

**Submission to the Ministry of Business, Innovation and Employment  
Russell McVeagh**

**25 February 2019**

**INTRODUCTION**

1. Russell McVeagh is grateful for the opportunity to submit to the Ministry of Business, Innovation and Employment ("**MBIE**") on the December 2018 "Protecting Businesses and Consumers from Unfair Commercial Practices" Discussion Paper ("**Discussion Paper**").
2. Our submissions are designed to assist MBIE to make recommendations that achieve the best policy outcomes for all New Zealanders, and reflect that we act for a range of businesses, both large and small. In making this submission, we emphasise that, from our perspective, the proposed prohibitions would represent one of the most significant changes to New Zealand's commercial law framework in recent memory, and could have far-reaching impacts on the way that businesses negotiate and contract with one another and with consumers. Accordingly, it is essential that any law reform is only introduced if there is clear evidence of a problem in New Zealand, and if it is established that intervention could benefit the economy as a whole.

**EXECUTIVE SUMMARY**

3. Our submission addresses:
  - (a) the need for MBIE to ensure that the proposed legislative solutions are only advanced for further consideration if there is clear evidence of a problem in New Zealand, and it is established that intervention could benefit the economy as a whole;
  - (b) that we do not consider there to be any material "gap" in the existing laws. If, however, the Government ultimately concludes that there is reliable evidence that there are "gaps" in New Zealand's consumer law in some instances, the first option should be to consider whether targeted amendments can be made to address those concerns at the margins (instead of a wide ranging reform of New Zealand's commercial law framework);
  - (c) our concerns that any wide-ranging unfair practices prohibition, unconscionable conduct prohibition, or oppressive conduct prohibition would introduce significant and unintended costs for all New Zealanders and adverse outcomes to the New Zealand economy. To the extent the Government wishes to implement one of these prohibitions, we submit that it should be a prohibition based on the existing (and well understood) equitable doctrine of unconscionability to best target and protect vulnerable parties without resulting in significant costs and economic detriment;
  - (d) that we do not consider extension of the unfair contract terms ("**UCT**") regime to business to business ("**B2B**") contracts to be warranted. Rather, such an extension will inevitably result in increased compliance costs for businesses without evidence of any need for this extension. If, nevertheless, the Government believes there is sufficient evidence to warrant further consideration of this, it is essential that certain design features and protections are built into the legislation –

including by only enabling the Commerce Commission to seek a declaration of unfairness, and having a principled based approach for determining when the regime applies (not just basing it on the size of the business involved).

#### **FURTHER EVIDENCE REQUIRED**

***Submission 1: The Government should conduct further analysis as to what specific conduct is of concern, so that additional options can be considered (and consulted on) that are targeted at the particular conduct of concern***

4. MBIE has requested input on whether there should be any reforms to New Zealand's laws. The Ministers also state that the purpose of the Discussion Document is to "help us to better understand whether or not there is a need for New Zealand's existing protections against unfair practices to be strengthened".<sup>1</sup>
5. We agree that assessing whether there is, in fact, a need for any additional protections is the appropriate focus for this initial phase, rather than consideration of what type of law reform might be proposed.
6. In particular, as the *Government Expectations for Good Regulatory Practice* set out, "[b]efore a substantive regulatory change is formally proposed" there should be robust consideration of the proposed change, including by "clearly identifying the nature and underlying cause of the policy or operational problem it needs to address." It is this measured approach to regulating business conduct that has led to New Zealand's respected position as first, amongst 190 countries, for ease of doing business.<sup>2</sup>
7. When making decisions on the matters raised in the Discussion Paper, we believe the Government must carefully consider whether there has been a sufficiently thorough, comprehensive, and analytical study of whether there is, in fact, an issue of widespread "unfair commercial practices" occurring in New Zealand, and if so:
  - (a) what type of practices are of concern (including by reference to whether they harm consumer welfare);
  - (b) the prevalence of such practices and the extent of harm (if any) to the economy; and
  - (c) whether those practices would be already captured by existing law and, if so, whether it is the case that the victims are simply choosing not to enforce existing legal rights (rather than them requiring additional legal rights, which equally they may choose not to enforce if there is an issue with enforcement).
8. It appears that MBIE recognises that a survey asking businesses whether they have felt unfairly treated is insufficient justification for a proposal to significantly reform New Zealand's consumer protection and contract law framework. Asking whether a business feels it has been treated "unfairly" is inherently subjective (as the Discussion Paper recognises), and is not necessarily indicative of a legal problem or conduct that has a negative impact on consumer welfare. Indeed, many negotiations that could be perceived as "unfair" by one of the parties (for example, firm procurement negotiations) may have the effect of lowering prices and improving quality and service for consumers.

<sup>1</sup> Ministers Foreword.

<sup>2</sup> World Bank "Doing Business 2019: Comparing Business Regulation for Domestic Firms in 190 Economies" (2019), available [here](#).

9. Furthermore, as outlined in the Business NZ submission, there are a number of methodological issues with the survey (with MBIE itself stating it is not a robust and comprehensive survey). For a proposed law reform of such significance, it is critical that the evidence of any problem be robust and comprehensive.
10. It is only by focusing first on problem definition that it is then possible to design a law reform package that is targeted at the specific issues of concern. That is an important aspect of the Government Expectations for Good Regulatory Practice, which recognise that new regulation can "impose costs, limit freedoms, stifle innovation, and give rise to other unintended consequences", and therefore require that law reform proposals have "clear objectives" and "seek to achieve those objectives in a least cost way, and with the least adverse impact on market competition, property rights, and individual autonomy and responsibility."
11. It is not possible to impose new reform in the least cost way, or with the least impact on other elements of the economy, when it is not clear what problem (if any) needs to be solved.
12. Accordingly, we submit that MBIE will need to carefully assess whether submissions on the Discussion Document provide reliable and objective evidence of identified problems in the New Zealand economy. If at that point MBIE believes that there is such evidence of specific conduct of concern, then it should undertake further consultation so that additional options can be considered that are targeted at the particular conduct of concern.
13. As we discuss below, we doubt that there is a problem that needs to be addressed. We are also very concerned that any change in the law could have adverse unintended consequences, such that there is a high risk that the costs of intervention will outweigh any perceived benefits.

***Submission 2: There is no material "gap" in the existing laws***

14. We do not consider that there is a material "gap" in New Zealand's existing laws in relation to "unfair" conduct. Existing laws and legal rights already cover the various types of "unfair" conduct referred to in the Discussion Paper:
  - (a) it is illegal to mislead or deceive another person in trade (s 9 Fair Trading Act ("FTA")), with those prohibitions taken very seriously (including a trebling of the penalties in 2013, and a record fine of \$1.9 million last year);
  - (b) it is illegal to make unsubstantiated representations in trade (s 12A FTA);
  - (c) it is illegal to harass or coerce another person in connection with the supply of goods or services (s 23 FTA);
  - (d) it is illegal to engage in bait advertising (s 19 FTA);
  - (e) it is illegal to include unfair contract terms in standard form contracts for the sale of consumer goods and services, with both consumers and businesses receiving that protection when purchasing goods/services of that nature (s 26A FTA);
  - (f) all consumer goods/services must be of acceptable quality, be fit for purpose, correspond with their description/sample, and have spare parts available (s 6, 8, 9, 10 and 12 Consumer Guarantees Act ("CGA"));

- (g) a business cannot charge more than the "reasonable price" for a consumer good if no upfront price has been agreed (s 11 CGA);
  - (h) with respect to (a) to (g) above, we note that businesses cannot contract out of the CGA or FTA in respect of B2B transactions, if that contracting out would not be "fair and reasonable" (s 5D FTA, s 43 CGA). This test of fairness explicitly considers the relative bargaining power of the two parties;
  - (i) it is illegal for a lender to engage in oppressive conduct, or include oppressive terms, when providing credit to consumers (Credit Contracts and Consumer Finance Act 2003 ("**CCCFA**"));
  - (j) it would be a breach of contract law for a business to not fulfil its payment obligations under a contract;
  - (k) an agreement is void under the existing doctrine of unconscionable conduct where it would be inequitable to allow a party to enforce its contractual rights;
  - (l) if a large business makes demands beyond the words of a contract, it has no legal means of compelling the small business to comply;
  - (m) unreasonable restraints of trade are unenforceable at common law;
  - (n) exclusivity provisions that have the purpose, effect, or likely effect of substantially lessening competition in a market are illegal under the Commerce Act (s 27);
  - (o) it is illegal for a business with market power to take advantage of that market power for an anti-competitive purpose (s 36 Commerce Act); and
  - (p) disproportionate damages clauses (i.e. penalty clauses) in contracts are unenforceable.
15. As such, there is existing legal recourse for all of the conduct listed at both Box 2 and Box 3 of the Discussion Paper.
16. Accordingly, to the extent that there is any problem, it is not that the existing legal framework does not provide sufficient legal rights. Rather the concern appears to be that certain businesses or consumers are not enforcing their legal rights - either for commercial reasons, lack of awareness of legal rights, or because the current procedural mechanisms are not sufficiently cost effective or timely. It could also be the case that expressing displeasure as part of a survey does not amount to a business believing that it has been treated in a manner that requires legal redress.
17. If ultimately the problem identified is not the law itself, but the willingness of consumers or small businesses to pursue the legal options available to them, then MBIE's proposed solution should be a procedural one, not a legislative one. For example:
- (a) to educate consumers and small businesses on their legal rights and remedy options;
  - (b) to update the Disputes Tribunal and court processes to enable businesses to enforce contracts against each other in a more cost and time efficient manner. For context, Russell McVeagh's experience is that at present even an urgent application for an injunction in relation to a commercial dispute can take 3-4

months to be heard in court. That is a material impediment to enforcement of legal rights (as opposed to there being a lack of legal rights in the first place).

18. What should not be forgotten in this consultation process is that the law reforms proposed would be significant – arguably the biggest changes to New Zealand's framework of contractual freedom in more than a century, with an impact on all commercial dealings. It is important that the Government does not take that step lightly and that any law reform is carefully tailored and targeted to the problem identified. A sledgehammer should not be used to crack a walnut.
19. If the Government ultimately concludes that there is reliable evidence that there are "gaps" in New Zealand's consumer law in some instances, the first option should be to consider whether targeted amendments can be made to the existing legal framework to address those concerns at the margins.

***Submission 3: The unfair practices prohibition would introduce significant costs and uncertainty***

20. We agree with the concerns in the Discussion Paper that any "unfair practices" prohibition (i.e. Option 1C, based on European law) would introduce significant uncertainty and costs into the New Zealand economy.
21. This change would represent a large-scale and unprecedented change to New Zealand's contractual framework – moving from a framework where the courts respect sanctity of contract (subject to protections against misleading/deceptive conduct, coercion, harassment, taking advantage of vulnerable counterparties, and anti-competitive conduct) to one where the courts become arbiters of what is "fair". There are significant concerns with this proposal:
  - (a) **Uncertainty:** "Unfairness" is an inherently subjective and uncertain term - every person has a different view of what unfairness is. Equally unclear is what is "good faith" conduct and what is conduct that is "contrary to the requirements of professional diligence". Will the requirements of professional diligence vary from profession to profession? Is a doctor more professionally diligent than an accountant? Or vice versa? Previous reviews of New Zealand's consumer laws have determined that the introduction of a widespread "good faith" obligation would not be appropriate due to the "difficulty of determining what good faith means in any given situation".<sup>3</sup> As the Majority Report in the Australian Senate Committee noted in relation to the potential introduction of an unfair conduct provision in Australia in 2003:<sup>4</sup>

... the consequence of [prohibiting unfair conduct] would make the meaning of the section so open to a variety of different interpretations that it would be inimical to the development of a coherent and relatively clear body of law.

Even with the assistance of external legal advice, businesses would not be able to form clear, confident and consistent views regarding what is 'unfair' or contrary to their obligation to act in good faith. Businesses should be free to deal with each other, and with consumers, with a clear and consistent view of whether their

<sup>3</sup> Ministry of Consumer Affairs "Consumer Law Reform - A Discussion Paper" (June 2010), available [here](#).

<sup>4</sup> Senate Standing Committees on Economics "Report on Issues relating to subsections 46(1), 46(3A-3C), 46(4A) & 51AC" available [here](#), at [4.22].

interactions are lawful or not. The ability to prospectively predict how the law will govern contractual relations is fundamental to the success of an economic system. The introduction of a prohibition that would cause every contract, negotiation and interaction to be retrospectively examined through an uncertain lens of 'unfairness' would significantly undermine that core principle. Businesses cannot wait months (or even years) for a judge to determine on a case-by-case basis whether in his or her subjective judgment one business has acted unfairly or not.

- (b) **Undermining of efficient negotiations:** Each party to a commercial transaction is obliged to protect its own interests and negotiate accordingly. A prohibition on "unfair practices" provides no meaningful guide as to how one business is to act in a particular transaction. Commercial parties require laws that, in any given situation, are able to be advised on with certainty by legal advisers. The inevitable result will be that businesses hold back in commercial negotiations for fear of being found to have acted unfairly or in bad faith. Take strategic negotiating as a single example. Businesses can currently choose to strategically negotiate in a manner that furthers their interests, provided they do so in a way that is not misleading, deceptive, or coercive. It is this process of each business strategically advancing its own interests, which ultimately (through competition) lowers prices and advances welfare for NZ consumers.
- (c) **Moral hazard:** The introduction of a prohibition on unfair practices will also inevitably mean that businesses are willing to take on additional contractual risks in reliance on the belief that they will be subsequently protected from the consequences by challenging that risk allocation as being unfair. This will mean that costs and risks are not efficiently allocated. It will also mean that businesses will be encouraged to embark on lengthy, costly and potentially meritless litigation in the hope that they will be able to unwind their contractual obligations by winning the sympathy of whichever judge happens to be sitting on the day.
- (d) **Harm to the New Zealand economy:** Enacting a prohibition that is wide open to various interpretations, lacks prospective certainty, results in businesses not advancing their own interests, and the misallocation of costs and risks will have significant adverse consequences for New Zealand's economy. As the Australian Productivity Commission warned in 2008:<sup>5</sup>

Attempting to legislate what constitutes a fair transaction and what does not, is inherently difficult and is likely to potentially constrain the efficient operation of the market as returns to superior bargaining skills are eroded, costs of disputation are increased and the efficiency of investment is diminished by increasing uncertainty.

It is vital for the efficient operation of a market economy that business relationships are able to be formed and operate within a legal framework that provides certainty and instils business confidence. It is also vital that bargains that are struck will be enforceable and not lightly put aside by the courts.

- (e) **Inconsistent with the requirements of good legislation:** The wide judicial discretion that the proposed prohibition would confer to the courts would be inconsistent with the expected requirements of good legislation, which requires that all legislation should set clear and identifiable standards that are able to be

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<sup>5</sup> Productivity Commission Australia "The Market for Retail Tenancy Leases in Australia" (March 2008), available [here](#), at 212.

interpreted and applied consistently without wide judicial discretion. As the Legislation Design and Advisory Committee sets out in its Legislation Guidelines:<sup>6</sup>

Legislation should be designed to provide certainty as to rights and obligations.

**The certainty or predictability of the law**—If too much policy content is delegated or delegations are given to different decision makers without clearly scoped mandates, clarity about what is required by the law can be undermined.

An imprecise statement of the prohibited conduct may lead to inconsistent enforcement of the law, uncertain application of the law, unintended changes in behaviour, or failure to preclude conduct that it was intended to prohibit.

- (f) **Inconsistent with trans-Tasman harmonisation**: This proposal would be inconsistent with the aims of trans-Tasman legal harmonisation. There is no such prohibition in Australia. There would be significant costs on businesses that operate on a trans-Tasman basis (being businesses that make up a significant proportion of New Zealand's economy) if a new and different regulatory regime were to be imposed in New Zealand.
- (g) **Broader than necessary**: The introduction of this provision would also be inconsistent with the views outlined in the Discussion Paper, which contemplates that not all unfair practices are problematic or require intervention.<sup>7</sup> And yet, a prohibition of all "unfair conduct" would do just that – thereby capturing conduct that is potentially advantageous to consumer welfare (or at worst, benign).

22. Accordingly, we submit that the costs of any such prohibition on unfair practices would be significant – including significant adverse effects to New Zealand's existing commercial contracting framework and the broader economy.

***Submission 4: The same concerns apply in respect of a prohibition on unconscionable conduct***

23. As noted throughout the Discussion Paper, any reform must be carefully balanced to ensure that it does not have a 'chilling effect' on competition or create significant uncertainty for businesses during commercial dealings.
24. We have similar concerns in relation to any prohibition on unconscionable conduct (i.e. Option 1A) as we have in relation to a prohibition on unfair conduct (outlined above) unless that prohibition was appropriately defined and confined.
25. In particular, based on the Australian experience, over time an improperly scoped prohibition on unconscionable conduct would inevitably risk morphing into a de facto prohibition on unfair conduct (which, as noted above, is uncertain and subjective). For example, it has been observed that:<sup>8</sup>

<sup>6</sup> Legislation Design and Advisory Committee "Legislation Guidelines - 2018 Edition", available [here](#), at [24.2].

<sup>7</sup> MBIE Discussion Paper, at 17.

<sup>8</sup> Australian Construction Law Newsletter #81 (December 2001), available [here](#).

Whilst in theory unconscionable is narrower than the term unjust, in practice the distinction is more illusory than real. Recent decisions have indicated a shift away from the once inflexible and limited notions of unconscionable behaviour meaning that there is now little difference between contracts which are unconscionable, unfair or unjust.

26. Similarly, in 2012 the (then) Ministry of Consumer Affairs noted in relation to the Australia regime that came into force in 2012:<sup>9</sup>

The Australian provisions establish a more general prohibition against unfairness throughout the course of contractual relations, and have therefore changed the meaning of the term 'unconscionable' in the legislation.

27. This concern of a shifting, and broadening, legal standard has been borne out in Australia. As the Discussion Paper notes, from a standard of a "high level of moral obloquy" the decision in *ACCC v Lux*:<sup>10</sup>

lowered the threshold at which conduct may be considered unconscionable, by clarifying that it must be 'against conscience by reference to the norms of society'. The courts are now more likely to consider social norms and questions of fairness and honesty rather than moral judgement when determining whether there has been a breach of the Act.

28. The *ACCC v Lux* judgment's view is that an unconscionable conduct prohibition necessarily rests on values that are "contestable" and notions of "honesty and fairness".

29. Notions of "contestable values" and "fairness" are far too subjective and ephemeral to provide the sufficient certainty for ordinary efficiency-enhancing commercial conduct, for the reasons outlined at paragraph [21] above.

30. After the *ACCC v Lux* case, it was necessary for the Federal Court of Australia to clarify that the legislation was not intended to prescribe "conduct in trade or commerce that is merely unfair or unjust".<sup>11</sup> However, the mere fact that it was necessary for a Federal Court decision to make that clear demonstrates the risk that an unconscionable conduct prohibition can, and likely would, morph over time depending on the subjective values of the judges that hear the particular cases. As the Federal Court cited in that case:<sup>12</sup>

On the issue of statutory unconscionability, a rationally based system of law needs to set out the limits of acceptable commercial behaviour in order that persons can order their commercial affairs in advance. Such a system cannot depend on the personal approach of a judge, based upon his or her view of commercial morality. Worse still, if there is the perception that the judge makes the law in any individual case and then applies it retrospectively.

31. Accordingly, if the Government is minded to further consider whether a prohibition on unconscionable conduct should be established, it would be essential that the prohibition does not simply prescribe conduct that might be regarded as unfair or unjust. Rather, it should import into legislation the existing (and well understood) equitable doctrine of

<sup>9</sup> Ministry of Consumer Affairs "Briefing for Commerce Committee on Consumer Law Reform Bill: Unconscionable Conduct and Oppression" (June 2012), available [here](#).

<sup>10</sup> *ACCC v Lux Distributors Pty Ltd* [2013] FCAFC 90 (2015).

<sup>11</sup> *Australian Competition and Consumer Commission v Woolworths Limited* [2016] FCA 1472.

<sup>12</sup> At 140.



unconscionability, which "protect[s] those who enter into bargains when they are under a significant disability or disadvantage," such as ignorance, lack of education, illness, age, mental or physical infirmity, stress or anxiety (and it is not meant to "relieve parties from 'hard' bargains or to save the foolish from their foolishness").<sup>13</sup>

32. Introducing a prohibition in this way would minimise the cost of the law reform as it would codify the existing common law and focus on those contractual counterparties that are most in need of protection. The prohibition would also empower the Commerce Commission to take action on behalf of those vulnerable counterparties, thereby creating a positive duty on parties to act in good conscience mitigating the concerns about existing low rates of enforcement, and the costs of taking a case to court, that are referred to in the Discussion Paper. For these reasons any enforcement mechanism for such a prohibition on unconscionability should be similar to the existing framework for enforcement of UCTs, namely that only the Commerce Commission could seek a declaration from the court that conduct or enforcement of a contract is unconscionable (without direct private enforcement rights under the statute in the absence of a declaration by the court). This would have three benefits:
- (a) It would mirror the enforcement mechanism for the existing UCT regime, which given they would be sister regimes, would be easiest for businesses to understand and design their compliance regimes accordingly.
  - (b) It would mitigate the risk of businesses using the threat of invoking the prohibition without legitimate justification as a bargaining tactic to weaken the position of counterparties. That risk would be particularly acute for large businesses, who would be vulnerable to unsubstantiated claims of unconscionability (especially from a reputational standpoint, if the counterparty took claims public, or threatened to do so).
  - (c) It would recognise that penalties and damages should not be imposed on businesses where their upfront obligations are uncertain (a declaration process would enable businesses to modify their behaviour, and build up a body of precedent, before business could be subject to penalty or damages awards).

***Submission 5: The same concerns apply in respect of a prohibition on oppressive conduct***

33. The oppressive conduct standard, used in the CCCFA context, is not an appropriate standard for broad application to all commercial interactions.
34. In particular, the limb under that standard that asks whether conduct is "in breach of reasonable standards of commercial practice" would introduce questions of what is reasonable and unreasonable into every contractual negotiation and bargain. Asking whether conduct is unreasonable or not would be equally uncertain, subjective, and ill-defined as a general prohibition on unfair conduct. Therefore, our concerns in relation to that standard would be as outlined at paragraph [21] above.
35. Furthermore, to the extent that this standard includes the concept of unconscionability, that could be addressed through a properly scoped prohibition as set out in paragraphs [23] to [32] above.

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<sup>13</sup> *Gustav & Co Limited v Macfield Limited* [2007] NZCA 205, at [30].

**Submission 6: The extension of the UCT regime to B2B contracts is not warranted**

36. We do not consider that there is evidence to support extending the UCT regime to B2B transactions. The Discussion Paper did not provide any evidence that the use of "unfair" standard form contracts is a particular issue or concern in the B2B space. Before contemplating any regulation on businesses' freedom to allocate contractual risks and benefits between one another, it is important that further evidence is collated to consider whether there is a problem that needs to be solved (see paragraphs [4] to [12] above).
37. In particular, the driving force behind any expansion of the UCT regime cannot merely be the subjective experiences of individual businesses (as surveyed by MBIE last year). It has to be how those experiences feed into a wider picture of New Zealand consumer welfare. When a business suffers what it perceives as 'unfair treatment', that can often be the result of an efficient allocation of risks/benefits between the parties. There are many circumstances where businesses compromise and consciously accept less favourable terms in one area in exchange for more favourable terms in another. Dissection of a particular contractual term will fail to appreciate the overall commercial context and trade-offs that arise in commercial dealings and lead to efficient outcomes.
38. Furthermore, to the extent MBIE's concern is to protect small business, it is important to bear in mind that the existing UCT regime already applies to B2B transactions to the extent that a business is purchasing "consumer goods or services" (for example, a small business person hiring a rental car at the airport, even those he/she is using that rental car for business purposes). This further asks the question as to what "gap" the prohibition is needed to fill. Indeed, as far as Russell McVeagh is aware, there have not been complaints from businesses under the existing UCT regime in relation to the terms used for their supply or procurement of consumer goods or services.
39. If the presumed "gap" is the use of standard form contracts in the supply of "business goods or services" to small businesses, it is essential to note that businesses, even small businesses, are not in the same class of vulnerability as consumers, given:
- (a) they have greater opportunities to negotiate the terms of commercial agreements than ordinary consumers do;
  - (b) they must be expected to do their own due diligence before entering into agreements in relation to the sale or purchase of "business good or services", and to take responsibility for the business decisions that they make; and
  - (c) they have a greater knowledge of contractual terms, and have greater resources to enforce contractual remedies.
40. If, notwithstanding the above, the Government believes there is sufficient evidence to warrant further consideration of whether to extend the UCT regime to B2B standard form contracts, it is essential that certain design features and protections are built into the legislation.
41. For example, we have significant concerns with the suggestion in the Discussion Paper that the UCT regime should provide protection for businesses based on the number of employees (e.g. less than 20) or their revenue. Our concerns with that suggestion are:
- (a) It reflects an unprincipled and arbitrary threshold that is designed to provide greater rights to a certain type of business/person than another. Principled legislation

should always focus on the type of conduct/term that is of concern, not a particular constituency.

- (b) Employee numbers and revenue are poor indicators of whether a business is capable of protecting its interests in commercial dealings. For example:
  - (i) many large multinational businesses have small branch offices in New Zealand that have small revenues and less than 20 employees; and
  - (ii) many small businesses in New Zealand comprise highly trained and sophisticated business professionals (medical professionals, for example).

The suggested limited application of the UCT regime on the basis of employee numbers or revenue would therefore provide UCT protection to businesses that do not warrant any special protection (for example, sophisticated multinational companies with large and experienced commercial and legal teams).

- (c) Significant time and cost would be incurred for businesses in:
  - (i) designing different standard form contracts for different sized counterparties (to mitigate the potential for UCT allegations, even if all terms are in fact legitimately justifiable); and
  - (ii) determining the number of employees or revenue of counterparties to determine which standard form contract to use given that would be information in the possession of one, but not both, parties to a transaction (and the larger business would be vulnerable to the risk of subsequently finding out that the UCT regime might apply if the counterparty changed size over time, or if the assessment at the outset was incorrect).

Given the cost and compliance risk involved, the experience of businesses in Australia has been that it is impractical to use different standard-form contracts for large and small counterparties. Accordingly, any threshold based on business size will not in practice result in targeted protection to small businesses, but rather will result in a blanket regulation of all contracts that could be said to be "standard form" in nature.

- (d) The rule of unintended consequences. The Window Tax of the Seventeenth Century resulted in property owners boarding up windows.<sup>14</sup> Equally, a discriminatory law based on the size of a business risks unintended consequences. Will a business with nineteen employees be reluctant to employ a twentieth in order to continue to have the benefit of "small business" protection? Similarly, will large businesses have a bias towards dealing with other large businesses, rather than dealing with small businesses, due to a preference to avoid having contractual terms potentially second-guessed under the UCT regime?

42. A more principled approach to extending the UCT regime to B2B contracts would be to have its application based on the value of the contract, not the size of the business. For example, even a small business will take legal advice (or at least very carefully read the terms and conditions) when entering into a contract to purchase land or a building on a standard form

<sup>14</sup> Andrew E. Glantz "A Tax on Light and Air: Impact of the Window Duty on Tax Administration and Architecture, 1696-1851" (April 2008), available [here](#).

sale and purchase contract. There is no principled justification for saying that a "small business" should have more legal protections in that context than a large business.

43. Reflecting this, the appropriate way to limit the application of the UCT regime is to base it on the contemplated upfront value of the agreement (for example, an upfront value or annual value that is contemplated at the outset). The UCT protection could then, in effect, be deemed a substitute for legal advice for contracts of sufficiently low value / importance that they would not typically warrant legal advice. That would mean:
- (a) all parties would be treated equally in the eyes of the law (not an imbalance in legal rights for parties on each side of a contract dependent on their size), and provide a principled basis for its application;
  - (b) the regime's application would be known to both parties at the time of entering the contract (not just the smaller party that holds the information about its number of employees or its revenue);
  - (c) the onus would remain on small businesses to conduct their commercial dealings with an appropriate standard of commercial prudence, and allocate risks and benefits appropriately, when negotiating contracts of particular value and importance. This will mitigate "moral hazard" concerns (see [21(c)] above). It is important that all businesses, both large and small, are incentivised to adopt a diligent and prudent approach to commercial dealing; and
  - (d) its application would be more consistent with the current UCT regime in the consumer space where it applies to standard form contracts that consumers do not typically seek legal advice on.
44. Even then, for contracts that do fall within the UCT value threshold, it will remain important that businesses are able to contract out of the UCT regime where it is "fair and reasonable" for them to do so, as they can for the rest of the FTA and CGA (with that assessment including consideration of the relative bargaining power of the two parties, the subject matter of the agreement, and whether the parties received legal advice).<sup>15</sup> This is so that any B2B UCT regime is consistent with the rest of the FTA and CGA, and to ensure that the benefits of the contracting out regime introduced in 2013 remain (being a regime intended to make the "law regarding business to business transactions and the circumstances in which the courts will give effect to exclusion-type clauses more transparent.")<sup>16</sup>
45. Furthermore, if the Government is minded to extend the UCT regime to B2B standard form contracts, we submit that this reform should adopt the current two-step process from the existing business to consumer ("**B2C**") UCT regime, whereby a term is only unfair once the Commerce Commission has applied for a declaration that a term is unfair, and a court has made that declaration. This is because:
- (a) it would make the B2B and B2C regimes consistent, thereby streamlining businesses' compliance costs;
  - (b) it would continue the important education/consultation process that the Commerce Commission has performed under the existing B2C UCT regime, enabling

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<sup>15</sup> Fair Trading Act, s 5D(4).

<sup>16</sup> Ministry of Consumer Affairs. (21 March 2012). Briefing for Commerce Committee on Consumer Law Reform Bill.

businesses to understand the types of contractual terms that risk being regarded as unfair; and

- (c) it would mitigate against the potential for the threat of private UCT proceedings to be used, without merit, as leverage in commercial negotiations and civil disputes.

46. Accordingly, we disagree with MBIE's assertion at [141] of its paper that no declaratory regime for B2B contracts is necessary. It is vital that the Commerce Commission acts as a 'gatekeeper' against potential misuse of the regime.

#### **CONCLUDING COMMENTS**

47. As noted, Russell McVeagh is grateful for the opportunity to submit to MBIE on its Discussion Paper. Our submissions are designed to assist MBIE to make recommendations that achieve the best policy outcomes for all New Zealanders.
48. We are available to make a verbal presentation to MBIE and its officials if requested.
49. All enquiries on this submission may be directed to:

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