

All's fair in love and war, but maybe not in business – Get your submissions in

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The New Zealand consumer law landscape looks set to shift again. Submissions close on 25 February 2019 on a [discussion paper](#) that explores whether existing protections against unfair practices should be extended.

Why suggest reform?

Existing laws already prohibit certain 'unfair' practices in both business-consumer and business-business contexts. Under the Fair Trading Act 1986 (FTA), Commerce Act 1986, Credit Contracts and Consumer Finance Act 2003 and the law of equity, practices involving misleading conduct, anti-competitive behaviour and irresponsible lending are prohibited.

In addition, the FTA already protects consumers from 'unfair contract terms' (UCTs) in standard form contracts. A term may be 'unfair' if it:

- Would cause a significant imbalance in the parties' rights and obligations arising under the contract
- Is not reasonably necessary to protect the legitimate interests of the party who would be advantaged by the term
- Would cause detriment to a party if it was applied, relied on or enforced.

However, the Ministry of Business, Innovation and Employment's (MBIE) discussion paper ([Protecting businesses and consumers from unfair commercial practices](#)) suggests that existing protections may be insufficient. For example, last year, an MBIE survey of (mainly small) businesses identified that 45% of the 250-or so respondents considered that they had been offered unfair contract terms in the previous year, and 47% considered they had been otherwise treated unfairly. Of course, this was a small and not necessarily representative sample of businesses and, as MBIE acknowledges, it is not the role of Government to protect people from entering into arrangements they might regret.

That said, MBIE is seeking feedback on whether there is a case for change, and describes some options for consideration. Some of the options could have potentially wide-reaching and uncertain impacts on businesses, including those that do not actually trade with individual end consumers.

What is being proposed?

The discussion paper considers two broad options for prohibiting unfair business practices: unfair conduct, and unfair contracts.

Unfair conduct

MBIE has a difficult job in trying to develop a universal or precise meaning of 'unfair conduct'. The discussion paper outlines three possible formulations for prohibitions on unfair conduct, as follows:

- 'Unconscionable conduct' (based on Australian law) – meaning "conduct so harsh that it goes against good conscience". Introducing such a prohibition was considered as part of the 2010-2013 consumer law reform process, but it was ultimately put aside to wait to see how the Australian case law developed before making any changes. The Australian regulator has taken unconscionable conduct cases against businesses in respect of a variety of conduct, including sales strategies targeting vulnerable consumers, the handling of customer complaints about product quality issues, and conduct by a supermarket in dealing with suppliers
- 'Oppressive conduct' (based on consumer credit law) – meaning "harsh, unjustly burdensome, unconscionable, or in breach of reasonable standards of commercial practice". MBIE's suggestion is to prohibit the inducement of another party to enter into a contract through oppressive means, or the exercise of a contractual right in an oppressive manner. In one consumer credit case, this threshold was breached when a party was induced to enter into an arrangement in order to prevent their spouse from being prosecuted for fraud
- 'Unfair practices' (based on European law) – meaning a practice "contrary to the requirements of professional diligence" and that "materially distorts... the economic behaviour of the average consumer" (or is likely to do so). As recognised by

MBIE, this option appears to have the most uncertain reach.

An assessment under any of the above tests would likely be extremely fact-specific, making it relatively difficult to predict whether or not particular conduct would be unlawful.

A prohibition like the ones above could be limited to the business-consumer context. However, MBIE is considering whether the prohibition should apply to the **business-business** context as well. Having the prohibition apply to all business and consumers would be consistent with New Zealand's general approach to competition and consumer law.

In addition, MBIE is considering whether any new prohibition should be extended to include the **substance** of unfair contracts – including the main subject matter and the price. This would mean that a contract that was found to be 'unfair', in an overall sense, could be unlawful even if there was nothing unfair about the way it was entered into or enforced. This goes significantly further than the FTA's current UCT regime, which is generally limited to examining particular terms. In other words, this is uncharted territory for consumer law in New Zealand.

Unfair contracts

Businesses are already protected by the current UCT regime where they acquire consumer goods or services under a standard form consumer contract (ie, when buying products typically used for domestic purposes – like a sofa).

However, MBIE's paper discusses whether the FTA's current protections relating to UCTs in the consumer context should be expanded to also apply to standard form **business** contracts (either alone, or in combination with an unfair conduct prohibition). The objective is, essentially, to extend 'consumer' type protections to small businesses – reflecting that many small businesses are, in effect, individuals and they may have limited (if any) leverage to negotiate standard form agreements. The proposal would mean that the acquisition of **non-consumer** goods or services under a standard form contract would be regulated (an example might be a standard form franchise agreement used by a franchisor).

Protections against UCTs already apply to small businesses purchasing non-consumer goods and services in Australia, and although they are currently under review, a range of contractual terms have already fallen foul of them. In a recent case, eight terms in a standard form contract used by a provider of waste management services to small businesses were found by a court to be unfair and therefore void. The terms included clauses that bound customers to subsequent contracts unless they opted out, and clauses that allowed the provider to unilaterally increase prices and charge customers for services not provided.

As MBIE notes, extending the application of the UCT provisions to businesses could affect a very broad range of contracts, and there would be transition costs in reviewing and amending standard form contracts. The criteria above are broad, and their meaning is likely to only be illuminated by incremental development of case law.

In the meantime – experience with the unfair contract terms regime

It has now been four years since the existing UCT regime came into force. Given that the regime is proposed to be extended, it is helpful to review how it has been applied so far.

In addition to publishing [UCT guidelines](#), the Commerce Commission has undertaken [reviews](#) of a number of standard form consumer contracts used by the telecommunications, energy retail and gym sectors. A more limited review has also been undertaken in respect of Auckland Transport's AT HOP Card.

The Commerce Commission reviews have highlighted several recurring UCT issues, and are generally consistent with the approach taken by the Australian Competition & Consumer Commission in respect of the equivalent Australian legislation (on which the FTA is largely based). In particular, the following terms have been emphasised by the Commerce Commission as being potentially unfair in a number of instances:

- Terms that limit the supplier's liability for breach of contract (particularly where the customer would be out of pocket as a result, and/or there is no equivalent limit for the customer) or appear to contract out of the Consumer Guarantees Act or the FTA (eg, terms that exclude all liability for consequential loss or exclude liability to the 'extent permitted by law')
- Terms that allow the supplier to unilaterally change the price, characteristics of services or terms of the contract, without an opportunity to negotiate, or without a right for the customer to terminate without cost
- Terms that state that the contract represents the whole agreement between the parties where any pre-contractual representations have been made by the supplier
- Automatic renewal terms, accompanied by termination fees, where the contract does not give the customer a choice about whether the contract will automatically renew, the automatic renewal is not transparent, or where the customer does not receive sufficient notice of the renewal with time to cancel before it automatically renews
- Terms that impose liability on the customer that is over and above what their liability would be at common law (ie, no fault liability that is not subject to rules of negligence or causation, or liability for another person's actions), or where the

subject of the term is something the supplier would be better positioned to control.

In 2018 the Commerce Commission also commenced its first [proceedings](#), seeking declarations that Home Direct and Viagogo's standard form contracts contained UCTs in relation to the following:

- Home Direct invited its customers to opt-in to a 'voucher entitlement scheme' when they signed up to purchase goods. Under that scheme, direct debit payments did not stop after the goods were paid off but were converted every week into 'voucher entitlements', which could only be used for purchasing more goods from Home Direct. The vouchers could not be refunded or exchanged for cash, and expired after 12 or 24 months, with the proceeds forfeited to Home Direct
- Viagogo's standard form consumer contract includes a term stating that all disputes brought by a customer must be heard in Swiss courts under Swiss law, but that Viagogo can choose to take court action against customers in their own country.

In terms of the progress of these proceedings, given their complexity, the Commerce Commission is of the view that it may be some time before an outcome is determined by the court.

Which side will you be on?

It will be interesting to see if submissions on the discussion paper reveal further evidence that reform is needed. Given that what is 'unfair' is highly subjective and imprecise, it will be important that any new prohibitions introduced appropriately target any identified problem, and do not over-reach or involve disproportionately high compliance costs.

If you would like to find out more about what is proposed, or would like to discuss making a submission, please contact one of our consumer law team members.

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