Finally, the Australian prohibition against unconscionable conduct was relied on by the ACCC when taking action against the Coles supermarket chain for imposing unfair terms of trade on its suppliers.¹⁰ Complaints about similar conduct were investigated here with reference to the prohibition against coercion contained in the FTA. No formal enforcement action was taken. The facts may have led to a different outcome here, but the Commission was unable to consider whether the complaints in New Zealand evidenced unconscionable conduct.

Support for “unconscionable conduct” formulation

29. To begin with, we note that any of the drafting formulations for a prohibition against unfair conduct proposed by MBIE could be effectively enforced by the Commission if they were adopted.
30. However, we have a preference for the prohibition of “unconscionable conduct” based on the Australian Consumer Law.¹¹ We take this position because:
- 30.1 We consider the statutory concept applied in Australia is suitable to fill any gap in consumer protection law in New Zealand;
- 30.2 This would more closely align New Zealand consumer protection law with the Australian Consumer Law;
- 30.3 It would make the Australian case-law a ready source of useful jurisprudence in New Zealand; and
- 30.4 We favour this approach in a context where we understand that the potential prohibition of a more expansive category of unfair conduct is under consideration in Australia and the results of that work may be of assistance to New Zealand in the long term.
31. We do not discuss Options 1B and 1C in detail in this submission. However, in summary, we do not favour those options because:

¹⁰ *Australian Competition and Consumer Commission v Coles Supermarkets Australia Pty Ltd* [2015] FCA 330, (2015) 327 ALR 540 (Cth).

¹¹ Competition and Consumer Act 2010 (Cth) sections 21 and 22.

- 31.1 “Oppression” is prohibited under the Credit Contracts and Consumer Finance Act 2003,¹² which we enforce. The provision focuses primarily on oppressive contracts and conduct relating to them. To that extent, it does not capture the broader range of unfair conduct the subject of the Discussion Paper. The Australian statutory formulation of unconscionability potentially captures a broader range of conduct which may or may not include aspects of a contractual relationship. While it may be possible to extend the application of a prohibition against oppression to a broader range of conduct, we do not submit further on that at this time.
- 31.2 We also consider that the alternative formulation prohibiting “unfair practices” provides the greatest uncertainty and potential cost in its application. It may be more difficult and time consuming to develop a coherent and meaningful body of case law if an expansive provision of this nature was adopted in New Zealand. In addition, as noted in the Discussion Paper and earlier in this submission, ‘unfair conduct’ has been identified as a topic requiring further exploration in Australia and that work is likely to include consideration of the effectiveness the European Union’s provisions. We submit that consideration of any further extension of a prohibition against unfair conduct in New Zealand would benefit from waiting for the outcome of this work.

Consistency with the Australian Consumer Law (ACL)

32. Since its enactment in 1986 Australian case law on the statutory concept of unconscionable conduct has developed, with cases in the highest courts helping to elucidate how the prohibition is to be applied. We believe that adopting a similarly worded test here would increase the value of the Australian precedent to the Commission as enforcement agency, to advisors and to the New Zealand courts. Applying that law, particularly more recent judicial discussion of the concept, it would most likely protect consumers and businesses to a more significant extent than the current equitable doctrine of unconscionability applied in New Zealand, without overreaching to chill efficient commercial conduct.
33. Since the commencement of the ACL in 2011, unconscionable conduct has been prohibited in two ways. First, section 20 of the ACL broadly prohibits a person from engaging in unconscionable conduct in trade or commerce, within the meaning of the unwritten law (common law).
34. Second, Section 21 of the ACL¹³ prohibits unconscionable conduct in connection with goods or services, phrased essentially as:

A person must not, in trade or commerce... engage in conduct that is, in all the circumstances, unconscionable.

¹² Oppressive credit contracts may be reopened by the Court, applying Part 5. The Lender Responsibility Principles now also require lenders to ensure that they do not enter into oppressive contracts, induce contracts by oppressive means or exercise rights and powers in an oppressive manner: Section 9C(3)(e).

¹³ Which replaced s51AB Trade Practices Act 1 January 2011.

35. There is no overlap between the two provisions, with subsection 20 (2) explicitly providing that section 20 does not apply to conduct prohibited by section 21.
36. Section 21 represents the kind of broad, flexible and principles-based drafting that we believe should be adopted in New Zealand. It allows the prohibition to be applied across all manner of behaviours and circumstances, and to apply over time without amendment as commercial practices develop and change. While its interpretation brings some degree of uncertainty and judicial discretion, this is not uncommon in legislation of this kind and is already subject to some judicial precedent in Australia.
37. Section 21(4) then makes a statement of Parliamentary intent, noting that:
- 37.1 The section is not limited to applying the unwritten law on unconscionability (i.e. in common law and equity);
- 37.2 The section can apply to a system or pattern of conduct whether or not any person has been disadvantaged by it; and
- 37.3 That the Court's consideration of unconscionability relating to a *contract* "may include" consideration of the terms of the contract, and the manner of carrying it out, and is not limited to the way in which the contract was formed.
38. We understand that these clauses were provided by way of clarification of matters that had been contested under the previous formulation of this law. Such clarifications may be unnecessary in New Zealand and it may also be unnecessary to expressly provide for the continued, and parallel, application of common law concepts of unconscionability alongside the statutory prohibition. Nevertheless, they provide some useful express guidance and their adoption may be sensible if consistency with the Australian Consumer Law is favoured.
39. The term "unconscionable" is not defined under section 21 but rather the court is provided with a non-exhaustive list of considerations¹⁴ it may take into account when considering a breach of the prohibition. Similar statutory guidance may be useful in New Zealand and would also preserve consistency with Australian law. The list is extensive, but non-exhaustive. It begins "Without limiting the matters to which the Court may have regard..." and includes such commonly relevant considerations as:
- 39.1 The relative bargaining positions of the parties;
- 39.2 The customer's level of understanding;
- 39.3 Whether undue influence or unfair tactics were used;

¹⁴ Set out in section 22 ACL

- 39.4 The amount for which¹⁵, and the circumstances under which, equivalent goods or services could have been acquired elsewhere;
- 39.5 The extent of any unreasonable failures to disclose relevant information;
- 39.6 All aspects of any contract entered into, including pre-contractual conduct, the contract terms and post-contractual actions; and
- 39.7 The extent to which the trader acted in good faith.
40. While it continues to evolve and to clarify the types of conduct that may be considered unconscionable, considerable case-law has interpreted the meaning of the term 'unconscionability', including providing various synonyms for the term.¹⁶ The term has been consistently applied to mean conduct that within ordinary concepts of society is so against conscience that a court should intervene. The prohibition can also apply to conduct that is unfair. Ordinarily, the cases entail some element of special disadvantage by the counterparty consumer, but this is not an essential feature. The courts distinguish between conduct that is merely opportunism or hard bargaining and conduct that is unconscionable. As noted above, we consider that the courts are capable of applying a prohibition against unconscionable conduct in a way that strikes the right balance between permitting effective and productive commercial bargaining and proscribing unfair conduct that harms consumers and the economy.

Timing for legislative reform

41. Finally, we note that the law in Australia is under regular consideration. There was a significant review in 2010, which did not result in material changes but some drafting consolidation.¹⁷ Both the Australian Competition Policy Review and the Australian Consumer Law Review¹⁸ concluded, in 2015 and 2017 respectively, that the unconscionability provisions were working as intended. This suggests that the provision also may be useful in New Zealand.
42. Nevertheless, protection against a more expansive concept of unfair commercial conduct is being considered in Australia. The Australian Consumer Law Review Final Report in March 2017 recommended a review of some proposals that were not immediate priorities but 'Looking to the future' topics. Among these was a

¹⁵ As above at [24], we submit that this drafting demonstrates the possible application of an unconscionability law to the pricing practices of mobile traders.

¹⁶ See R Steinwall ed. *Annotated Competition and Consumer Legislation* (2018 edition) LexisNexis Butterworth at [14.605.20] for the references to this paragraph.

¹⁷ Australian Treasury, *The nature and application of unconscionable conduct regulation: can statutory unconscionable conduct be further clarified in practice?*, November 2009, http://archive.treasury.gov.au/documents/1676/PDF/Unconscionable_Conduct_Issues_Paper.pdf at 9-15 and Australian Treasury, *Strengthening statutory unconscionable conduct and the Franchising Code of Conduct*, February 2010, http://archive.treasury.gov.au/documents/1744/PDF/unconscionable_conduct_report.pdf

¹⁸ Australian Government (2015) *Competition Policy Review, Final report*. Australian Government (2017) *Australian Consumer Law Review: Final Report*.

recommendation to ‘explore how an unfair trading prohibition could be adopted within an Australian context to address potentially unfair business practices’. This review seeks to determine whether there is a gap in the law such that conduct short of meeting the unconscionability threshold, but which might be viewed as ‘predatory’ or ‘immoral,’ should fall within the scope of the ACL and be regulated.¹⁹

43. The project will examine overseas regulatory models, including the European Union’s Unfair Commercial Practices Directive.
44. As part of the CAANZ Review of the ACL²⁰, stakeholders provided examples of common features of unfair practices in business models that:
 - 44.1 Take advantage of consumers being unable or failing to appreciate the unexpected consequences of a contract.
 - 44.2 Exploit vulnerable consumers by charging fees or costs that far exceed the cost of providing service.
 - 44.3 Take advantage of vulnerable consumers who cannot access alternative products or are unaware of alternatives available to them.
45. This work is clearly relevant to the issues raised in the Discussion Paper, including Option 1C – a prohibition against unfair commercial practices based on the approach taken by the European Union. It follows that if Option 1A is adopted in the short term, MBIE should continue to monitor the outcome of the project in Australia and its potential impact on the law in New Zealand over the longer term. We submit that consideration of any further extension of a prohibition against unfair conduct in New Zealand is best deferred pending the outcome of this work in Australia.

Application to all businesses and consumers

46. We consider it appropriate that the statutory protection covers all consumers, including business consumers.
47. Because we cannot presently enforce the FTA on behalf of businesses, we lack information about how commonly businesses are subjected to unfair conduct or of what kinds. However, as between large and smaller businesses it is clear that there can be a disparity in bargaining position and/or exploitative practices.
48. We do not favour the inclusion of size, turnover or similar limits to determine which businesses have the protection. Rather, we prefer that the protection applies where conventional circumstances such as inequality of bargaining position, or exploitation of a position, can be made out.
49. We expect that, as with individual consumers, either the statute or the Courts will need to distinguish ‘rough negotiation’ from prohibited unfairness. As noted above,

¹⁹ Australian Government (2017) *Australian Consumer law Review: Final Report*

²⁰ Consumer Affairs Australia and New Zealand

we consider the courts readily capable of striking the right balance, drawing where appropriate on precedent developed in comparable contexts.

50. Under the ACL the prohibition can currently be enforced by any person except publicly-listed companies. However, the Australian Consumer Law Review Final Report recommends extending the provisions to publicly-listed companies. We favour this approach and agree with the statement in the Report that:²¹

This exclusion (for publicly-listed companies) departs from the generic nature of the ACL and its rationale is unclear, as public listing is not necessarily a reflection of a trader's ability to withstand unconscionable conduct.

Private action

51. As is the case under the ACL, we submit that an unconscionable conduct protection should allow for legal action to be taken by any person.
52. One of the strengths of the FTA is that it is generally enforceable privately as well as by the Commission. This has allowed a wealth of case-law to develop over the years which provides considerable guidance and public benefit. The obvious advantage of this is that would-be plaintiffs are not deprived of their rights and access to a remedy where the Commission is unwilling or unable to take proceedings on their complaint. Private plaintiffs also have the option of retaining full control of the conduct of their own case if they choose.

Unconscionable conduct and penalties

53. We submit that it would be consistent with enforcement of other provisions of the FTA for a prohibition against unconscionable conduct to be a criminal offence, with criminal penalties available. An alternative would be to provide for civil pecuniary penalties to be imposed by the courts but we note that civil pecuniary penalties are not presently available under the FTA.
54. We also submit that civil compensatory, injunctive and other remedies should also be available under the FTA to provide protection and redress.

Part 2: Extension of the UCT regime to businesses

55. We support MBIE's reconsideration of the scope, role and efficacy of the UCT provisions, alongside consideration of a protection against unfair conduct. These protections should be designed to operate effectively together as proposed under Package 4 proposed in the Discussion Paper.
56. However, we also consider that the current UCT protections could be strengthened.

²¹ Australian Consumer Law Review – Final Report at 48.

Business-to-Business UCT extension

57. We support extending the UCT regime to businesses, expressed as Option 2 in the paper.
58. In Australia, the UCT provisions were extended to small businesses in 2016, due to a recognition that small businesses, like consumers, frequently lack the bargaining power, time and expertise to negotiate or assess standard form contracts and to protect themselves from unfair standard terms. UCTs often allocate risk to the party that is least able to manage them²². We note that Australia is also currently reviewing the Unfair Contract Term Protections for Small Business.²³
59. We note that the ACCC has successfully taken action under the UCT protections (business-to-business) against a waste management company.²⁴ The supply contracts were found to have limited the ability of the mainly commercial customers to change their waste collector. We also have received several complaints about such contracts, both from competing waste collection providers and from users of those services. We did not identify any breach of the Commerce Act, but did consider that the matter would lend itself well to analysis under the prohibition against UCTs if it was extended to business to business contracts.
60. Consistently with our position above on unfair conduct, we do not support the restriction of the UCT protection to ‘small’ businesses alone, nor the adoption of a metric such as the number of employees, or the level of turn-over. Size may not be determinative of bargaining strength, and in any event the hallmark of the UCT law is that it applies where contract terms are offered on a “take it or leave it” basis with no effective opportunity for negotiation.²⁵ Like consumers, businesses need to purchase utilities, software and other goods and services for which there may be no real negotiating opportunity.
61. We submit that the proper focus in a business-to-business UCT case should be on any disparity in bargaining power, such that one business is able to exert and impose unfair conditions on another.²⁶ To that end, we consider it likely that the existing tests for the application of the prohibition against unfair contract terms strike the right balance between protection and freedom of contract.

²² Senator Kim Carr (14 September 2015) Senate Hansard, Treasury Legislation Amendment (Small Business and Unfair Contract Terms) Bill 2015 at 6632.
<https://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p?page=0;query=unfair%20contract%20term;rec=1;resCount=Default>

²³ Review of Unfair Contract Term Protections for Small Business Discussion Paper November 2018.

²⁴ *Australian Competition and Consumer Commission v JJ Richards & Sons Pty Ltd* [2017] FCA 1224, [2017] ATPR 42-558 (Cth).

²⁵ Section 46J(1).

²⁶ Such considerations apply in section 46J(2), but presently only in respect of trader-to-consumer contracts.

Private enforcement

62. We submit that the UCT prohibitions should be extended to allow for private enforcement by affected persons (including, business consumers) for the reasons discussed above in relation to a prohibition against unfair conduct.

Remedies for breach

63. We submit that the current remedy for including UCTs within a contract – a declaration that a term is a UCT – is inadequate:
- 63.1 There is no sanction on the trader, so no effective deterrence.
- 63.2 There is uncertainty as to whether declarations are available for terms that were in standard form contracts but are not at the time of the Court hearing.²⁷
- 63.3 There is uncertainty as to whether any other person is prohibited from including, applying, enforcing or relying on an equivalent term in other contracts that were not the subject of the litigation.²⁸
64. We therefore agree with MBIE's initial views²⁹ that a penalty should attach to the inclusion of UCTs in standard form contracts, without the need for the term to have previously been declared to be unfair.
65. In Australia, the government has commenced a review of unfair contract terms law. In an address to the National Small Business Summit,³⁰ ACCC Chair Mr Rod Sims commented that:

'the ACCC will be making the case for significant strengthening of the law [business-to-business unfair contract law].....The biggest limitation that the ACCC has identified is this; unfair contract terms are not illegal . They should be! ...The second biggest limitation to the current regime is that the ACCC cannot seek civil pecuniary penalties.....nor can we issue infringement notices for contract terms that are likely to be unfair.....Penalties and infringement notices should apply if unfair contract terms are included in standard form contracts. Otherwise, no real incentives exists for businesses to ensure their standard contract do not contain such terms.'

Further assistance

66. We thank MBIE for this submission opportunity, and would be pleased to provide any further assistance that you may require. Please contact Yvette Popovic in respect of this submission.

²⁷ The FTA makes declarations available where a term "is" in a contract: section 46I(2)(a).

²⁸ See section 26A(1). It is only an offence to include a UCT in a consumer contract where that term has previously been declared unfair: section 46I

²⁹ Discussion Paper at [141].

³⁰ Council of Small Business Organisations Australia's National Small Business Summit 31 August 2018.