

Submission

Discussion Paper – Protecting Businesses and Consumers from Unfair Commercial Practices

To the Ministry of Business Innovation and
Employment

**By: Cosmetic Toiletry and Fragrance Association of New Zealand Inc.
operating as Cosmetics New Zealand**



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Contact Details

Submitter: Garth Wyllie

Title: Executive Director

Organisation: Cosmetics New Zealand (Cosmetic Toiletry and Fragrance Association Inc)

Postal Address: Private Bag 92-066 Auckland 1142 New Zealand

Telephone: 09-3670913

Facsimile: 09-3670914

Mobile: 021-649900

Email: ctfa@ctfa.org.nz

Web Site: www.cosmeticsnewzealand.org.nz

Cosmetics New Zealand does not object to this submission being publically available.

3. Submission Summary Statements

Cosmetics New Zealand represents the majority of cosmetic companies operating in New Zealand ranging from small New Zealand businesses to multinational brands.

While we have answered, the specific questions raised within the discussion document, we believe that additional changes to the Fair Trading Act around unfair contracts and commercial practices should not proceed, as there is no evidence of harm among our members regardless of company size.

We believe that with full enforcement there is sufficient powers within the existing Fair Trading Act to ensure protection of both consumers and small businesses and we recommend that this should be the focus rather than adding additional unnecessary regulations to the Act.

We support submissions made by Business New Zealand and the Employers and Manufacturers Association Northern as being consistent with our view of the proposals in the discussion document.

4. Cosmetics New Zealand Specific Comments

Cosmetics New Zealand responses to questions raised in the discussion paper.

Unfair Contract Terms

Question 1:

We are not aware of any unfair business to business contract terms in relation to our industry membership.

Question 2:

Our members have not reported any adverse impact from contractual arrangements.

Question 3:

We do not believe that government intervention in relation to our member's contractual arrangements is warranted

Unfair Business to Business Conduct

Question 4:

We do not observe any unfair business to business conduct by our members and are not aware of any outside of our membership.

Question 5:

There is no impact from those companies offering standard terms of trade.

Question 6:

There is no justification for government intervention based on the experiences of our members.

Business to Consumer Conduct

Question 7:

Our sector does not see and of the issues used as examples and believe that in the examples given there is sufficient existing legal recourse under both the Fair Trading Act and possibly the Crimes Act.

Question 8:

As we do not see examples of such conduct it is not possible to give an impact assessment. We believe that any such examples will be isolated and capable of being dealt with under existing law.

Question 9:

There is already sufficient law and powers under the Fair Trading Act to address business to consumer conduct and therefore no justification to intervene.

Objectives

Question 10:

We agree that the high-level objectives are important for any regulatory framework in protecting against unfair practices however we firstly must understand whether additional regulation is necessary due to market failure and harm. We do not accept that either situation has occurred and therefore further regulation above the existing framework is necessary.

Options

Question 11:

We do not believe that there is justification for a high-level prohibition against unfair conduct as the existing provisions under the Fair Trading Act already have sufficient teeth to address most issues.

Question 12:

While we do not believe any of the options to be necessary, option 1C does provide the most pragmatic description of unfair commercial practices and given this could use the industry codes as a benchmark. We do not support the Australian model of 1A as this becomes highly subjective without strong case law and even then has the potential to have adverse consequence if the interpretation by the courts is incorrect.

Question 13:

We do not support use of Unconscionable Conduct as the term is open to wide subjective interpretation of what this might be. We believe that if a particular conduct is not acceptable, then it is that conduct that should be regulated to address the specific issue. This is the basis of a number of existing clauses within the Fair Trading Act such as Pyramid Selling/Referral Selling, Bait Advertising and Harassment and Coercion.

Question 14:

Good faith is a key tenant of good business however, it may sometimes be difficult to assess whether a particular action is done in good faith without specific reference so we do not support this being introduced into law which can then be subjective in its interpretation.

Question 15:

We do not support any variations or option 1 proceeding.

Option 1

Question 16:

We do not believe that option 1 should extend to the contract as the existing unfair contract provisions are sufficient and there is an assumption that this is necessary in the question.

Who should be protected?

Question 17:

The term unfair conduct is not necessary as addressing the contractual arrangement is sufficient under unfair contract for consumers. We do not support this option for either consumers or businesses.

Extension of unfair contract term protections to businesses

Question 18:

We do not accept that there is a necessity to extend unfair contract provisions to business therefore retaining the existing UCT protections is unnecessary other than for the existing consumer protection.

Question 19:

We do not believe the examples under the FTA consumer grey list should be carried over if unfair contracts is extended to business transactions. Contract terms in a business to business setting are often different and by the very nature of ongoing transactions, it will be necessary for businesses to be able to vary pricing, commissions and other

remunerations in order to remain in business. Placing these fully in the bounds of equal negotiation powers would be a considerable barrier to business.

Who should be protected?

Question 20:

We believe that unfair contracts should remain only to consumer as presently applied. We see the extension to business problematic for many business models and a significant burden if contracts were to be negotiated individually with businesses. By example a supplier for a hair dressing salon would need to spend significant time negotiating a contract for supply for many salons if an employee or turnover threshold were applied but that salon could choose to change supplier which is a common practice but then have to negotiate again with the new supplier. This is a burden for both parties and in a sector that does not have contracts that could be considered onerous.

Question 21:

The suggestion of a transactional value for extension of unfair contracts to business would cause significant issues. We do not support a transactional value should this extension proceed for this reason.

Enforcement penalties and remedies

Question 22:

We do not support business UCT but believe that all cases must be undertaken via the court process with the ability of the business to provide a settlement with the Commerce Commission prior to the case going to court.

Because such a breach is likely to be subjective we do not support penalties but rather remedy of the particular clause via the existing Commerce Commission process.

We do not support civil remedies being applied irrespective of whether this is B to B or B to C.

Other options

Question 23:

We believe that formally recognising some industry codes assist in addressing unfair conduct but oppose any extension of unfair contracts regulation.

Background Information

Cosmetics New Zealand (as the operating name for the Cosmetic Toiletry and Fragrance Association) is the pre-eminent membership organisation representing cosmetic companies within New Zealand. Cosmetics New Zealand is affiliated to similar bodies internationally and communicates with such bodies to ensure international harmonisation where possible.

The present membership consists of the majority of Cosmetic, Toiletry and Fragrance manufacturers and/or distributors of such products within New Zealand and by value around 90% of the domestic New Zealand Cosmetic market.

The Cosmetics industry in New Zealand generates over \$150 million in exports across a range of product types ranging from traditional cosmetic products to natural ingredient and unique New Zealand cosmetics. These products are also sold in the domestic market.

The domestic market is currently around \$1.5 billion in total retail value sales

Cosmetics New Zealand Membership is voluntary and governed by a Code of Ethics for market conduct.

Currently the Cosmetics New Zealand has 114 full members included sub groups such Beauty, Hair Salon Marketers and includes 22 domestic manufacturers. It also has 26 associate or supplier members ranging from media to packaging and services suppliers. International brands make up 15 of the full members while the balance are New Zealand brands

Cosmetics New Zealand and its members support the charity "Look Good Feel Better" by both fund raising and providing products in excess of \$2.5 million dollars per annum. The charity provides annually workshops for more than 2000 women with cancer on how dealing with the effects of the treatment each year.

Cosmetics New Zealand works in close cooperation with groups such as the Direct Sellers Association and the Employers and Manufacturers Association on issues of common interest. Direct Sellers account for around 20% of Cosmetic sales in New Zealand and for a significant component of the exports from New Zealand.

Our products range from the well understood perfumes, colour and skincare products to products such as toothpaste, oral care and anti-dandruff shampoos. These are commonly called personal care products within the wider industry.

Governance of our products falls mostly under the HSNO Cosmetic Products Group Standard and in conjunction with the Hazardous Substances and New Organisms (HSNO) regulations legislation as set out within the Cosmetics Products Group Standard.

Products that have a therapeutic benefit or claim maybe covered by the Medicines Act as a related product such as higher level fluoride toothpastes and anti-dandruff shampoos that also include treatments for other conditions.

Around 90% of cosmetic products sold in New Zealand are imported for sale, however in some product types New Zealand brands can account for as much as 25% of that segment due to the growth of domestic brands

Cosmetics New Zealand

New Zealand is not an isolated market with more than 380 fragrances marketed to women and almost 200 fragrance or cologne products marketed to men currently. Around 50+ new fragrances are launched each year and around 15 are withdrawn making this a dynamic and changing market.

Skin care, colour make up and beauty products have a range of more than 200 product brands while hair care, body wash and care products number around 100 brands. While less products are launched or withdrawn in this category of product it continues to change with new and innovative skin products constantly being launched. We see sun care and sunscreen products as part of those skincare products.

The representation of cosmetics products in New Zealand is less than is available in some larger markets. In spite of the size of our market, it is considered to have a significant range of consumer choice which is enabled by the current internationalisation of the New Zealand marketplace under the Cosmetic Group Standard.