

25 February 2019

Competition and Consumer Policy
Ministry of Business, Innovation and Employment
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By email: competition.policy@mbie.govt.nz

PROTECTING BUSINESSES AND CONSUMERS FROM UNFAIR COMMERCIAL PRACTICES

Introduction

1 Retail NZ is a membership organisation representing the interests of the retail sector. We have about 4,000 members ranging from the tiniest retailers to large retailers. Collectively, our membership accounts for about two-thirds of New Zealand's total retail turnover.

2 Many retail firms are typically both contractors purchasing goods and services, as well as suppliers to other businesses. In many cases, retailers will be the smaller player, especially in terms of supplier relationships. Even a large New Zealand retail chain is small by global standards, and will lack negotiating leverage against larger firms.

3 We wish to provide some comments on MBIE's discussion paper *Protecting businesses and consumers from unfair commercial practices*.

General commentary

4 In general, we agree that businesses should be expected to behave ethically and fairly in their treatment of each other and consumers. While it is correct that, in some cases, there is a commercial power imbalance between large and small firms, we are not generally aware of significant instances of unfair commercial behaviour in the New Zealand market.

5 It is important to note that "fairness" and "unfairness" are inherently subjective terms and can be interpreted differently by different people. It is important to note that a contract term is not necessarily unfair, just because one party does not like it. For example, a manufacturer or wholesale supplier will typically want to be paid a higher price for its products, while a purchaser will typically want to pay a cheaper price in order to generate a higher return on sales. This is not, in itself, inherently unfair, even if the parties disagree on what the price should be. Typically, cheaper pricing will lead to benefits for consumers, while pricing that is too high will create market opportunities for more efficient players to enter the market.

6 It should be noted that businesses are not forced to sign contracts if they do not like the terms. According to the MBIE survey, 66 per cent of those businesses offered a contract they perceived as "unfair" chose not to enter into the contract as originally offered; and half of those businesses which asked for changes had their concerns partly or fully addressed.

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Unfair business to business contracts

7 We are not aware of unfair contract terms being widespread across the economy, although we are aware of some instances where large firms impose lengthy payment terms on smaller firms. This can have a significant impact on cashflow for smaller suppliers. While regulation could address these issues, we are unconvinced that this is warranted. Our sense is that they are best dealt with through negotiation between the parties in the first instance.

Unfair business to business conduct

8 We have heard of limited instances where some franchisees have concerns about the conduct of franchisors. For example, we are aware of situations where franchisees have not been made aware of the costs of certain products or systems required by a franchisor in order to run a franchise business. Greater transparency may be key to resolving these limited situations.

9 More generally, we are not aware of significant and widespread instances of unfair business to business conduct in the New Zealand market. While we are aware that there are sometimes robust commercial discussions between parties, our understanding is that these are typically resolved through negotiation. We do not see a need for regulation in the first instance.

Unfair business to consumer conduct

10 Business to consumer conduct is already heavily regulated under the Fair Trading Act and other legislation, and we note that the Commerce Commission has already been given the power to take action against unfair contract terms imposed on consumers. We believe most businesses behave responsibly towards consumers, although we are aware of some players operating at the fringes of the retail market who undertake misleading and unfair sale practices, often targeted at vulnerable consumers. This is neither appropriate nor acceptable, but we consider that behaviours of the kind identified in the consultation paper are typically some form of misleading and deceptive conduct, and are therefore already prohibited under section 9 of the Act.


Options for reform

11 We agree with MBIE's presumption in page 28 of the consultation document that there is not a large gap in the protections against unfair conduct at present, and on that basis, we do not think that further regulatory action can be justified.

12 However, if the Government is minded to regulate, we would recommend package 1 - additional protections for consumers; or package 3 - extra protections for consumers and a prohibition of unfair contract terms between businesses.

13 Based on our understanding of normal business practices, and the lack of evidence presented in the MBIE discussion paper, we do not think there is justification for trying to regulate against business conduct or practices.

Yours sincerely



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