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Competition and Consumer Policy
Ministry of Business, Innovation and Employment
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**SUBMISSION on
"Protecting businesses and consumers from unfair
commercial practices" discussion paper**

1. Introduction

Thank you for the opportunity to make a submission on the "Protecting businesses and consumers from unfair commercial practices" discussion paper. This submission is from **Consumer NZ, New Zealand's leading consumer organisation. It has an acknowledged and respected reputation for independence and fairness as a provider of impartial and comprehensive consumer information and advice.**

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2. General comments

Consumer NZ receives regular complaints from consumers regarding unfair business practices. In some situations, the Consumer Guarantees Act, Fair Trading Act or Credit Contracts and Consumer Finance Act will provide redress for the consumer. However, in other situations, existing laws are of limited or no use to the consumer.

We therefore support new measures to strengthen the protections for consumers against unfair commercial practices.

3. Answers to questions

Our answers to specific questions in the discussion paper are set out below. Our comments focus on protections for consumers.

Thank you for the opportunity to make a submission on the discussion paper. If you require any further information, please do not hesitate to contact me.

Areas for comment: How prevalent are unfair contracts and conduct currently? Is further government intervention to protect against unfair commercial practices warranted?

Consumer NZ's advisory service receives regular complaints from consumers about unfair conduct and unfair terms.

The Fair Trading Act's ban on unfair terms has resulted in some improvement in standard form consumer contracts. However, the prevalence of unfair terms and unfair conduct is still a major issue for consumers.

We find unfair terms in most consumer contracts that we review. In our recent consumer survey, one in 10 respondents said they'd been given a contract during the past 12 months that contained unfair terms.¹

Research lead by Associate Professor Alexandra Sims, from the Department of Commercial Law at Auckland University, found 1225 unfair terms in 114 retail contracts before the unfair terms ban took effect in 2015. The number of unfair terms remained at 1086 after the ban and every contract still contained at least one unfair term.²

See our answer to question 9 below on whether government intervention is warranted.

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

As noted above, we receive complaints from consumers about unfair business-to-consumer conduct on a regular basis, including complaints about unfair terms.

Given consumers can't challenge unfair terms themselves, there is little redress available in these situations. As a result, many businesses are getting away with the inclusion and enforcement of unfair terms.

Examples of complaints we have received about unfair business-to-consumer conduct and unfair terms are below.

- A consumer was cold-called and offered a free set of coasters or chopping board if she agreed to a demonstration of a company's home purification system. She agreed and was subjected to a vacuum cleaner and air filter sales pitch that lasted six hours. During the sales pitch, the consumer was told the system could remove cancer-causing particles from the air. The consumer felt the only way to get the seller to leave was to sign up to buy the product.
- An elderly man was door-knocked by a company selling home security systems. The man, who already had a security system, was pressured into purchasing a new system at a cost of more than \$2500 (paid off over a period of months). The new system was installed the same day.
- A family purchased two vouchers for a photo session from a daily deal site. The vouchers cost \$39 each but were valued at \$450. After the session, the family was advised they needed to pay a minimum of \$880 for a photo package. The family felt duped as they never would have purchased the vouchers if they'd known the cost of the photos.
- An insurance company refused to allow a consumer to cancel their pet insurance policy before the end of a 12-month term. The consumer paid the policy in monthly instalments so assumed she was free to cancel at any time. The terms allowed the insurance company to cancel the policy on 21 days' notice. However, there was no equivalent right of cancellation for the consumer. Terms allowing insurance

¹ Our data are from a nationally representative sample of 1069 New Zealanders aged 18 years and over. The survey was carried out online in December 2018.

² <http://www.lawsociety.org.nz/lawtalk/lawtalk-archives/issue-897/unfair-contract-law-not-working>

companies to cancel a policy at any time are common. Similar clauses have been found to be potentially unfair in the UK.

- A gym company insisted a member could only cancel their membership by going into the gym, filling in a form and having the termination request counter-signed by the gym manager. In another case, a gym advised a member she needed to provide 56 days' **notice to terminate her contract despite the contract stating 30 days' notice** was required.
- Another gym contract included a \$100,000 penalty for breach of its terms by the consumer.

We also receive regular complaints about the following practices:

- the refusal of gyms to let consumers out of fixed-term contracts when their circumstances change (for example, when they are relocated for work or they injure themselves).
- the refusal of companies to extend expiry dates on gift cards (or issue replacement cards) when gift cards expire. We estimate consumers could be losing up to \$10 million per annum on expired cards.
- high break fees charged by rental agencies to end fixed-term tenancies. Break fees are often not disclosed in tenancy agreements but consumers are forced to pay them if they want to get out of their tenancies.
- mobile **truck shops targeting vulnerable consumers and selling them goods they can't afford**. In one recent case, a truck shop visited a young woman with mental health issues and signed **her up for expensive items that she didn't need and couldn't afford**.
- the high fees charged by private car parking companies for alleged breaches of the **carpark's terms and conditions**. For example, Wilson Parking charges a \$45 fee for a lost ticket when all day parking would only cost \$12.

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

In most situations involving unfair conduct that we receive complaints about, the consumer suffers economic loss. Consumers also have reduced confidence in their ability to transact with businesses in a fair manner and may also suffer unnecessary stress and inconvenience.

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

Given the frequency and severity of the complaints we receive about unfair business-to-consumer conduct, we consider government intervention is warranted to protect consumers against unfair commercial practices.

We consider consumers here deserve protections from unfair business-to-consumer conduct at least comparable to those afforded to Australian consumers.

The Australian Competition and Consumer Commission (ACCC) has taken enforcement action against companies for unconscionable conduct in a large number of cases. There **are no equivalent provisions in New Zealand's Fair Trading Act that would allow the Commerce Commission to take similar action.**

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

For the reasons stated above, we consider a high-level prohibition against unfair conduct should be introduced to provide better protections for consumers.

Question 12: What are the advantages and disadvantages of Options 1A, 1B and 1C? Which option, if any, do you support?

We would support option 1B. Option 1C may also have merit and should be explored further.

We do not support option 1A, given the narrow definition of unconscionable conduct. We would prefer a ban on oppressive conduct as this is broader than the concept of unconscionability. It therefore creates the opportunity for remedies to be available in a wider range of circumstances and has the potential to enhance consumer protection.

Question 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?

As mentioned above, our preference is for a prohibition on oppressive conduct. If unconscionable conduct is prohibited, the legislation should either define unconscionability or include a list of factors to be considered in determining whether conduct is unconscionable.

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

Under the current unfair terms regime, the price and main subject matter of the contract are excluded, insurance contracts are largely excluded and consumers can't challenge unfair terms themselves.

Given these limitations, we think option 1 should extend to matters relating to the contract.

Question 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.

At a minimum, the protections should apply to all consumers.