

22 February 2019

Competition and Consumer Policy
Ministry of Business, Innovation and Employment
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Protecting businesses and consumers from unfair practices

1 About Kensington Swan

- 1.1 This is a submission by Kensington Swan on the *Discussion Paper – Protecting businesses and consumers from unfair commercial practices*.
- 1.2 Kensington Swan is one of New Zealand's premier law firms with a legal team comprising over 100 lawyers who act on technology, government, corporate, commercial, litigation, property, and financial markets projects from our offices in Wellington and Auckland.
- 1.3 We have extensive experience advising our clients on the implications of, and the negotiation of, their contractual arrangements. We have advised clients not only in respect of negotiated agreements, but also with respect to the production and implementation of standard-form terms. We also advise clients on the implication of entering into a contract on the basis of standard-form terms offered by a supplier or purchaser of goods and services.
- 1.4 Our clients range from multinational corporations operating across numerous jurisdictions, to tightly-held small local businesses.
- 1.5 Our lawyers have extensive experience advising on the application of New Zealand law as it applies to contracts and business conduct, including the application of the Fair Trading Act 1986 and the Commerce Act 1986. In addition, several of our lawyers have direct experience of working in, and advising on the consumer protection laws of, other jurisdictions (notably, the UK).
- 1.6 This submission is made on behalf of the firm and not on behalf of any client of the firm.

2 Unfair contract terms in standard-form business to business contracts

- 2.1 We do not believe that government intervention to address unfair business-to-business contract terms is warranted. We consider that, with respect to the regulation of business-to-business contract terms, the status quo should prevail, since there is no policy problem that needs to be addressed by legal means. We also consider that an attempt to regulate those terms to achieve 'fairness' would most likely be counterproductive.

- 2.2 In our view, certainty remains crucial in the business setting. We are concerned that, if measures are introduced to regulate the 'fairness' of business-to-business contract terms, this will inevitably lead to uncertainty for businesses.
- 2.3 It is important to acknowledge that when two parties enter into a contract, regardless of whether the contract is on a standard-form, the assumption is that the entry into the contract represents a 'meeting of the minds', in that the terms of the contract reflect the terms on which the parties agreed to do business. It would be unwise to undermine this assumption in the business-to-business context in reliance on an abstract notion of 'fairness'.
- 2.4 In this regard, it is important to distinguish between what is 'unfair', and what is a legitimate commercial (or 'business') decision for a business to make.
- 2.5 In our experience, many businesses who prepare and offer terms in respect of the provision of services and goods do so in the context of an understanding of the risks to their business of doing business on those terms. They invest time and energy in understanding those risks, and taking steps to mitigate them. They arrange for appropriate insurance cover, or implement internal procedures and protocols, in order to strike a commercial balance that enables them to agree to deliver or acquire the services or the goods at a price that reflects the risk they assume when doing so.
- 2.6 In other words, the offer of services or goods is an offer made on the terms, and subject to the conditions, of the offeror. If the offeror is not willing to assume responsibility for a certain risk or guarantee a particular outcome, the offeree may simply price that into the offeree's assessment of the goods and services offered, and if the overall 'offer' does not meet the offeree's purpose or otherwise successfully meet the relevant cost/benefit test, the offeree can either negotiate or look elsewhere. This does not result in the offer or its terms being 'unfair'.
- 2.7 On the other hand, our experience of businesses who seek our advice in connection with the procurement of services or goods on a counterparty's standard terms is that they do so for the purposes of understanding what risk the supplier has assumed, and whether that reflects a 'fair deal' in light of the pricing offered. They consider not just the price at which the services or goods are offered, but the whole 'basket' of rights that are accorded to them under the terms. By doing so, they are put in a position whereby they can compare services or goods offered by multiple suppliers. They compare the 'apples' offered by one supplier with the 'oranges' offered by another, and make a decision as to which supplier to engage with based on their own assessment of which offer best fits their purpose. Whether or not the terms are 'fair' is, in our view, a red herring. The terms are the offer made by the offeror. It is up to the offeree to assess whether that offer represents a 'fair deal' to the offeree, in light of the offeree's requirements. If it does not, it is not by dint of the 'fairness' or otherwise of the terms. Rather, it is because the offer to supply the services or the goods on the terms offered does not meet the business requirements of the offeree. In our view, that is not something with which the law should be concerned.
- 2.8 The Discussion Paper notes (at paragraph 66(b)) that businesses may nevertheless enter into a contract that has what they consider to be 'unfair' terms, even in the face of 'fairer' alternatives, because they consider that other features of the contract outweigh their concerns about unfair terms. This is a legitimate business decision for those businesses to take. Indeed, it recognises

that in a competitive market, a business can validly compete with other businesses by offering a lower price that reflects a lower risk taken; and conversely, a business can distinguish itself in a market by offering goods or services on terms that are better than those offered by its competitors (and can price those goods or services accordingly). We think that this ability to distinguish oneself in a market through the terms on which one does business facilitates competition, which should be encouraged.

- 2.9 We note that you have canvassed business owners to establish if they have been offered contract terms that they considered to be 'unfair' in the past year. While we acknowledge that many supplier contracts (including standard-form contracts) do contain provisions that are often onerous – or worse, indecipherable – we query whether the examples given in the Discussion Paper can be rightly classified as inherently 'unfair', without a contextual analysis of the circumstances in which they were proposed.
- 2.10 The examples also appear to ignore the fact that business owners are entitled to, and do, take different approaches to risk assessment. They also make legitimate business decisions as to whether or not they will bear any particular risk, and to what extent.
- 2.11 For example, the Discussion Paper notes that 59 per cent of businesses indicated that they had been offered 'unfair' terms that limited the liability of their supplier or business customer and/or placed the risk on their business.
- 2.12 With respect to the views of those businesses, we do not consider that a supplier or customer limiting their own liability or seeking to transfer risk to a counterparty is inherently 'unfair'. As will be clear from our comments above, we consider that the inclusion of a limitation of liability in the offer of goods or services is an inherent feature of the offer. Often, a party proposing terms will have made a deliberate decision to exclude liability on the basis that they have made a business decision not to take steps (such as implementing insurance or increasing prices) to cover that liability. In other words, the party is 'not in the business' of assuming that sort of risk. Indeed, it may well be 'unfair' to propose that the party offering the terms assume that business risk.
- 2.13 Generally speaking, we consider that the same principles should apply to all other contractual terms offered by a supplier or purchaser of goods or services on a business-to-business basis.
- 2.14 To the extent that the market is unable to respond to the demands of a business for a 'fair' deal, or a deal that otherwise meets its requirements, we believe that this is a matter that should be considered through the lens of competition law (that is, under the Commerce Act 1986). If barriers to entry or other market conditions exist that prevent competitors from offering goods and services that, in the eyes of their customers, represent a 'fair' deal, then this should be addressed through regulation of the relevant market, rather than by dictating the terms on which businesses do business.

3 Other matters under consideration

- 3.1 The Discussion Paper asks whether we are aware of any types of 'unfair' business-to-business conduct. To the extent that we are, we consider that existing regulations and remedies available to businesses are an adequate response.

- 3.2 With respect to business-to-consumer conduct, we appreciate that the relationship dynamic is such that consumers deserve additional protection from both unfair conduct, and unfair terms. While we do not have any specific comments in this regard, we wish to clarify that nothing in our submission should be read as implying that the same rules or considerations should apply in the business-to-consumer context.
- 3.3 We are generally supportive of any changes which seek to prevent unconscionable, oppressive, or misleading practices by businesses who offer goods or services to consumers, provided that such changes are implemented in a way that ensures that businesses who operate in such markets can rely with some certainty on the way in which the law will apply and be enforced.

4 Further information

- 4.1 We are happy to discuss any aspect of our feedback on the Discussion Paper.
- 4.2 Thank you for the opportunity to submit.

Yours faithfully
Kensington Swan




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