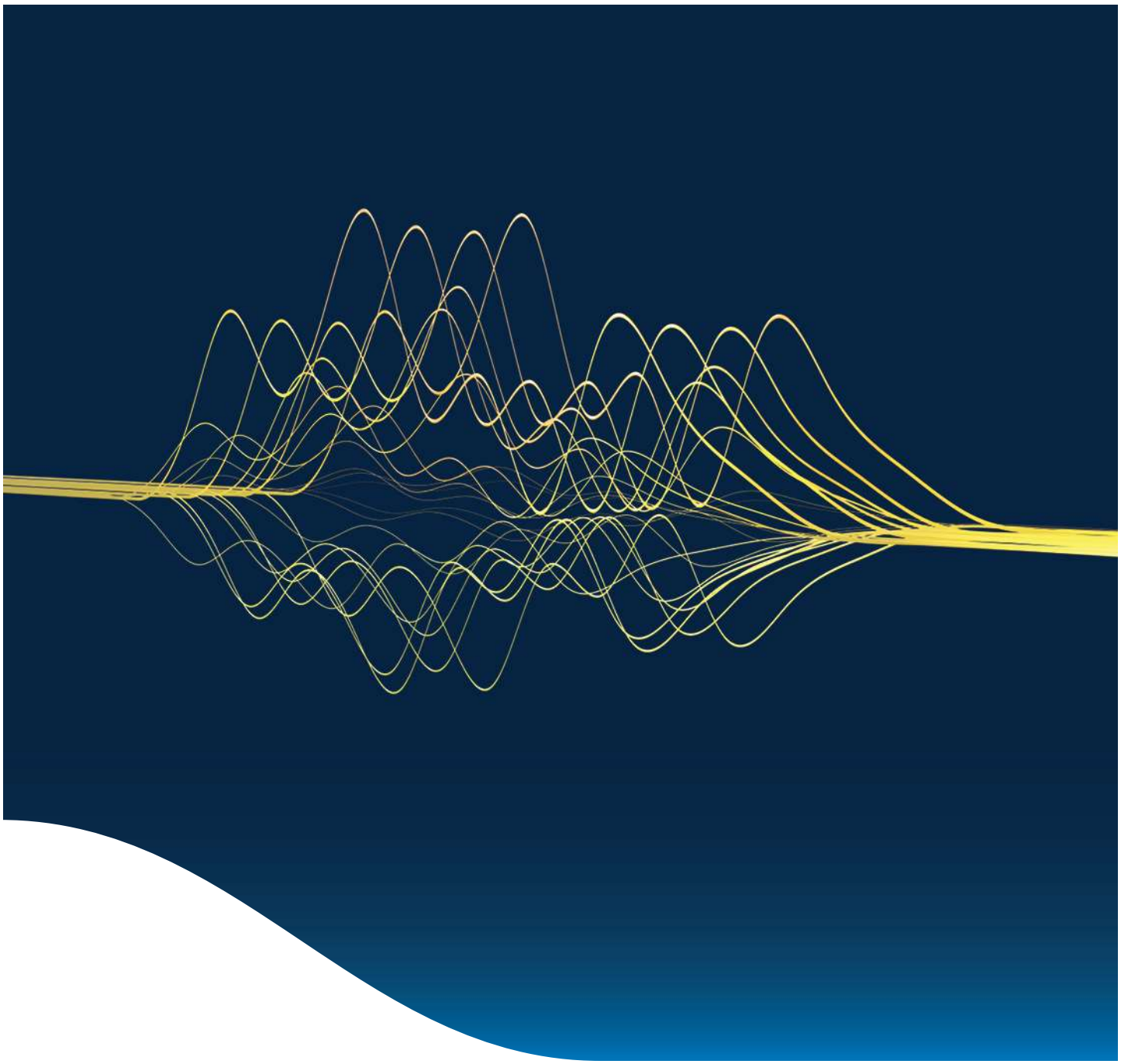


DLA Piper Submission

Discussion Paper - Protecting businesses and consumers from unfair commercial practices

22 February 2019

DLA PIPER

Introduction

DLA Piper welcomes the opportunity to make this submission to the Ministry of Business, Innovation and Employment (**MBIE**) in respect of MBIE's December 2018 discussion paper 'Protecting businesses and consumers from unfair commercial practices' (**Discussion Paper**).

Our submission is focused on business to business practices as this is what we consider is most relevant for our clients. However, the majority of our positions on unfair conduct can also be applied in the consumer context.

Executive Summary

- We do not support the introduction of an unfair contract terms or unconscionable conduct/oppressive conduct/unfair practices regime (**Conduct Regime**) in respect of business to business dealings.
- There is no need for further government intervention in business to business practices because:
  - there is no identifiable problem that needs to be addressed;
  - existing legislation and the common law provide sufficient protection against unfair business to business practices;
  - businesses (large and small) can, and do, protect themselves through due diligence, negotiation and informed risk decisions; and
  - there have been no significant changes since this issue was last considered during the consultation in respect of the Consumer Law Reform Bill.
- Government intervention as proposed in the Discussion Paper would have significant detrimental impacts on businesses, including by introducing uncertainty into business dealings and increasing the cost of doing business.
- A better alternative would be for MBIE and industry bodies to educate businesses about contract terms they should watch out for, allowing businesses with limited resources to conduct more targeted contract reviews, and providing them with additional justification for seeking to negotiate those terms.
- If MBIE considers that government intervention is required, extending the current Fair Trading Act 1986 (**FTA**) unfair contract terms regime to cover businesses is preferable to a Conduct Regime.

Submission

Solution without a problem

Freedom and certainty of contract are fundamental to commerce, competition, and the overall success of the economy. They should not be undermined without a compelling reason to do so.

We do not believe there is a problem in business to business practices that warrants the intervention proposed in the Discussion Paper, for the following reasons:

- most of the evidence presented in the Discussion Paper is either anecdotal or based on MBIE's 2018 survey, which was a small sample that relied on subjective assessments from businesses;
- as MBIE noted at paragraph 10 of the Discussion Paper, what is considered to be unfair is subjective, so the survey is unlikely to accurately reflect the extent of unfair contract terms or unfair conduct in business to business transactions (for example, a one-sided limitation of liability can reflect an appropriate allocation of risk between the parties, despite seeming unfair to one party); and
- even if individual businesses are encountering unfair terms or unfair conduct, the Discussion Paper does not present any evidence that those terms or conduct are having a detrimental impact on the economy that warrants intervention (unlike, for example, anti-competitive conduct prohibited under the Commerce Act 1986).

MBIE is correct that *'caution also needs to be taken to ensure that measures to protect individual businesses do not over-reach and unduly inhibit economic growth'* and that *' … practices that are viewed as 'unfair' or detrimental to an individual business are not necessarily detrimental to the economy'*.[1]

In the absence of clear problem, there is no case for government intervention.

Businesses can look after themselves

Businesses, small and large, are capable of protecting their own interests:

- through appropriate due diligence, negotiation and risk assessment; and
- using the statutory and common law protections already available to them.

Due diligence and negotiation

MBIE's survey found that 86% of small businesses surveyed generally understood the terms of the contracts they enter into.[2] The fact that survey respondents identified that they had been presented with unfair terms indicates that businesses are reviewing contracts before signing them and understand unfavourable provisions.

[1] Paragraphs 44 and 45 of the Discussion Paper

[2] Paragraph 64 of the Discussion Paper

This means businesses are in a position to make a well-informed risk assessment, balancing the potential downside of unfavourable terms against the commercial benefit of the agreement. The government should not intervene in this process.

MBIE also identified that a significant number of businesses who felt they had been presented with unfair terms acted to protect their interests.[3] Almost half of the respondents who identified an unfair term asked for it to be amended or deleted and half of those businesses had their concerns addressed.

This indicates that even small businesses are able to negotiate the terms of their contracts where they feel it is warranted.

Existing rights are sufficient

In our view:

- the existing protections MBIE identified in section 2 of the Discussion Paper (misleading and deceptive conduct, harassment and coercion, and the Commerce Act);
- the availability of remedies for breach of contract; and
- the law on (ie unenforceability of) penalties,

provide sufficient protection for businesses against the types of unfair conduct MBIE has identified.

MBIE correctly stated in paragraph 79 of the Discussion Paper that much of the unfair conduct reported by survey respondents is already prohibited (eg by the misleading and deceptive provisions of the FTA) or would amount to a breach of contract giving rise to contractual remedies.

This supports the submission that there is no problem that warrants government intervention.

What's changed since last time this was looked at?

In 2010 the Ministry of Consumer Affairs (as it then was) asked for submissions on whether a prohibition on unconscionable conduct should be introduced in New Zealand along the lines of the Australian legislation.[4] In an additional paper covering unconscionability released in October 2010, the Ministry noted that most of the submissions on that discussion paper opposed the introduction of Australian-based unconscionable conduct provisions for various reasons, including:[5]

- unconscionability is an emotive and uncertain term;
- adding unconscionable conduct provisions in legislation would compromise freedom of contract;
- there is no evidence of the need for the protection that the provision would provide;
- the existing misrepresentation provisions of the FTA are sufficient to protect consumers (and small businesses); and

[3] Paragraph 65 of the Discussion Paper

[4] Consumer Law Reform - A Discussion Paper, published by the Ministry of Consumer Affairs in June 2010 (retrieved from https://www.mbie.govt.nz/assets/de7d195058/consumer-law-review-a-discussion-paper.pdf)

[5] Consumer Law Reform Additional Paper - October 2010 (titled 'Unconscionability') (retrieved from https://www.parliament.nz/resource/0000157640)

- harmonisation with Australia is not a sufficient reason for making a change in New Zealand law.

We submit that the same concerns exist today and there has been no economic or social change that diminishes the importance of any of those issues.

In the Commerce Committee's report on the Consumer Law Reform Bill,[6] the Commerce Committee acknowledged that implementing unconscionability provisions could lead to a period of uncertainty and recommended that the position be reviewed once the Australian courts have had the chance to consider the equivalent Australian legislation.

As MBIE identified at paragraph 158 of the Discussion Paper, the Australian Consumer Law Review noted that there is some uncertainty as to how the unconscionability restrictions in the Australian Consumer Law apply. Given the lack of certainty in Australia, we submit that implementing an unconscionable conduct regime akin to Australia would not align with the principle of the Commerce Committee's recommendation - namely that the position should be reviewed once there is more certainty in the application of the Australian provisions.

There is considerable downside

Implementing an unfair contract terms regime for businesses, or a Conduct Regime, would:

- undermine parties' freedom to contract as they wish;
- create a lack of certainty in contracts and business dealings;
- result in increased costs of doing business (eg through protracted negotiations or overhauls of standard contracts); and
- undermine the benefits of standard form contracts (such as those identified at paragraph 56 of the Discussion Paper).

An alternative

The Discussion Paper highlights that businesses (particularly small businesses) can be vulnerable to unfair terms because they do not have the resources to review contracts or the bargaining power to negotiate them.

Businesses should be encouraged to review and assess contracts before entering into them. They should not be empowered to fall back on legislative protections as a substitute for sensible commercial practices.

We think a campaign by MBIE to educate New Zealand businesses about the 'red flag' terms they should be looking out for in contracts would assist businesses with limited resources conduct a targeted review of contracts they are considering entering into, to identify particularly problematic clauses. The FTA's 'grey list' for standard form consumer contracts is an appropriate starting point. This campaign could be supported by industry bodies like BusinessNZ and the Employers and Manufacturers Association.

---

[6] Consumer Law Reform Bill (287-2) (2 October 2012) as reported by the Commerce Committee (retrieved from https://www.parliament.nz/en/pb/sc/reports/document/50DBSCH_SCR5629_1/consumer-law-reform-bill-287-2)

If businesses are aware of the potential impacts of agreeing to a particular 'red flag' term, they will be well placed to make an informed risk decision as to whether to enter into the agreement (balancing the risk against their view of the commercial benefit). Businesses could also use MBIE educational tools (eg fact sheets) to improve their bargaining power in relation to the negotiation of 'red flag' terms. For example, if a MBIE publication stated that it would be unusual for a party to agree to unilateral variation rights, a business could point to that information when requesting deletion of the relevant clause.

Providing businesses with more information and access to easily digestible resources could help address the issues identified by MBIE without the negative impacts of government intervention identified above.

An unfair contract terms regime is the lesser of three evils

If MBIE considers that intervention is required in relation to business to business practices, we submit that the extension of the FTA's unfair contract terms regime to businesses (Package 3 of the Options Packages in the Discussion Paper) is preferable to a Conduct Regime, because:

- the concepts will be reasonably well understood, particularly by consumer-facing businesses;
- there is already guidance from the Commerce Commission in respect of the application of the regime in the consumer context (eg in the telecommunications, energy retail and gym sector reviews); and
- the ability to specify a 'grey list', and for the judiciary to develop that list over time, provides a more objective framework in which businesses can operate, which gives greater certainty than a Conduct Regime.

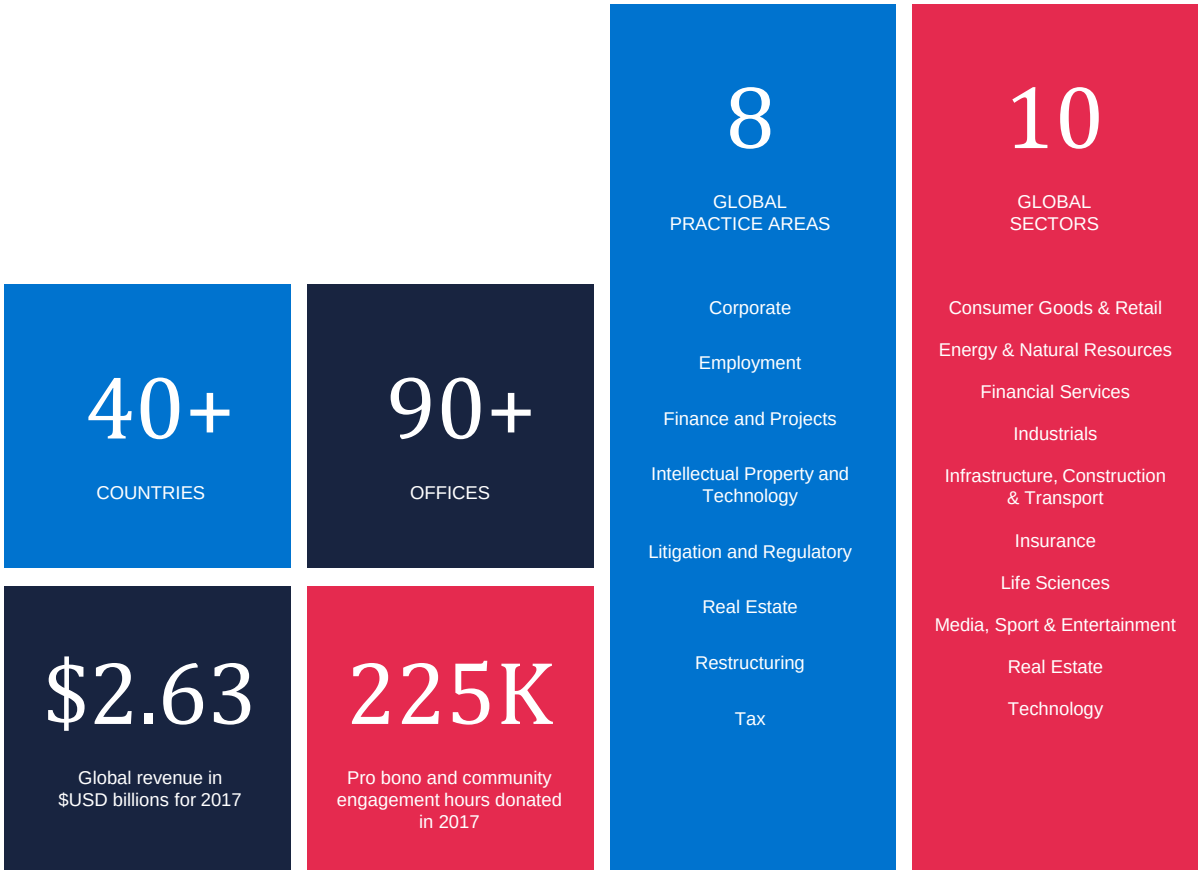
Contact

We would be happy to provide more information, or discuss this submission in more detail, if that would assist MBIE. Please contact either Mark Williamson or Nick Valentine.

Nick Valentine
Special Counsel
T: +64 9 916 3703
nick.valentine@dlapiper.com

Mark Williamson
Partner
T: +64 9 300 3857
mark.williamson@dlapiper.com

About DLA Piper



www.dlapiper.com