SUBMISSION ON BEHALF OF PRODRIVE IN RESPONSE TO DISCUSSION PAPER ENTITLED 'PROTECTING BUSINESSES AND CONSUMERS FROM UNFAIR COMMERCIAL PRACTICES

1. New Zealand Professional Drivers Association (**ProDrive**) is pleased to see that MBIE and its responsible Ministers are considering options to strengthen the protections for businesses and consumers against 'unfair' commercial practices. In particular unfair contract terms and unfair conduct.

2. ProDrive was established back in 2010 to advocate for the rights of independent contractors who, more particularly, operate in the trucking and delivery industry in New Zealand.

3. ProDrive's position with regard to contractor vulnerabilities set out in this submission are informed via:

   (a) Ten years at 'the coalface' providing advocacy and legal representation on behalf of independent contractors, ie truck drivers, couriers, waste management, security, taxi-or-Uber drivers etc.

   (b) ProDrive being New Zealand's only specialist Owner-Driver advocacy/legal service for independent contractors.

   (c) Formal submissions to parliament in 2016 in respect of Hon. David Parker MP's private member's bill in relation to the introduction of minimum wage requirements in contractor agreements.

   (d) Commentary via various media outlets, articles and interviews – ongoing.

4. ProDrive has successfully advocated for owner/drivers across a range of industries including FMCG-supply chain, security, waste management, freight transport, courier and taxi industries. With the invaluable assistance of leading New- Zealand law firm, Simpson Grierson (Mr Ben Upton) and Auckland Barrister Helen White, ProDrive has brought numerous challenges to the conduct of international corporations and New Zealand companies, including a High Court class action (2011), District Court (2013 and 2015), mediations and private settlements.

5. It has been ProDrive's experience, after thousands of hours spent listening to the stories of contractors and their families, that poor corporate conduct, contractor vulnerabilities, adverse health and safety outcomes and often devastating family impacts flow directly from one-sided non-negotiable contracts presented by principals with vastly superior bargaining power. There is the overlay of poor education and immigration. The vast majority of contractors in the transport industry are poorly educated in relation to contract, health and safety and transport law and new immigrants often have English as a second language.

6. It is a recognised fact that at the heart of New Zealand business is the Small to Medium Enterprise[1]. Within that large grouping is an equally large sub-set of people and entities operating in the New Zealand market who, in order to get business or otherwise operate within certain industries (such as delivery work), have to contract with a sole principal on terms and conditions which are wholly dictated by that principal. These persons are 'dependant contractors' who, in ProDrive's view, are vulnerable and require protection from unfair contract terms. Such vulnerability has indeed been recognised by the New Zealand courts who have had to find creative ways to resolve such issues[2]. That state of affairs is unsatisfactory and, for reasons elaborated on below, requires law reform in New Zealand.

7. There are a number of examples in New Zealand where large corporates, in particular, have put in place a contracting model in order to avoid / lessen employment obligations and shift responsibility for capital cost and other risks (such as health and safety) onto the contractor. This practice is not limited to the transport sector but that is sector where there are obvious examples and where the concerns expressed in this submission are self-evident. There is nothing necessarily nefarious in this practice – All that is advocated here is that if contracting is established such as to create dependency and significantly unequal bargaining power, the law should be altered to make it easier to challenge any real or potential abuses that result from the terms of the contract itself or from the conduct of the principals who seek to implement contractual terms in their favour in an unfair, harsh or oppressive manner.

1 The NZ Government's Small Business Sector Report 2014 establishes that small businesses (as defined in that report dominate New Zealand industry. That report also mentions the existence of some 380,000 self-employed persons.

2 See Olsen v Goodman Fielder New Zealand Limited, CIV-2011-404-5622, HC Auckland, 23 November 2011, Keane J. As to vulnerability, see [88] of the judgment.

Comment about past investigation around law reform

8. Before addressing the more substantive aspects of this submission, and addressing the questions raised by the MBIE Discussion Paper, a few observations should be made.

9. First, New Zealand law makers have looked at this issue of unfair contract terms before. There is an excellent Law Commission discussion paper on "Unfair Contracts" dated September 1990[3]. The authors (footnoted below) of that report included a retired Chief Justice (Woodhouse), two lawyers who were later to be Judges of the New Zealand Supreme Court (Keith and Blanchard) and one of New Zealand's (then and still) leading commercial Queen's Counsel (Hodder). The last member of the panel was a High Court Judge.

10. That Law Commission Report, while reserved in its actual recommendations, provided a blueprint for the very form of legislation that is under consideration today. It addressed all the 'pros' and 'cons' of such reform.

11. ProDrive observes that what held true in 1990 still, by-and-large, holds true today, save that reform is likely even more necessary given the greater use of the contractor model (see 6 above).

12. Second, New Zealand has fallen behind in this important aspect of area contract law especially when compared to our closest commercial neighbour, Australia. Most relevantly, Australia has had the Independent Contractors Act 2006 in place since late 2006/early 2007. That particular piece of legislation is excellent and permits service contractors to ask a court to review and seek remedy in relation to contracts that are found to be 'unfair' or 'harsh'. In ProDrive's view, the Government need look no further than that Act if it wants to make a significant difference to business-to-business conduct in New Zealand.

13. Even England has had an Unfair Contract Terms Act in place since 1977 (albeit that it is limited to outlawing unreasonable exclusion clauses). However, England has a broader view of who 'workers' are for the purposes of their employment laws and so it is much easier for contractors to seek the protections afforded to an employee in dependent contractor relationships. The recent decisions around London Uber drivers supports that.

3 Law Commission Preliminary Paper No.11 - "UNFAIR" CONTRACTS. Authors Sir Owen Woodhouse, Jack Hodder, Sir Kenneth Keith, Hon. Justice Wallace, Peter Blanchard.

14. The same can be said for Canada whose laws provide protections for 'dependent contractors'[4]. The Canadian courts having previously recognised the existence of such a category of worker[5] .

15. As such, while New Zealand has looked into the issue of protecting those who are vulnerable as a result of unfair or harsh contract terms, and had excellent reports commissioned in that area many years ago, outside of the consumer and credit contract sphere[6], nothing has been done.

16. Other comparable jurisdictions, on the other hand, have either put in place specific legislation (Australia and to a limited extent England) or reformed their employment laws to ensure that it has greater reach so as to capture those who work as contractors but are essentially similar to employees and/or otherwise dependent upon their principal as a result.

17. In summary, therefore, New Zealand is far behind comparative jurisdictions when it comes to contractor protections, more particularly in the area of 'dependent contractors' who are the most vulnerable class of contractor in this instance.

Dependant contractors

18. The reason this submission places some focus on 'dependant contractors' is because the key features of dependent contractor relationships are often a combination of the contractual terms or features which looked at individually, collectively or in context are the types of provisions that could be termed 'unfair' or 'harsh' but where there are no or very limited rights of challenge[7]. Such terms or features include[8]:

    (a) Standard-form, non-negotiable contracts prepared by the principal.

4 Part 1, Canada Labour Code.

5 McKee v Reid's Heritage Homes Ltd (2009) ONCA 916. This case recognised the existence of an intermediate category of worker which consisted, it said, at least those non-employment work relationships that exhibit a certain minimum economic dependency, which may be demonstrated by complete or near-complete exclusivity. Workers in this category are known, the decision records, as 'dependent contractors'. See also, in this regard the more recent UK Supreme Court decision in Plimco Plumbers Ltd v Smith [2018] UKSC 29.

6 Through the Fair Trading Act 1986, Credit Contracts and Consumer Finance Act 2003 in particular.

7 It is of interest to see that the Labour Party manifesto has the introduction of laws protecting the interests of 'dependent contractors' as one of its stated aims.

8 Many of these features are apparent in current Goodman Fielder bread contracts for their bread delivery contractors and in many courier contracts..

(b) Exclusivity clauses, where the contractor must essentially work exclusively and/or full-time for the one principal, despite being termed an ‘independent contractor’.

(c) Exclusion of goodwill or clauses which limit the principal's risk for actions by them which damage the contractor's goodwill.

(d) The existence of a unilateral power granted to the principal to adjust payment rates, terms or calculation methods.

(e) The existence of a unilateral power granted to the principal to require the ownership or lease of key capital items (eg. Vehicles, tools or specialist plant) with the principal having the complete power in respect of the level of funding provided for that. The effect of this later right being the ability to lock contractors into having to deal with certain suppliers that are preferred by the principal (as to insurance, purchase of petrol or other essential business costs).

(f) One-sided termination rights in favour of the principal.

(g) Unilateral control rights in favour of the principal over the contractor's territory or customers.

(h) The right given to the principal to dictate staff the contractor uses or an ability to (expressly or impliedly) give direction as to who is hired or not.

(i) The principal’s right to decide the type, model, age and colour of vehicle to be purchased by the contractor.

(j) The equipment to be installed that must either be paid for or lease-maintained by the contractor. Additionally the principal’s right to continually add to the equipment at the contractor’s cost.

(k) The principal’s right to set the hours of work and to amend these at its sole discretion.

(l) The principal’s right to set the route to be operated by the contractor.

(m) Complete rights of audit granted to the principal.

(n) Unilateral rights of set-off in sole favour of the principal.

(o) No ability by the contractor to assign at all or no ability to assign without principal approval – such approval not being curtailed by a 'not unreasonably withheld' provision. Rather, simply a unilateral right of veto for no or any reason.

(p) Unilateral right granted to the principal to impose changes to practice or procedures which create material changes to the contract terms. This can be done through terms which allow unilateral changes to a Practice Manual or other document outside of the actual written contract, as opposed to a change of contract term.

(q) Limitation of liability clauses, to include capped damages clauses.

(r) Exclusion of liability clauses.

(s) Provisions which record that the contractor has received independent and accounting advice prior to signing when it is known that it would be difficult and/or expensive for this to have occurred (and therefore highly unlikely to have occurred).

(t) Post-termination restraint clause(s) that preclude the contractor from working within the same industry for a competitor for up to 12 months or longer.

(u) Governing law and jurisdiction clauses which exclude New Zealand law and require disputes to be litigated in overseas jurisdictions[9].

(v) Finally, and importantly, clauses which require the contractor to accept that they are 'independent contractors' and not employees. Such terms usually included so as to make it more difficult for contractors to later assert that they are employees.

[9] There are such provisions in Uber Driver contracts that ProDrive has seen. The Uber driver contract is actually with an entity domiciled in the Netherlands. While such provisions do not exclude the jurisdiction of the Disputes Tribunal, some disputes often exceed that tribunal's threshold.

19. Whilst dependent contractors do in principle have rights at the outset (they have a choice to sign up to these contracts or not[10]) it is not uncommon for dependent contractors to either:

(a) be forced into such contracts though the disestablishment of their employee roles but with an option to contract back in as an independent contractor, as opposed to an employee; or

(b) in a restructure, have existing contracts terminated on notice, but then offered back on altered terms.

(c) have existing contracts unilaterally altered in a material way such that terms or payment rates which are objectively fair at the outset become unfair.

20. A classic example of this is what was observed in *Olsen v Goodman Fielder New Zealand Limited* [11] where:

(a) Existing contractors (who were all at that time engaged on various and differing terms) were all transitioned from existing contracts (which were all terminated on short notice) into a new, uniform, standard-form contract in 2008;

(b) Such contractors were all already dependent because their livelihoods were linked to existing contracts and they invariably had invested capital (trucks) and/or had borrowed to purchase these businesses. Most had little choice but to sign the new contracts.

(c) The new contracts were in the most part on less favourable payment terms (albeit that there were arguably some other more favourable new terms if compared to the terminated contracts).

(d) The new contracts were then exploited by lowering payment terms further through the unilateral adjustment of cost model inputs in 2011 without any prior discussion and on one-week's notice.

10 Many dependent contractors are required at the outset to sign declarations that they have received legal and/or accounting advice. Few will actually get such advice.

11 See fn 2. ProDrive declares its interest in this case. It assisted contractors involved in this case in getting adequate legal representation. Simpson Grierson, Auckland was approached and worked with Pro Drive and the contractors to get the matter heard ungently by the High Court.

(e) The unilateral adjustments led to commission payments being lowered by (on average as between the 9 contractors affected) 24%. One contractor had his commission reduced by 42%.

(f) Goodman Fielder refused to reinstate commission payments saying that it had a unilateral right recorded in the contract to adjust the commission payments. It also said that because the contractors had been 'overpaid' for some time, they could cope with any changes at short notice.

21. In this instance the nine *Olsen* contractors were unable to challenge the contract or its terms as being unfair or unconscionable[12]. Rather, they were reduced, on existing legal principles at the time, to having to argue interpretation points and the existence of fiduciary duties. Neither argument prevailed. However, the High Court did, in this instance, create a new concept of there being breaches of implied duties[13]. It implied duties that required notice and consultation when the dominant principal wanted to effect contract changes. That concept was not challenged on appeal, but was certainly a new concept in law which the *Olsen* contractors gratefully accepted in resolution of their dispute in the circumstances. Many of the unilateral changes were, after review, reversed.

22. While, therefore, the contractors succeeded in getting relief in a first instance court, the decision of the High Court in *Olsen* did lead to a rather novel and, arguably, fragile concept of implied contractual duties[14].

23. Aside from the fragility of that common law protection, the situation in *Olsen* underscores the lack of satisfactory protection for the dependent contractor[15].

24. It might be argued that a dependent contractor can seek protection by claiming that he or she is, by reason of his or her dependency, really an employee and, through that claim, challenge terms which reduce bargaining rights or protections[16]. However, again dependency does not of itself establish an

12 The law relating to unconscionablity in New Zealand did not lend itself to that situation.
13 It was not possible to imply terms into the contract, as that possibility was excluded by the contract itself.
14 Goodman Fielder did accept that it was possible to challenge a unilateral power, but only where the power was being exercised arbitrarily, maliciously or capriciously – a high threshold which could not be established in this instance as Goodman Fielder was able to show that it had undertaken some behind the scenes desk analysis which supported the changes (albeit that, at trial, that analysis was shown to be faulty in a number of respects).
15 ProDrive observes here that had legislation in the form of the Independent Contractors Act 2006 (Australia) been in place, then the position of the contractors would have been vastly improved. Indeed, that of the Court too. It would not have had to strain existing common law principles to the limit.
16 In line with the principles set out by the Supreme Court in *Bryson v Three Foot Six Limited* [2005] 3 NZLR 721.

employer / employee relationship. Dependent contractors are also invariably companies where the employee / employer relationship will be difficult to assert[17].

25. As such, ProDrive advocates that law reform is needed in New Zealand to, at a minimum, legislate for unfair contract terms protections where the relationship is one of dependent contractor and principal. In this instance a dependent contractor should be able to challenge and seek relief against unfair contract terms much like a consumer can in relation to an unfair term in a consumer contracts in New Zealand[18]. The underlying rationale being that the vulnerable need protection applies in all cases.

26. ProDrive says that the protection of dependent contractors is critical to small businesses in New Zealand: Because such businesses are by far the predominant means New Zealanders do business reform is all the more critical.

27. The proposal for legal change in this area should not be controversial:

(a) The existence of dependent contractors is not uncommon and capable of statutory definition and expression.

(b) The exploitation or potential exploitation of a dominant position by one contracting party over another is the antithesis of good business and can lead to wider problems (health and safety risk, poverty etc.).

(c) Most principals should welcome protections. They would no doubt profess business values which reject exploitation.

(d) Protections are, however, clearly necessary as some principals have been shown to have exploited their dominant position.

(e) The ability to challenge unfair contract terms in such instances is, at present under New Zealand law, difficult, expensive and uncertain.

(f) There is example law in other jurisdictions – Independent Contractors Act 2006 in Australia for example.

17 It is a usual term of contractor agreements that the parties both agree that there is no employment relationship. So it is left to the contractor to prove otherwise. Invariably contractors do not have the resource to pursue such litigation.

18 Under the Fair Trading Act 1986 or Credit Contracts and Consumer Finance Act 2003. Both recently amended to introduce enhanced consumer protections.

28. Payment rates and terms are invariably a key issue in arguments about contract rights and obligations. Further, in many industries finding ways of cutting cost is an everyday imperative. This invariably leads to principals seeking to find ways to cut contractor pay. Dependent contractors frequently perform necessary but what are considered low level tasks (eg delivery of product). The is also a high level of new migrants involved, where English is invariably a second language or education levels low. As such, contractors are often seen as 'low hanging fruit' that can be targeted[19]. As research shows, however, the lowering of pay leads to the heightened risk of accidents[20].

29. Indeed, ProDrive's more recent activity has been in the courier industry. Having engaged with several courier companies over the past months, it is not only clear that the contractors in question fell within the 'dependent contractor' group, but that through unilateral alterations to pay and routes, there is a disturbing and increasing trend of requiring more for less. Further analysis of this issue and indeed the more serious risk around deaths on the road follows below. The point being, however, that low wages lead to contractors having to do all the work hours themselves, as opposed to being in a position to hire staff or relief workers when required. This leads to work time regulation breaches and clear health and safety risks. One contractor who ProDrive has assisted suffered injury and can no longer work. This is now a cost to the tax payer, through ACC.

30. As such, whilst ProDrive is supportive of broader reform which would enable challenge to all unfair or harsh contract terms, given that its intent has a noble aim of improving contracting more generally, it would not want this opportunity to be lost through legislators being too ambitious and being ‘shouted down’ as a result. This appears to have been the case in the 1990s when very good reasons were highlighted by the Law Commission for change in this area and a clear blue-print presented. However, nothing happened.

31. ProDrive’s view is that the better approach is to look at reform in specific areas of need. This point needs to be made now, at this point in the submission and prior to addressing the specific questions posed, as it underlies the ProDrive response to the specific questions asked.

19 In the Goodman Fielder example, Goodman Fielder's actions were preceded by a large $300m impairment and a resulting open cost cutting exercise within the baking division.

20 See for example the views of Associate Professor H Belzer of the Department of Economics at Wayne State University: "… Every 10% more that drivers earn in pay rate is associated with an 18.7% lower probability of crash, and for every 10% more paid days off the probability of driver crashes declined 6.3%."

RESPONSE TO QUESTIONS IN THE DISCUSSION PAPER

Q1. What types of unfair business-to-business terms are you aware of, if any? How common are these?

32. See paragraph [18](b) to (t) above. These types of provisions are very common in the transport industry. Particularly in delivery and courier contracts.

33. ProDrive would observe, however, that certain clauses which (in isolation) could be viewed as 'fair' can, in reality and in practice, be unfair. For example, in cases where there are a group of contractors who are all subject to the same terms and conditions, it is invariably the case that there are strong 'confidentiality' provisions which are invoked by principals in the case of disputes which may be relevant to a number of contractors. A principal may want to do this so as to isolate contractors from one another and therefore seek to prevent collective action. So, while confidentiality is important in some respects, such provisions can have 'harsh' consequences if used tactically to disempower collective action.

34. Another example would be dispute resolution clauses. Many contracts impose dispute resolution processes that involve good faith meetings, negotiations, mediation and end with requiring arbitration. While all of this looks good on the surface. This process can in practice actually involve quite a lengthy period before a final determination process can be invoked, and once invoked, require a very expensive arbitral exercise where, by reason of the process alone, Legal Aid is not available. It is ProDrive's experience, therefore, that many disputes cannot be pursued to their necessary conclusion as principals are quite happy to hold out until the arbitral process is reached and, only then, offer a meagre compromise (despite the merits) because they know that the contractor cannot afford to go any further. Disputes also often involve money which the principal is withholding; the delay tactic is all the more tempting and effective in such instances. So in those instances arbitral clauses (common in business-to-business contracts because they provide private resolutions, as opposed to public court cases) can be misused and, in that context, constitute 'harsh' or 'unfair' terms.

35. So, as always in all contractual matters, context is everything. There should not be, therefore, any legislative reform which focuses on certain clauses. It is the nature of the relationship that is important and the context in which contractual terms or powers are invoked and operate that must be the focus. That is why

ProDrive has, at the outset, indicated that the Independent Contractors Act 2006 in Australia provides a good starting point for this type of reform, as that Act demonstrates a pragmatic philosophy which is responsive to the actual situations ProDrive has encountered in day-to-day contractor vs principal disputes.

Q2. What impact, if any, do these unfair contract terms have?

36. It is self-evident that unfair or harsh contract terms or behaviour can be value destroying from a business perspective. But there is an important human angle here. Those who suffer from harsh or unfair terms or behaviour are those who, invariably, have the least means of recovering financially or emotionally from the outcomes. In ProDrive's experience, those who are the victims lose out personally, financially, emotionally and in their health. It destroys relationships and families. Sometimes lives are lost.

37. In November 2012, ProDrive discussed (among other issues) the question of truck-related fatalities with senior representatives of the NZ Police. One of the principal questions we asked was 'why are the CVIU not taking investigations beyond the roadside and 'upstream' into corporate offices to determine contributing or possibly root causes to fatigue, working over hours, falsifying hours, and consequent fatalities. Aside from international research that clearly supports this ProDrive's experience is that there is a clear link between poor contract terms and poor conduct on the part of principals with deaths on the road, particularly when poor pay results. It was a simple equation: Bad work conditions and low pay mean contractors cut corners and break the law in order to survive financially.

38. The answer from CVIU – lack of resource. Blunt, honest, disturbing and unacceptable then as now.

39. In 2013 truck-related deaths were 45; in 2017 they rose to 77. To ProDrive's knowledge CVIU continue to exempt corporations from investigation by the Serious Crash Unit at the time of a fatality.

40. In a recent case in Taranaki a truck driver, Mr John Baptiste Barber (of Hawera), killed two children as a direct result of operating extended shifts, extreme fatigue and falsifying log books.

41. He has pleaded guilty and awaits sentence in April 2019. The company blames the driver entirely, however this case begs for further Police investigation into any possible role, influence, direction or action by the company that contributed to the driver's conduct and the shocking and unnecessary loss of two young lives.

42. The truck-related death rate in New Zealand has now reached the annual equivalent of 2 x Pike River disasters per year. It is unimaginable that this could occur in any other industry in NZ while transport industry operators, spokespersons, quasi-representative bodies and seemingly even the NZ Police wring their hands on the side-lines and claim to be powerless.

43. One way of starting to address that statistic is to put in place laws that should have some impact in improving contracting terms by providing some easy and inexpensive remedies for contractors when they are subjected to harsh or unfair contract terms or behaviour.

44. The financial and economic damage is also real and cannot be underestimated. A case in point is the courier industry. In July 2018, John Campbell of Radio New Zealand's *Checkpoint* ran a story about courier drivers. This emerged out of a news story about a contractor leaving a parcel containing a gun at the wrong address without (as required) getting a signature on delivery. The courier was heavily criticised until it was revealed that the courier was actually poorly paid and under heavy time pressure to perform his tasks; the error was excusable in those circumstances. *Checkpoint* contacted ProDrive and others for comment and more detailed information regarding the vulnerabilities of contractors within this industry. During the course of the next few weeks (4) ProDrive was informed by Mr Campbell that Checkpoint received hundreds of responses from Couriers essentially repeating the courier's story and highlighting the poor pay, work conditions and the fact that poor service was no doubt a result of that, as opposed to the courier being incompetent. He and his producer (Pip Keane) described the response as *"overwhelming".* Campbell ran with the story for some weeks and this, in itself, led the courier industry to try and defend itself.

45. The story eventually led Minister (Rt Honourable) Lees-Galloway to the point of saying that he would want to obtain a "*thorough and rigorous analyses of the industry".*

46. ProDrive as it happens represents contractors from eight different Courier companies. These comprise between 3000-4000 Contractors or 60-80% of the courier industry.

47. We have analysed their various contract terms and are able to confirm that they all have the same or similar terms to those previously referred to in paragraph 18 above. The contracts are so one-sided that it is embarrassing. Yet people (in large part new immigrants with poor English language skills) still sign these contracts and invest comparatively large sums of money in vans to do the work.

48. Yet the actual remuneration earnt is quite disturbing. ProDrive's assessment based on its extensive involvement in assisting in disputes involving eight different courier companies is as follows:

(a) Gross daily returns are typically between $300-$350 (+ GST) per day. Typically 250+ working days per year.

(b) Thus the variation of (typical) gross returns is

(i) $300/per day (x 250/year) = $75,000 + GST Gross income

(ii) $350/per day (x 250/year) = $87,500 + GST Gross income

(iii) Less; Capital, Operating costs and Depreciation of between $33,000 to $40,000 per annum (+ GST)

(iv) Nett Returns – Pre Tax

$42,000 to
$47,000

(v) Effective nett hourly rates

$15.00 per hour to
$16.79 per hour

49. The NZ Minimum Wage is set to rise to $17.70 from April 2019. Thereafter the vast majority of NZ Courier Contractors will fall below (nett earnings) the minimum wage.

50. Presently, none of the eight companies (principals) recognise or acknowledge that there are fundamental, systemic and structural problems facing the courier industry. They all appear opposed to any contract law reforms.

51. The courier and wider transport industry is fiercely competitive; Companies are intensely focused upon profitability, cost-cutting and return to shareholders. The price paid (by contractors) of low returns and economic struggle is currently not a material concern to these companies. A constant supply of new migrants and poor regulatory protection for contractors makes this attitude prevalent. It does however overlook the fact that the financial difference between underpayment of a minimum or even a living wage means that the difference is made up by the New Zealand tax payer through 'family support or WINZ'. It also ignores the consequences of poor pay (from poor service at the low end of the scale to a death on the road at the higher end).

52. Put bluntly, it is ProDrive's view that corporate advantage prevails in the transport industry and within many other independent contractor relationships where there is a visible imbalance between the contractor and the principal. Very few rights including those of collective representation are retained by contractors. Business risk and precarity is high, however remuneration rates and returns to business owners are correspondingly low. This, coupled with inadequate regulatory protection, results in a fundamentally distorted market place, where transport operators post millions of dollars in profit on the backs contractors whose incomes permanently 'hover' between (at best) minimum and living wage.

53. While 'the race to the bottom' is widely accepted in discussions with senior management of courier companies and all equally lament this situation, few if any acknowledge the systemic, structural and 'fundamental inequity' problems that are (in ProDrive's view) at the heart of this distorted and exploitative market.

54. The disconnect between top management and workers is all too real. ProDrive is aware that few if any of the major courier companies in New Zealand see any need for contract law change or that the industry requires any regulatory intervention. ProDrive disagrees.

Q3. Is government intervention to address unfair business-to-business terms justified?

55. Yes, for the reasons set out above. Particularly in 'dependent contractor' relationships.

Q4. What types of unfair business-to-business conduct are you aware of, if any? How common is this type of behaviour?

56. The types of behaviour that ProDrive has observed has included:

(a) Unilateral alteration of inputs in commission payment models so as to reduce commission payments substantially on short notice and without consultation: See *Olsen v Goodman Fielder.*

(b) Invoking confidentiality so as to prevent collective contractor action in relation to issues common to a number of contractors.

(c) Unilateral removal of or increase to work without consultation or compensation.

(d) Unilateral termination of contracts on grounds that a contract was 'uneconomic' to the contractor when the commission payment model made that scenario impossible.

(e) Refusal to provide contractors with information as to the means of calculation of payment models on grounds that this was confidential to the principal.

(f) Bullying or favouritism so as to force a contractor to give up their contract or become in breach of contract, such that the contract is terminated for cause.

(g) Misrepresentations pre-contract, later denied.

(h) Unreasonable interpretation of contract terms. Such position then held so as to force the contractor into an expensive dispute, later settled but

on compromised terms when the principal was entirely wrong, but willing to exhaust the contractor.

(i) Unreasonable unilateral deduction from payments at the point of termination of a contract.

(j) Conduct of investigations using 'banana republic' type processes where the contractor is denied basic 'natural justice' protections.

57. This type of conduct is not uncommon in the transport industry. The cases that ProDrive has supported provide raw examples of the above.

Q8. What impact, if any, does this conduct have?

58. See answer to Q2.

Q9. Is government intervention to address unfair business-to consumer conduct beyond existing legislative protections justified? Why?

59. Yes, for the reasons set out above. Particularly in 'dependent contractor' relationships.

Q10. Do you agree with our proposed high-level objective and criteria for assessing any potential changes to regulatory framework governing unfair practices? If not, why not?

60. Yes, although regard should be had to specific groups where vulnerability is higher (e.g. dependent contractors).

Q11. - Should a high-level prohibition against unfair conduct be introduced? Why? / Why not?

61. This would be an ideal in ProDrive's view. In short, a push for broader reform should not lead to no reform in specific areas of concern where the need for change is more self-evident and grounds for opposition weak (e.g. dependent contractors).

Q.12 - That are the advantages and disadvantages of Option 1A, 1B and 1C?

62. Option 1A (unconsciounablity) will achieve nothing. It is a high threshold and challenge on this ground is open to litigants in a common law context anyway.

63. Option 1B (oppressive). The same comment to option 1A applies. Noting, of course, that the key to oppression (as the courts have found in the context of credit contract cases) is whether the conduct falls below 'reasonable standards of commercial practice'. In many instances (particularly in the transport industry) regard to current standards of commercial practice will not assist, as they are actually low and framed by years of poor conduct and low standards.

64. This leaves Option C (unfair commercial practice). This applies a more objective 'reality' approach.

65. Note, however, that ProDrive has pointed to the Australian Independent Contractors Act 2006 as providing a good model, and the Law Commission in 1990 has already provided a suitable blue print for unfair contract reform.

66. Looking at Options, as the discussion paper suggests, is perhaps not necessarily the right approach.

Q.13 – Not answered as ProDrive does not favour this approach.

Q14 – Is it appropriate to require business to act in good faith?

67. This could be adopted, but 'good faith' is of itself an uncertain concept and could simply add to a further layer of complexity of what should be a relatively simple objective analysis of whether a term is unfair or harsh in the context of the relationship.

Q.15 – Other variations to Option 1

68. See Q 12 above.

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

69. Yes.

Q.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?

70. Reform should not extend consumers only. It should apply to consumers and all service contractors, particularly dependent contractors.

Q.18 – If the UCT protections are extended to businesses, do you agree that the current consumer UCT provisions should be carried over without major changes? If not, why not?

71. There should be unfair contract terms legislation specific to contractors.

Q.19 – Should the FTA's grey list be carried over?

72. While examples can assist, context is always relevant. See discussion above where even standard terms can be unfair in certain contexts.

Q.20 – Should any protection against unfair terms apply to consumers only, consumers and some businesses (and, if so, which ones), or all consumers and businesses?

73. Reform should not extend consumers only. It should apply to consumers and all service contractors, particularly dependent contractors.

Q.21 – If the protections against UCTs are extended to businesses, should a transaction value threshold be introduced, above which the protections do not apply?

74. No. It is the nature of the relationship that is important, not the value of the contract.

Q.22 – Should there be penalties for breaching any new provisions regarding UCTs, and should there by civil remedies, even if unfair terms have not previously been declared by a court to be unfair? How should any penalties and remedies be designed?

75. Remedies should allow a court to declare the terms / conduct unfair, re-open the contracts in such cases and provide such remedy as the court sees fit in relation to those outcomes. That could include striking out the offending terms, re-writing the contract to make the terms fair, compensating for losses arising from unfair terms or conduct, injunctions or the like.

76. In essence, the available remedies to a court could be broad as the scenarios arising from unfair conduct in particular are many and varied.

Q.23 Other options

77. Legislation similar to that set out in the Independent Contractors Act 2006 in Australia should be considered.

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