

Submission

Discussion Paper – Protecting Businesses and Consumers from Unfair Commercial Practices

To the Ministry of Business Innovation and
Employment

From the Employers and Manufacturers
Association Northern Inc

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Contact Details

Submitter:	Garth Wyllie
Title:	Executive Officer Manufacturing and Industry Groups
Organisation:	Employers and Manufacturers Association (Northern) Inc. (EMA)
Postal Address:	Private Bag 92-066 Auckland 1142 New Zealand
Telephone:	09-3670913
Facsimile:	09-3670914
Mobile:	021-649900
Email:	garth.wyllie@ema.co.nz
Web Site:	www.ema.co.nz

The Employers and Manufacturers Association (Northern) Inc. accepts this submission being publically available.



About the EMA:

The EMA has a membership of more than 4,500 businesses in the Upper North Island employing around 320,000 New Zealanders.

The EMA advocates on behalf of its members to bring change in areas which can make a difference to the day-to-day operation of our members, such as RMA reform, infrastructure development, employment law, skills and education along with export growth.

We have a solid reputation as a trusted and respected voice of Business in New Zealand, and our presence makes a difference.

Summary

The Employers and Manufacturers Association (Northern) Inc represents a significant proportion of business in the upper half of the North Island.

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 strongly oppose the proposals in this discussion paper.

We support submissions made by Business New Zealand and other industry associations such as Cosmetics New Zealand as being consistent with our view of the proposals in the discussion document.

Specific Comments:

The Employers and Manufacturers Association (Northern) Inc has responded to questions raised in the discussion paper specifically below.

Unfair Contract Terms

Question 1:

We are not aware of any unfair business to business contract terms in relation to our 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 if not all 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 small businesses. This is a burden for both parties and no formal contracts are used versus standard terms and conditions, 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 ethical codes assist in addressing unfair conduct but oppose any extension of unfair contracts regulation.