



**MINISTRY OF BUSINESS,  
INNOVATION & EMPLOYMENT**  
HĪKINA WHAKATUTUKI

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# Discussion paper

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Protecting businesses and consumers  
from unfair commercial practices

December 2018

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ISBN (online) 978-1-98-853596-8

# How to have your say

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The Ministry of Business, Innovation and Employment (MBIE) seeks written submissions on the issues raised in this document by 9am on Monday 25 February 2019. Your submission may respond to any or all of these issues. Where possible, please include evidence to support your views, for example references to independent research, facts and figures, or relevant examples.

Please include your contact details in the cover letter or e-mail accompanying your submission.

You can make your submission:

- By sending your submission as a Microsoft Word document to [competition.policy@mbie.govt.nz](mailto:competition.policy@mbie.govt.nz).
- By mailing your submission to:

Competition and Consumer Policy  
Ministry of Business, Innovation & Employment  
PO Box 1473  
Wellington 6140

Please direct any questions that you have in relation to the submissions process to [cameron.vannisselroy@mbie.govt.nz](mailto:cameron.vannisselroy@mbie.govt.nz).

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# Ministers' Foreword

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The Government has a goal of building a productive, sustainable, and inclusive economy. An important part of achieving this goal is ensuring that New Zealand has a trading environment where both businesses and consumers are treated fairly. Fairness means different things to different people, but at its core, we think a fair economy is one where businesses and consumers trust one another, businesses compete on their merits, all businesses have a reasonable opportunity to grow and thrive, and consumers are protected from high levels of detriment.

New Zealand already has a number of protections against unfair practices, including those contained in the Fair Trading Act. However, when we asked New Zealand small businesses earlier this year about whether their relationships with their suppliers and business customers were fair and healthy, many told us that they were not.

For example, some businesses told us about the significant cash-flow issues they have faced as a result of other businesses not paying them for several months. Others told us about the wasted time and increased stress they faced as a result of the tactics used by some larger businesses, such as not complying with the terms of a contract, placing significant risk onto the smaller business, and unilaterally increasing the price of goods or services under contract. We have also heard about examples of businesses preying on vulnerable consumers in shopping malls, in their homes, and even in mental health units.

While we are concerned about these practices, much of what we know at present is anecdotal. This discussion document is an opportunity for you 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. If there is a need for a law change, then we want to ensure that any changes are proportional to the problem. In particular, we want to make sure that all businesses, big or small, can continue to compete effectively, negotiate firmly, and freely enter into contracts that reflect their wishes.

Your input is critical to ensuring that we get this balance right.



Hon Stuart Nash  
**Minister for Small Business**

Hon Kris Faafoi  
**Minister of Commerce and Consumer Affairs**

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# Executive summary

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1. This document considers options to strengthen the protections for businesses and consumers against 'unfair' commercial practices.
2. What is 'unfair' is highly subjective. However, it can broadly be grouped into two categories:
  - a. **Unfair contracts.** This may include contract terms which shift risk from one party to another, make it difficult for a party to terminate a contract, or are otherwise very one-sided.
  - b. **Unfair conduct** outside of the terms of a contract itself. This may include the use of pressure tactics, deceptive conduct, or the way a contract is enforced.
3. Unfair commercial practices can undermine the economic and social outcomes sought by government. They can prevent markets from functioning effectively by decreasing trust and increasing search and transaction costs. They may restrict competition, and with it, productivity and innovation. Even where practices are not strictly anti-competitive, they may restrict the ability of firms to grow and thrive, by diverting their attention away from their core businesses. They can also lead to high levels of financial detriment and stress for consumers.
4. It is for these reasons that a range of legislative protections already exist against unfair commercial practices. These include the Fair Trading Act 1986's (FTA) prohibitions against harassment, coercion, and misleading and deceptive conduct (and, in the case of consumer contracts, its protections regarding unfair contract terms); and the Commerce Act 1986's prohibition against anti-competitive agreements, mergers, and unilateral conduct.
5. However, at the same time, it is not the role of government to protect consumers or businesses from every transaction that they might ultimately regret. Caution also needs to be taken to ensure that measures to protect individual businesses do not over-reach and unduly inhibit competition or economic growth. For example, robust commercial negotiations between a business and its supplier can lead to lower prices for consumers. This document asks whether New Zealand currently has the balance right.

## Extent of the problem

6. Despite the existing legislative protections against unfair commercial practices, in response to a recent survey by the Ministry of Business, Innovation and Employment (MBIE), a significant proportion of businesses reported experiencing unfair conduct or contract terms. In particular, 45 per cent of businesses surveyed felt that they had been offered unfair contract terms in the last year, and 47 per cent felt that they had otherwise been treated unfairly.
7. Some of these concerns are unlikely to justify a response from government, and many businesses noted that they have successfully taken their own action in response to the unfair practices that they experienced. Nevertheless, these results indicate that there might be a gap in the protections available to businesses, particularly those that are small and without effective bargaining power.
8. We are also aware of examples of egregious conduct by some businesses towards consumers, which are not easily addressed under existing consumer law. As with businesses, this suggests there may be a gap in the protections available to consumers.

|                          |  |
|--------------------------|--|
| <b>Areas for comment</b> | How prevalent are unfair contracts and conduct currently? Is further government intervention to protect against unfair commercial practices warranted? |
|--------------------------|--|

## Options to address unfair commercial practices

9. We have considered several options to address unfair conduct across the economy, and unfair business-to-business contracts. Unfair business-to-consumer contracts are not in scope of this review, as the relevant existing provisions of the FTA are being reviewed separately.

### Option 1: Introduce a high-level protection against unfair conduct

10. There are various ways that a high-level prohibition could be designed, including:
  - a. Option 1A: prohibit ‘unconscionable’ conduct (based on Australian law);
  - b. Option 1B: prohibit ‘oppressive’ conduct (based on consumer credit law); or
  - c. Option 1C: prohibit ‘unfair’ practices (based on European law).
11. Options 1A and 1B would have a relatively high threshold before they were breached, and act as a ‘safety net’ to target relatively rare cases of particularly egregious conduct not prohibited under current legislation. As such, while there could be some initial uncertainty as to the extent of the prohibitions, we do not expect that they would have any significant impact on the ability of firms that act fairly and reasonably to go about their business. Option 1C would have more uncertain – but potentially broader – impacts.
12. We are also seeking input on whether Option 1 should be extended so that it can also apply to the substance of unfair contracts, including the main subject matter or price of the contract. This would mean that – in rare cases – an unfair contract could be found to be in breach of the prohibition, even if there was nothing unfair about the way it was entered into or enforced.

### Option 2: Extend the protections against unfair contract terms in standard form consumer contract terms to also protect businesses

13. We are also considering protecting some businesses from unfair contract terms in standard form contracts (those which have not been subject to effective negotiation). Under this option, businesses would not be able to include terms that would:
  - a. cause a significant imbalance in the parties’ rights and obligations under the contract;
  - b. are not reasonably necessary; and
  - c. would cause detriment if they were enforced.
14. This option differs from the option outlined in Paragraph 12 above. Option 1 would focus on the *overall* fairness of the contract. In contrast, Option 2 would focus on the fairness of *individual terms*. As such, Option 2 would not apply to the main price or subject matter of the contract.
15. Extending these protections would impact on a wide range of business contracts and there could be some transition costs for businesses in reviewing and amending their contracts. However, because the protections would not apply to the main subject matter of the contract, the upfront price, or terms that are reasonably necessary, we would not expect these changes to significantly inhibit businesses’ ability to enter into pro-competitive or welfare-enhancing transactions.

## Options Packages

16. In practice, there are a number of ways to combine these options for increasing the protections against unfair practices. We have presented four possible packages of options below. The packages are high-level only and do not address, for example, which version of Option 1 would be selected.

|                            | Package 1  | Package 2  | Package 3                                | Package 4  |
|----------------------------|--|--|--|--|
| Protections for Consumers  | Option 1: Prohibit either unconscionable conduct (1A), oppressive conduct (1B), or unfair practices (1C) |  |  |  |
| Protections for businesses | N/A  | AND  | AND                                      | AND  |
|                            |  | Option 1: Prohibit either unconscionable conduct (1A), oppressive conduct (1B), or unfair practices (1C) | Option 2: Prohibit unfair contract terms | Option 1: Prohibit either unconscionable conduct (1A), oppressive conduct (1B), or unfair practices (1C) |
|                            |  |  |  | AND  |
|                            |  |  |  | Option 2: Prohibit unfair contract terms   |

## Design issues

17. If any of the above packages are introduced, decisions will need to be made about:
- who the protections apply to (e.g. consumers only, consumers and some businesses, or consumers and all businesses);
  - which transactions the protections apply to; and
  - how any new protections would be enforced, and the penalties for breaching the law.

| Areas for comment | Which options package, if any, do you support? How should any provisions be designed? Can you offer any evidence about the costs and benefits of any of the options packages? |
|-------------------|---|
|-------------------|---|



# 1 Introduction

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## Purpose of this discussion document

1. Interactions between businesses and consumers in New Zealand are governed by a wide variety of legislation and common law, as well as societal and commercial norms and standards. This discussion document considers proposals to strengthen legislative protections against both business-to-business and business-to-consumer practices that may be considered to be 'unfair'.

## Unfair commercial practices and their impacts

2. The New Zealand Government has a goal of building a more productive, sustainable and inclusive economy. Amongst other measures, this goal can be supported by ensuring that New Zealand's regulatory systems contribute to a business environment where businesses and consumers are confident participants in fair and thriving markets. A thriving business environment is not an end point in itself; rather, it serves to improve outcomes for all New Zealanders, in their capacity as consumers, employees, and investors.
3. Unfair commercial practices can undermine the economic and social outcomes sought by government. For example, anti-competitive conduct by firms can harm consumers by increasing prices and restricting innovation. It can also harm other businesses which may be restricted from entering markets and competing. Misleading and deceptive conduct can prevent markets from functioning effectively by reducing consumer confidence and skewing the playing field in favour of businesses that act dishonestly.
4. It is for these reasons that legislation such as the Fair Trading Act 1986 (FTA) and the Commerce Act 1986 seeks to prohibit 'unfair' practices in both business-to-consumer and business-to-business transactions that ultimately harm outcomes for New Zealanders. Chapter 2 outlines the existing legislative protections against unfair conduct.
5. What is 'unfair' is highly subjective. However, it can broadly be grouped into two categories:
  - a. unfair contracts; and
  - b. unfair conduct.
6. Unfair contracts may include terms that:
  - a. permit one party to unilaterally vary the terms of a contract;
  - b. shift risk onto one party for events outside of their control;
  - c. restrict the ability of a party to enforce its rights under a contract;
  - d. limit one party's ability to terminate a contract (such as by imposing high cancellation fees);
  - e. do not provide for a supplier to be paid until after an extended period of time (for example, terms that provide for payment up to 90 days after being invoiced); or
  - f. are anti-competitive (such as price-fixing).
7. Further examples of terms that may be considered to be unfair are presented in Chapter 2.
8. Unfair conduct, on the other hand, broadly involves matters other than the terms of a contract. It may include factors related to a contract, such as:

- a. the way a party is induced into entering into a contract, such as through the use of harassment, coercion, or other pressure tactics (including making demands in relation to the upfront price of a good or service);
  - b. the way in which a contract is enforced;
  - c. making demands over and above the terms agreed in an existing contract; or
  - d. not complying with the terms of an existing contract (such as making late payments).
9. Unfair conduct may also include factors that do not relate directly to a contract, such as:
- a. misleading or deceptive conduct; or
  - b. refusal to supply (or purchase) a good or a service.
10. As noted above, what is considered to be unfair is subjective – something regarded as unfair by one business may be regarded simply as robust commercial negotiation by another. Such negotiations form a key part of healthy competition and can lead to benefits for consumers. For example, a retailer that manages to secure reductions in wholesale prices from its suppliers can pass these savings on to consumers. Similarly, competitive conduct by a firm that leads to new or improved goods and services is generally in the interests of consumers, even if it leads to the demise of its competitors.
11. Figure 1 below provides a visual representation of the relationship between practices that are ‘unfair’, practices that are harmful to consumers or the wider economy, and practices that are already prohibited.

Figure 1: Relationship between ‘unfair’, harmful, and already prohibited practices



12. Given this, in seeking to distinguish between practices that should be prohibited, and practices that should not, it is important to consider the effects of different practices on broader economic and social outcomes. This discussion document asks whether New Zealand currently has the balance right in terms of its protections against unfair commercial practices.

## Scope of this discussion document

13. This discussion document considers whether there is a need for additional generic protections against unfair commercial practices. In particular it considers whether additional protections are needed against:

- a. unfair business-to-business *contracts*;
  - b. unfair business-to-business *conduct*; and
  - c. unfair business-to-consumer *conduct*.
14. Unfair business-to-consumer contracts are not within the scope of this review, as there are already relevant provisions in the FTA which are being reviewed as part of MBIE's evaluation of the 2010–2015 consumer law reforms.
  15. There is significant cross-over between the issues considered in this document. Protections for consumers can also be extended to businesses, and vice versa. Similarly, there is not always a clear distinction between unfair *conduct* and unfair *contracts*.
  16. The focus of this document is on economy-wide, generic protections, as opposed to sector-specific regulation or regulation focussed on specific conduct. This aligns with the largely generic nature of New Zealand's existing competition and consumer legislation.
  17. This document is not a broad review of existing competition, consumer, or other commercial law. It is also not a review of the effectiveness of individual provisions of legislation. Rather, it focuses on whether there are any high-level gaps in New Zealand's existing legal framework for regulating unfair commercial conduct, and, if so, how these gaps could be addressed.

## 2 Status quo

18. As noted in Chapter 1, what is ‘unfair’ is highly subjective. However, existing legislation and common law provide a range of protections against practices that could be perceived as unfair. This chapter provides a brief overview of the extent of these protections in New Zealand. It also briefly outlines other current government reviews relevant to unfair commercial practices.
19. Table 1 provides a high-level overview of the current protections against unfair practices in New Zealand, divided into:
  - a. protections which are primarily about unfair *contracts*, and those which are primarily about unfair *conduct*; and
  - b. protections which apply to all practices, and those which only apply to consumers.
20. This table is intended as a stylised outline of the existing landscape, not a fully-exhaustive descriptor. Further information is presented below the table.

Table 1: Current protections against unfair practices

|                                     | Unfair contracts   | Unfair conduct  |
|-------------------------------------|--|---|
| All business practices              | <ul style="list-style-type: none"> <li>• Commerce Act 1986</li> </ul>  | <ul style="list-style-type: none"> <li>• FTA (misleading and deceptive conduct, harassment and coercion)</li> <li>• Commerce Act 1986</li> </ul>  |
| Business-to-consumer practices only | <ul style="list-style-type: none"> <li>• FTA (unfair contract terms)</li> <li>• Consumer Guarantees Act 1993</li> <li>• Credit Contracts and Consumer Finance Act 2003 (oppressive contracts and unreasonable fees)</li> </ul> | <ul style="list-style-type: none"> <li>• Credit Contracts and Consumer Finance Act 2003 (responsible lending obligations)</li> <li>• Equitable doctrine of unconscionability</li> </ul> |

### Fair Trading Act 1986

21. The FTA seeks to contribute to a trading environment in which the interests of consumers are protected, businesses compete effectively, and consumers and businesses participate confidently. To this end, the FTA prohibits:
  - a. misleading and deceptive conduct;
  - b. false, misleading, or unsubstantiated representations;
  - c. harassment and coercion;
  - d. unfair contract terms (see below); and
  - e. specific practices such as bait advertising and pyramid selling schemes.
22. Of particular relevance are the FTA’s protections against unfair contract terms (UCTs). At present, the FTA prohibits UCTs in standard form consumer contracts. An unfair contract term is defined as a term that:
  - a. would cause a significant imbalance in the parties to the contract’s rights and obligations arising under the contract;

- b. is not reasonably necessary in order to protect the legitimate interests of the party who would be advantaged by the term; and
  - c. would cause detriment (whether financial or otherwise) to a party if it were applied, enforced, or relied on.
23. Terms that define the main subject matter of the contract, set the upfront price payable under the contract, or are required or expressly permitted by any enactment, cannot be declared to be unfair.
24. A standard form contract is defined as a contract in which the terms have not been subject to effective negotiation between the parties, with reference to factors such as:
  - a. whether one of the parties has all or most of the bargaining power relating to the transaction; and
  - b. whether one or more of the parties was, in effect, required either to accept or reject the terms of the contract in the form in which they were presented.
25. For a contract term to be prohibited, the Commerce Commission must apply to a court for a declaration that a term is unfair. Private parties are not able to apply to have a term declared to be unfair – although they can make a complaint to the Commerce Commission requesting that the Commerce Commission make a court application.
26. If a court has declared that a term in a standard form consumer contract is an unfair contract term, the business must not:
  - a. include the unfair contract term in a standard form contract; or
  - b. apply, enforce, or rely on the unfair contract term in a standard form contract.
27. The rest of the contract will continue to bind the parties to the extent it is capable of operating without the unfair term.
28. There are no penalties for businesses that are found to have included unfair contract terms in a standard form consumer contract, unless the term has previously been declared to be unfair.
29. The FTA includes a non-exhaustive list of contract terms that may be unfair. This is referred to as a 'grey list'. Terms are not automatically deemed to be unfair just because they are included in the grey list. These terms are outlined in Box 1 below.

#### Box 1: The Fair Trading Act's grey list of unfair contract terms

The following terms are included in the FTA's list of terms that may be unfair. Terms that:

- permit one party (but not the other) to avoid or limit performance of the contract;
- permit one party (but not the other) to terminate the contract;
- penalise one party (but not the other) for a breach or termination of the contract;
- permit one party (but not the other) to renew or not renew the contract;
- permit one party to assign the contract to the detriment of another party without that other party's consent;
- permit one party to vary the upfront price payable under the contract without the right of another party to terminate the contract;
- permit one party to unilaterally vary the characteristics of the goods or services to be supplied under the contract;
- permit one party to unilaterally determine whether a contract has been breached;

- limit one party's liability for its agents;
- limit one party's right to sue another party;
- permit one party (but not the other) to vary the terms of the contract;
- limit the evidence one party can offer in proceedings relating to the contract; and
- impose the evidential burden on one party in proceedings relating to the contract.

## Commerce Act 1986

30. The Commerce Act 1986 seeks to promote competition in markets for the benefit of consumers. It does so by prohibiting agreements (including cartels), and mergers that substantially lessen competition. It also prohibits anti-competitive unilateral conduct by firms with market power, and provides for the regulation of the price and quality of goods or services in markets where there is little or no competition.
31. The focus of the Commerce Act is on promoting competition, and the associated benefits it produces for consumers in terms of lower prices, higher quality, and innovation in goods and services. It is not designed to protect individual firms from their competitors. While protecting against unfair practices is not the primary goal of the Commerce Act, its provisions nevertheless protect against a range of practices which could be deemed to be unfair.
32. As will be outlined in Chapter 3, many business concerns about unfair practices relate to practices by their suppliers or customers. While nothing prevents the Commerce Act from applying to practices by a firm towards its suppliers or customers, in practice such 'vertical' arrangements are less likely to be anti-competitive than 'horizontal' arrangements between competitors. As noted throughout this document, robust negotiations between a firm and its suppliers or business customers can often offer pro-competitive benefits (such as lower prices for consumers).

## Credit Contracts and Consumer Finance Act 2003

33. The Credit Contracts and Consumer Finance Act 2003 (CCCFA) protects against a range of practices which could be considered to be unfair in respect of credit contracts and related transactions. Of particular relevance are its provisions relating to oppressive contracts and conduct. Under the CCCFA, on application by the Commerce Commission, or any party to a contract, a court may 'reopen' a credit contract, a consumer lease, or a buy-back transaction if, in any proceedings, it considers that:
  - a. the contract, lease, or transaction is oppressive;
  - b. a party has exercised, or intends to exercise, a right or power conferred by the contract, lease, or transaction in an oppressive manner; or
  - c. a party has induced another party to enter into the contract, lease, or transaction by oppressive means.
34. The CCCFA defines "oppressive" as "harsh, unjustly burdensome, unconscionable, or in breach of reasonable standards of commercial practice."
35. If the court reopens a credit contract, consumer lease, or buy-back transaction, it may, among other things:
  - a. cancel or change all or parts of the contract;
  - b. order one party to pay the other party a sum of money; and/or
  - c. order a lender to stop behaving in a particular way.

36. In deciding whether to reopen a credit contract, consumer lease, or buy-back transaction, the court must have regard to factors such as (but not limited to):
- a. the relative bargaining power of the parties;
  - b. whether the borrower was reasonably able to protect their own interests, taking into account matters like their age, physical or mental condition;
  - c. whether the lender used unfair pressure or tactics to encourage the borrower to enter into the contract;
  - d. how the lender's contract compares with other lenders' contracts for similar finance products;
  - e. the amount the borrower has to pay under the loan;
  - f. whether the contract is in plain language; and
  - g. whether the terms of the loan or guarantee are reasonably necessary to protect the lender's interests, and whether they allow the borrower a reasonable opportunity to comply with the loan.

### Equitable doctrine of unconscionability

37. There is no statutory prohibition against 'unconscionable' conduct in New Zealand. However, the concept of unconscionability has developed within the courts over time. The Disputes Tribunal also has a power under the Disputes Tribunal Act 1988 to intervene if it finds contracts to be unconscionable.
38. Unconscionability does not have a precise legal definition, but it has been applied where New Zealand courts have considered it inequitable to allow a party to enforce its contractual rights against another party who is detrimentally affected by an agreement. Contracts which appear to be enforceable under normal legal principles will not be enforceable if a court decides they were made in an unconscionable manner.
39. There are three essential features of when New Zealand courts have intervened against unconscionable conduct:
- a. the weaker party has a qualifying disability (e.g. age, infirmity, difficulty understanding English);
  - b. the stronger party has knowledge (actual or constructive) of this disability; and
  - c. the stronger party takes advantage (passively or actively) of a benefit from the transaction.<sup>1</sup>
40. There are, however, a number of limitations to the usefulness of unconscionability as a protection. For example:
- a. The doctrine of unconscionability only applies when it is invoked in court. It does not create a positive duty on parties to act in good conscience. It also means that the Commerce Commission cannot take a case and seek penalties against parties engaging in practices which are unconscionable.
  - b. The cost of taking a case to court means that court cases usually only concern high-value transactions. This reduces the doctrine's applicability for many low-value consumer transactions. While the Disputes Tribunal has jurisdiction to consider unconscionability,

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<sup>1</sup> Gustav & Co Ltd v Macfield Ltd [2007] NZCA 205.

parties who do not receive legal advice may not be aware of the existence of the doctrine of unconscionability and therefore may not take a case.

- c. There will generally only be a finding of unconscionability if it involves an element of unfair *conduct*.<sup>2</sup> As such, the doctrine does not offer protections against the terms of a *contract*, even if they are grossly unfair, unless there is also an element of victimisation.
- d. A finding of unconscionability will generally be limited to business-to-consumer transactions; the courts have tended to avoid a finding of unconscionability in respect of commercial transactions.<sup>3</sup>

## Other fairness-related provisions

41. Other legislation which potentially protects against some forms of unfairness includes:
  - a. the Consumer Guarantees Act (CGA) 1993's statutory warranties in respect of the quality of consumer goods and the fitness-for-purpose of services, and associated rights of redress; and
  - b. the Contract and Commercial Law Act 2017's provisions relating to contractual mistakes, illegal contracts, and the sale and carriage of goods.

## Other current reviews

42. The Government is currently undertaking a number of other reviews relevant to 'unfair' commercial practices. These include:
  - a. **Payment practices.** The government is considering how to improve business-to-business payment practices. Legislative and other interventions will be considered, potentially including a disclosure regime, penalties or fines for late payments and/or maximum payment timeframes.
  - b. **The CCCFA.** Legislation is being drafted that will strengthen protections for consumers against irresponsible and high-cost lending.
  - c. **Insurance contract law.** Currently, some terms in insurance contracts are exempt from the FTA's consumer UCT protections. The government is considering whether these exemptions should be amended or removed.
  - d. **Section 36 of the Commerce Act.** Section 36 prohibits anti-competitive unilateral conduct by firms with market power. The Government has signalled its intention to review section 36 on the basis that it is costly and complex to enforce, and may not be sufficiently deterring anti-competitive conduct by powerful firms.
  - e. **Consumer law.** MBIE is evaluating the effectiveness of each of the individual changes to the FTA that came into effect between 2013 and 2015 (including the provisions relating to unfair contract terms in standard form consumer contracts). This differs from the focus of this discussion document, which is on understanding whether any significant gaps exist in the overall framework for protecting businesses and consumers from unfair commercial conduct. However, both could potentially feed into legislative changes to the FTA.

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<sup>2</sup> O'Connor v Hart (1986) 1 NZL 159 (PC).

<sup>3</sup> Gault on Commercial Law. FC7 Reopening for oppression.



# 3 Potential issues

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43. This chapter outlines three potential issues associated with unfair commercial practices at present:
- a. Issue 1: Unfair business-to-business *contracts*;
  - b. Issue 2: Unfair business-to-business *conduct*; and
  - c. Issue 3: Unfair business-to-consumer *conduct*.

## Business-to-business practices

44. In considering the role of government in intervening in relationships between businesses, MBIE's primary focus is on prohibiting practices that have an overall negative effect on New Zealand's economic performance. Arguments can also be made that fairness, in and of itself, is important in business-to-business practices. However, caution also needs to be taken to ensure that measures to protect individual businesses do not over-reach and unduly inhibit competition or economic growth. As such, while fairness is considered in this discussion document, it is considered within the broader context of the economic impacts of unfair practices.
45. The extent to which unfair commercial practices undermine New Zealand's economic performance is difficult to determine; they are only one of a wide range of contributing factors. In addition, as noted in Chapter 1, practices that are viewed as 'unfair' or detrimental to an individual business are not necessarily detrimental to the economy. Some practices – such as robust negotiation over price – are likely to simply lead to transfers of wealth between parties, while other practices may be efficient and welfare-enhancing. As such, we do not consider all 'unfair' practices to be problematic or to necessitate government intervention.
46. Nevertheless, at an economy-wide level, unfair commercial practices have the potential to ultimately result in lower levels of competition, innovation, and productivity across the economy, with corresponding negative impacts for consumers.
47. The next sections examine the extent of unfairness as experienced by individual businesses. They draw on a survey of (predominantly small) businesses conducted by MBIE in June and July of 2018.<sup>4</sup>

### Issue 1: Unfair business-to-business contracts

48. This section focuses on unfair business-to-business contracts. Other than the protections offered by the Commerce Act, there are no real legislative protections for businesses against unfair contracts at present.

#### Prevalence of unfair contract terms

49. Overall, 45 per cent of businesses surveyed by MBIE indicated that they had been offered contract terms that they considered to be unfair in the past year. Of the businesses that indicated that they had been offered an unfair contract term:

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<sup>4</sup> The survey was opt-in, and distributed via the government's business.govt.nz channels and through the Regional Business Partner network. The survey was started by 260 respondents, with a completion rate of around 77 per cent. 85 per cent of respondents had fewer than 20 employees. Businesses from all New Zealand regions and sectors (other than mining) were represented.

- a. 59 per cent had been offered 'unfair' terms that limited the liability of their supplier or business customer and/or placed the risk on their business;
  - b. 47 per cent had been offered 'unfair' terms that allowed their supplier or business customer to unilaterally vary the terms of the contract (including the price);
  - c. 45 per cent had been offered an 'unfair' upfront price that their business had to pay or receive for goods or services;
  - d. 41 per cent had been offered 'unfair' extended payment terms;
  - e. 35 per cent had been offered 'unfair' terms that limited their ability to enforce their rights under the contract;
  - f. 29 per cent had been offered 'unfair' terms that limited their ability to terminate a contract;
  - g. 18 per cent had been offered terms that they considered to be anti-competitive; and
  - h. 16 per cent had been offered 'unfair' terms that allowed their business customer or supplier to unilaterally determine when a contract has been breached.
50. 19 per cent offered their own examples of what they deemed to be unfair contract terms, including requiring high levels of liability insurance, extensive use of pro-forma invoicing, being required to pay the supplier's legal fees, the duration of the contract, and unrealistic timeframes for the delivery of services.
51. As noted above, not all contractual terms that businesses perceive as unfair are necessarily problematic from a policy perspective. As one example, 'high' prices of goods and services tend to, by themselves, facilitate entry from competitors, and thus generally do not require government intervention. Similarly, some level of flexibility and uncertainty may be necessary in some types of contracts. For example, a business may legitimately use contract terms to pass on risk to a business customer for events that the customer is able to influence, therefore incentivising the customer to reduce the risk of this event occurring, and allowing the supplier to offer the good or service at a lower price.
52. The overall prevalence of unfair contract terms is likely to be constrained, to an extent, by competitive forces. This is likely to be the case in situations where:
- a. a large number of businesses have a good understanding of the terms they are being offered;
  - b. the power imbalance between suppliers and their business customers is low (such as if firms have potentially many other suppliers or customers to purchase from or sell to); or
  - c. there is potential for a negative reputational impact if unfair terms are included.
53. Nevertheless, the results outlined above indicated that a relatively high proportion of businesses have experienced what they consider to be unfair contract terms in the past year.
54. Problems associated with unfair contract terms are likely to be concentrated in contracts:
- a. which are standard form; and
  - b. where one of the parties is small in either absolute terms, or relative to the other party.

#### Standard form contracts

55. Standard form contracts are contracts typically offered on a 'take it or leave it' basis by a party with greater bargaining power. Generally, a contract is considered to be standard form if one of the parties has not had the opportunity to negotiate or change the terms of the contract

when agreeing to it. The same standard form contract may be used widely by a firm with its customers or suppliers with little, if any, modification of the terms across different contracts.

56. Standard form contracts can provide a number of benefits. In particular, they save businesses time and resources, particularly for repeated transactions. Lower costs associated with using standard form contracts can enable businesses to offer more competitive pricing on goods and services than if individual terms were negotiated with each customer. It would be infeasible and inefficient to entirely prohibit the use of standard form contracts.
57. However, standard form contracts can also present disadvantages. Most significantly, they make it much easier to include unfair contract terms in a contract, compared to a situation where both parties are involved in the preparation of a contract. This is because:
  - a. the accepting party is likely to pay less attention to the detailed terms of the contract if they are not involved in drafting them, making it easier to 'hide' unfair terms; and
  - b. the accepting party is less likely to challenge the terms of a contract if it knows that the contract is standardised.
58. In addition, some businesses may base standard form contracts on those currently being used by their competitors. This practice can result in poorly drafted and unfair contract terms being duplicated and multiplied across entire industries. One example of this that we are aware of in the business-to-consumer context is in the mobile trader ('truck shop') industry.<sup>5</sup>
59. MBIE's survey indicates that standard form contracts are widely used in New Zealand when businesses purchase and supply goods and services, with 79 per cent of respondents having entered in to at least one standard form contract in the past year.

#### Small businesses' vulnerability to unfair contract terms

60. The problems with unfair contract terms are likely to be more pronounced for small businesses. Compared to larger businesses, small businesses are less likely to have:
  - a. the resources to identify unfair terms, appreciate their significance, and determine whether they can manage the associated risks;
  - b. the resources to engage in negotiations over the terms of a contract;
  - c. the bargaining power to successfully negotiate the terms of a contract; and/or
  - d. the resources and bargaining power to resist the enforcement of unfair contract terms.
61. While some medium and large businesses may also lack legal resources and bargaining power, larger businesses are more likely to have the ability to effectively assess and negotiate contracts.
62. As such, unfair contract terms can shift risks to the party that is less able to manage them effectively. Small businesses may be less likely to have robust risk management procedures and policies in place, and may be less able to absorb the detriment if an unfair term is enforced. For example, an unfair contract term may require the small business to bear the risk of a high-cost, low-probability event. While this may result in a lower contract price, the small business may be taking on risks that they are unable to effectively manage.
63. A business seeking to avoid signing a contract that includes unfair terms may incur substantial costs in gaining the necessary information to assess whether they are present. As small businesses often lack in-house legal expertise, gaining this information, even for a simple

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<sup>5</sup> Commerce Commission. (2015). *Mobile Trader 2014/15 project*. Retrieved from <http://www.comcom.govt.nz/the-commission/consumer-reports/mobile-trader-201415-project/>

standard form contract, could feasibly cost several thousand dollars. For low-value contracts, this can be viewed as disproportionately high and, therefore, not worth undertaking.

64. Of the small businesses<sup>6</sup> we surveyed, 86 per cent agreed that they generally understood the terms and conditions contained in contracts they entered into, and less than half generally assumed that a contract they were offered contained no unfair terms. However, only 26 per cent felt that they were able to afford legal and financial advice regarding the terms and conditions of a contract, and only 39 per cent felt that they had the resources necessary to negotiate over the terms and conditions of contracts with their suppliers or customers.

#### Businesses' response to unfair contract terms

65. Businesses who are offered an unfair contract term have a number of options available to them, including declining the contract, seeking legal advice, and seeking to renegotiate the terms of the contract. For example, in response to the most 'unfair' contract that survey respondents had been offered, while 34 per cent reported entering into the contract in question, 45 per cent asked the business to alter or delete terms that were unfair, and 16 per cent did not enter into the contract. Of those businesses who asked their supplier or customer to alter or delete terms that were unfair, nearly half had all, or at least some, of their concerns addressed.
66. As shown above, despite the presence of one or more unfair contract terms, in a number of situations, businesses may nevertheless enter into a contract. This may be because:
- a. They have no other viable alternative – there may be no other business customers or suppliers offering 'fair' terms. As such, accepting a contract may be the only avenue to a commercial opportunity that the business is seeking.
  - b. They have 'fairer' alternatives, but consider that other features of the contract (such as the price and quality of the good or service) outweigh their concerns about unfair terms.
  - c. They believe that they will be able to mitigate the risk of the unfair terms ever needing to be invoked through, for example, a strong focus on relationship management.
  - d. They may not be aware that the terms exist. According to our survey, of the businesses which suffered detriment as the result of an 'unfair' term being enforced, 44 per cent were not aware that the term existed at the time they signed the contract.

#### Business detriment as a result of unfair contract terms

67. 36 per cent of businesses who had entered into a contract that contained an unfair contract (16 per cent of all businesses) indicated that a term had been enforced in a way that had harmed their business. Examples of this detriment offered by businesses included cash flow issues, increased costs, use of internal resources, reduced output and sales revenue, and reduced profitability.
68. More generally, we would expect that unfair contract terms would:
- a. increase transaction costs, by requiring firms to spend more time doing 'due diligence' on contracts, or seek more legal advice;
  - b. increase operating costs, such as if a firm is required to increase the amount of insurance it takes out as a result of a contract;
  - c. increase finance costs, as a result of cash flow issues associated with extended payment terms;

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<sup>6</sup> For this context, a small business is deemed to have less than 20 employees.

- d. increase costs for other parties, if the price of a contract is raised to compensate for unfair terms; and
  - e. negatively impact on a firm's ability to grow and innovate, if its limited resources are diverted into dealing with the above.
69. While some of these effects may be confined to individual businesses, many of them have the potential to have broader economic impacts, although this is difficult to measure.

#### Are current protections sufficient to address unfairness in business-to-business contracts?

70. As outlined in the previous section, New Zealand's legal framework already provides a number of protections against unfair commercial practices. However, there are currently no legislative protections that specifically address unfair contract terms in contractual dealings between businesses.
71. As presented above, there is both theory and evidence to suggest that businesses (particularly small ones) are vulnerable to unfair contract terms in a range of circumstances. As such, we think that the case for protecting businesses from some forms of unfair contract terms should be explored further. However:
- a. there is some evidence that businesses are taking action in response to unfair contract terms, and have some success in addressing their concerns;
  - b. it is difficult to understand the impact that unfair contract terms have on the wider economy, as opposed to individual businesses; and
  - c. we want to ensure that businesses are not unduly limited in their ability to contract freely between themselves, and enter into pro-competitive, welfare-enhancing transactions.
72. Given this, we are seeking input on the size of the problem and whether government intervention is justified.

|   |  |
|---|--|
| 1 | What types of unfair business-to-business contract terms are you aware of, if any? How common are these? |
| 2 | What impact, if any, do these unfair contract terms have?  |
| 3 | Is government intervention to address unfair business-to-business contract terms justified? Why/why not? |

## Issue 2: Unfair business-to-business conduct

73. As noted in Chapter 1, unfair conduct may include (but is not limited to) the use of pressure tactics, misleading or deceptive conduct, not complying with the terms of a contract, or enforcing a contract in a harsh manner. This recognises that even if a contract is not inherently unfair in itself, the way in which it is entered into or enforced may be.
74. As outlined in Chapter 2, and in contrast to unfair contracts, a range of unfair business-to-business conduct is already prohibited. This includes misleading and deceptive conduct, harassment, and coercion.

#### Prevalence of unfair conduct

75. In response to MBIE's survey, 47 per cent of businesses indicated that they had been treated unfairly by a supplier or business customer in the last year, other than in relation to the terms of a contract. Of the businesses that indicated that they had been subjected to unfair conduct:

- a. 34 per cent indicated that this involved suppliers or business customers not complying with the terms of an existing contract;
  - b. 32 percent felt that they had been misled or deceived;
  - c. 28 per cent indicated that they had faced demands over and above the terms agreed in an existing contract;
  - d. 19 per cent dealt with firms that refused to supply a good or service, or refused to purchase a good or service; and
  - e. 12 per cent considered that they had been harassed, coerced, or otherwise subject to pressure.
76. 31 per cent of respondents offered other examples of what they deemed to be unfair conduct. These included poor levels of service, poor communication, price demands, late payments, and price changes without warning.
77. Like Issue 1, not all conduct that businesses perceive as unfair is necessarily problematic from a policy perspective. For example, while many businesses are likely to appreciate the difference between reasonable negotiations and undue harassment or coercion, some may consider the former category to be ‘unfair’, despite the benefits that such negotiations can bring (such as lower prices for consumers).
78. As with Issue 1, the overall prevalence of unfair conduct is likely to be constrained, to an extent, in cases where the power imbalance between suppliers and their business customers is low, or there is potential for a negative reputational impact from acting unfairly.
79. Much of the unfair conduct reported by businesses is already prohibited to some extent, or, in the case of breach of contract, subject to common law remedies. The prevalence of this conduct as reported by businesses therefore suggests that:
- a. businesses are not complying with the law; and/or
  - b. the threshold at which a specific form of conduct is prohibited under the law is higher than the threshold at which some businesses feel aggrieved.

#### Small businesses vulnerability to unfair conduct

80. Like unfair contracts, small businesses are arguably more likely to be vulnerable to unfair conduct than large ones. In particular, small businesses are less likely to have the bargaining power or capability to negotiate in response to pressure tactics, or to deal with larger businesses who do not comply with the terms of a contract. Such tactics may result in most of the benefits of a contract being shifted to the larger party.
81. However, some forms of unfair conduct are likely to impact on all businesses relatively equally. Widespread misleading or deceptive conduct in a market, for example, impacts on the ability of all businesses to operate efficiently. As such, compared to Issue 1, we do not see the potential problem associated with unfair conduct as being concentrated on small businesses to the same degree.

#### Businesses’ response to unfair conduct

82. As with unfair contract terms, businesses have options in response to the unfair conduct that they face. We asked businesses what they did in response to the most unfair conduct they had been subjected to in the past year. While 43 per cent were already in business with the other party and continued to be, 41 per cent asked the business to change their conduct, and 21 per cent ended their relationship with the relevant business. Of the businesses who asked the other party to change their conduct, 39 per cent had all or some of their concerns addressed.

## Business detriment as a result of unfair conduct

83. 59 per cent of businesses who had experienced unfair conduct (27 per cent of all businesses) indicated that the conduct had harmed their business in some way. Examples of this detriment offered by businesses included reputational damage, disrupted supply of goods and services, and wasted time, inconvenience, and increased stress. Businesses also reiterated many of the forms of harm that they identified in relation to unfair contract terms, such as cash flow issues and reduced profitability.
84. As with unfair contract terms, while some of these effects may be confined to individual businesses, many forms of unfair conduct can also have wider economic impacts. For example, unfair conduct could undermine competition and the efficient operation of markets if, for example, search costs increase as a result of widespread misleading or deceptive conduct. This could reduce the competitive pressure on businesses, and make it harder for businesses to effectively source or supply goods and services. Similarly, economic efficiency could be undermined if businesses are harassed or coerced into entering into, or altering, contracts that they ultimately do not want to enter into, straining the concept of freedom of contract.

## Are current protections sufficient to address unfair business-to-business conduct?

85. We think there are sound economic reasons for prohibiting unfair business-to-business conduct, as well as broader ‘fairness’ justifications. In line with this, many of the examples of conduct which may be considered to be unfair are already prohibited under existing legislation (although the threshold at which conduct is prohibited is relatively high in many cases, such as under the FTA’s provisions relating to harassment and coercion). As such, compared to Issue 1, there is arguably less of a ‘gap’ in terms of protections against unfair conduct.
86. On the other hand, it could be argued that there are stronger justifications for protecting businesses against unfair conduct than unfair contracts. Unfair conduct seemingly has the ability to distort market outcomes and undermine free and informed decision-making by businesses more than unfair terms within the contract itself (while acknowledging the take-it-or-leave-it nature of many contracts).
87. In line with this, and the fact that a range of businesses have indicated that unfair conduct is causing them detriment, we think that it is worthwhile testing whether the protections against unfair business-to-business conduct should be extended.

|   |   |
|---|---|
| 4 | What types of unfair business-to-business conduct are you aware of, if any? How common is this type of conduct?                           |
| 5 | What impact, if any, does this conduct have?  |
| 6 | Is government intervention to address unfair business-to-business conduct beyond existing legislative protections justified? Why/why not? |

## Box 2: Unfair treatment of contractors

The focus of this section is on businesses' conduct towards other businesses, as opposed to their conduct towards natural persons. However, we are also aware of concerns about the treatment of contractors by firms in some industries (such as the trucking and delivery industry). Contractors nominally function as businesses, but in practice they can bear a number of similarities to employees. The Employment Relations Act 2000 already provides guidance around when a person is an employee. However, there are situations where contractors may genuinely be in business on their own account (and therefore unlikely to qualify as employees), while in practice having very little bargaining power, and being economically dependent on a single principal firm.

Some of the concerns we are aware of in this context include:

- contracts which allow a principal firm to unilaterally adjust payment rates or the contractor's territory;
- one-sided termination rights in favour of the principal firm; and
- clauses which require the contractor to work exclusively for the principal firm.

While these examples are not dissimilar to the examples of unfairness in more clear-cut business-to-business relationships, they may be of added concern because such contractors are not afforded the protections given to employees. The options discussed in Chapter 5 are not specific to any particular form of business model. As such, they have the potential to address some of contractors' concerns.

## Business-to-consumer conduct

88. As noted above, we consider that the strongest arguments for government intervention in respect of business-to-business practices are in relation to the potential for them to negatively impact on New Zealand's economic performance.
89. In respect of business-to-consumer practices, there are similar arguments about the potential for unfair practices to have negative economic impacts. In addition, we consider that there are good arguments that unfair practices should be prohibited on the basis that they can lead to high levels of detriment for individual consumers, irrespective of any wider economic impact.
90. In addition, while businesses – particularly small ones – may be vulnerable to unfair practices, we think that consumers are generally less well-equipped to protect their own interests than businesses are. As such, while we do not see it as the role of government to protect all consumers from all instances in which they may suffer harm, or from making any decision that they might ultimately regret, in general, we see a stronger case for protecting consumers from unfair practices than for protecting businesses.

## Issue 3: Unfair business-to-consumer conduct

91. This Issue is similar to Issue 2, except that it focusses on unfair conduct directed at consumers. Currently, the protections that apply to businesses in respect of unfair conduct also apply to consumers. In addition, additional protections exist in certain contexts, such as the responsible lending principles established under the CCCFA.

### Prevalence of unfair conduct

92. We do not have good data about the extent to which consumers have experienced unfair conduct. However, Commerce Commission staff have provided some examples of unfair conduct that they have received complaints about. These are outlined in Box 3 below.



## Box 3: Examples of unfair conduct provided by the Commerce Commission

### Skincare products

The Commerce Commission received a significant number of complaints about an offshore-based trader selling expensive skincare products in shopping malls. The trader employed young personable salespeople who employed aggressive sales tactics to sell the products. A number of the complainants were elderly or otherwise vulnerable. For example, one complaint was on behalf of two people with autism who, between them, had been charged \$10,000 for their purchases. The Commission considered that it was unable to take enforcement action under existing provisions.

### Mobile photo studios

One New Zealand company operated mobile photo studios which approached young parents in shopping malls to take photos of their young children. They were asked to return at a specific time to view the photos. When the customers returned, they were offered packages costing up to \$4,777. In some circumstances customers were asked to sign contracts on electronic devices and copies of the contract were e-mailed to them after they had signed them. Some complainants indicated that, if they had been told upfront the likely price of the photos, they would have decided not to purchase them as the price was well beyond their means to pay. Some consumers said that, once they found out the price of the photos, they tried to cancel the contract but were then asked to pay significant cancellation fees. The Commission did not prosecute this trader primarily because the conduct did not appear to clearly breach provisions of existing legislation.

### Mobile trader practices

In one case, a mobile trader engaged in predatory lending practices by entering a mental health unit and signing up nearly all the clients to unreasonable contracts for phones and PlayStation consoles. While these lenders may have been breaching some existing legislative provisions, the current prohibitions may not necessarily directly address the conduct in question.

## Consumers' response to unfair conduct

93. MBIE's National Consumer Survey 2016<sup>7</sup> provides some indications about how consumers respond to problems they experience with goods or services. While such problems are not necessarily synonymous with unfair conduct:
- a. 68 per cent of consumers who had problems took steps resolve the problem;
  - b. 55 per cent of those who took action (37 per cent of those with problems) had their problem resolved to their satisfaction; and
  - c. 35 per cent of those who took action (24 per cent of those with problems) were able to resolve the problem the first time they approached the business responsible.
94. These results indicate that consumers are having some – but not complete – success at resolving their consumer problems. However, it is likely that many consumers who were able to resolve their problems to their satisfaction were less likely to be vulnerable, and more likely to be dealing with 'reputable' traders who make reasonable efforts to act reasonably and comply with the law. We consider it likely that businesses that engage in conduct which is particularly unfair or egregious are less likely to adjust their behaviour or remedy the situation in response to action by consumers.

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<sup>7</sup> Ministry of Business, Innovation and Employment. (2017). *National Consumer Survey 2016: Summary Findings*. Retrieved from <https://www.consumerprotection.govt.nz/assets/PDFs/NCS-Final-Report-Summary-Findings.pdf>

## Consumer detriment as a result of unfair conduct

95. It is difficult to identify the detriment that consumers experience as a result of unfair conduct. However, we would generally expect that it could:
- a. reduce consumers' ability to transact and engage in markets with confidence;
  - b. lead to financial hardship; and
  - c. lead to wasted time, inconvenience, and increased stress.

## Are current protections sufficient to address unfair business-to-consumer conduct?

96. As with Issue 2, a range of protections already exist against unfair commercial business-to-consumer conduct. However, the examples provided by Commerce Commission staff suggest that there may nevertheless be some gap in existing protections. Where conduct falls within this gap, there is a potential for it to lead to very high levels of detriment for consumers, as well as broader negative economic impacts. The examples provided by Commission staff give a flavour of this.
97. In addition, while some conduct may already breach existing legislation, in some cases, conduct which is clearly unfair effectively needs to be 'shoehorned' to fit into an existing prohibition. This can make enforcement more difficult, and arguably reduces predictability for businesses and consumers about how the law can and will be interpreted. Because of this, we think that there is a case for testing whether the protections against unfair business-to-consumer conduct should be extended.

|   |   |
|---|---|
| 7 | What types of unfair business-to-consumer conduct are you aware of, if any? How common is this type of conduct?                           |
| 8 | What impact, if any, does this conduct have?  |
| 9 | Is government intervention to address unfair business-to-consumer conduct beyond existing legislative protections justified? Why/why not? |

# 4 Objectives

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98. As outlined in Chapter 1, the high level objective of this work is to ensure that New Zealand’s regulatory systems contribute to a business environment where businesses and consumers are confident participants in fair and thriving markets.
99. We propose five main criteria to assess any potential changes to the regulatory framework governing unfair practices. These are:
- Criterion 1: Consumers are protected from high levels of detriment and practices which unduly impact on their ability to confidently participate in markets.
  - Criterion 2: Businesses are protected from practices which unduly impact on their ability to confidently participate in markets.
  - Criterion 3: Businesses are not unnecessarily prevented from competing effectively, negotiating firmly, and entering into contracts that reflect their wishes.
  - Criterion 4: The law is predictable for businesses and compliance costs are reasonable.
  - Criterion 5: Consumers and businesses have access to effective redress when things go wrong.

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

## 5 Options for reform

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100. This chapter presents options regarding:
  - a. additional generic protections for businesses and consumers against unfair *conduct*; and
  - b. additional generic protections for businesses against unfair *contracts*.
101. These options are not mutually exclusive – potential packages of options are discussed in Chapter 6.
102. All options are subject to establishing that there are sufficient issues at present to warrant government intervention.
103. This chapter first outlines and analyses high-level options for additional protections. It then considers a number of design issues that would need to be determined in relation to any prohibition, including:
  - a. which businesses, if any, are protected by the prohibitions;
  - b. which transactions the protections apply to; and
  - c. enforcement, remedies and penalties.
104. Some of the below options were previously considered by the Ministry of Consumer Affairs as part of the 2010–2015 consumer law reforms, but ultimately not adopted at the time.

### Option 1: Introduce a high-level protection against unfair conduct

105. This option would involve introducing some form of general statutory prohibition against unfair conduct. The intention would be to broaden the protections beyond those currently provided in statute, common law, and equity.
106. Our presumption – subject to submissions – is that there is not a large gap in the protections against unfair conduct at present. That is, existing prohibitions – such as those relating to misleading and deceptive conduct, harassment and coercion, and anti-competitive conduct – already protect against many of the situations where consumers or businesses might otherwise be subject to detriment. However, we also recognise that there may be some forms of conduct which are unfair, are not currently prohibited, and justify government intervention.
107. As such, this option would generally have a relatively high threshold – in terms of the detriment that would need to be suffered or the departure from commercial norms – before it would provide additional protections above the status quo. The objective, therefore, is to design options which can act as a flexible ‘safety net’ to catch conduct which is particularly egregious and not addressed by other more specific consumer protection provisions.
108. Three options for a prohibition against unfair conduct are summarised below, and explored further in Annex 1. Each of these is adapted from international or domestic legislation. In practice, we think it likely that each option would broadly target similar forms of conduct. There are other options around wording that could be used in defining a prohibition against unfair conduct, including combinations of the below three options. As such, we welcome submissions which identify alternatives to, or hybrids of, the options presented below.

109. Regardless of the exact design, we consider that it should be an offence to contravene any new prohibition against unfair conduct, in line with the general design of the FTA. Similarly, we think that the FTA’s general regime in respect of civil proceedings remedies (including providing for injunctions, refunds, damages, or having a contract altered or declared void) should extend to any new prohibition. Consumers and businesses would also be able to seek remedies at the Disputes Tribunal.
110. We also consider that any prohibition should be accompanied by legislative guidance as to what is unfair. This could be modelled on the guidance in the CCCFA related to oppressive conduct (see Chapter 2), and in Australia’s Competition and Consumer Act 2010 relating to unconscionable conduct (see Annex 1).

### Design issue: what specific prohibition should be preferred?

111. Three options for a specific prohibition against unfair conduct are:
- a. Option 1A: A prohibition against unconscionable conduct. This statutory prohibition could be modelled, in part, on the Australian prohibition. As such, it could prohibit conduct in relation to the supply (or possible supply) and acquisition (or possible acquisition) of goods or services that is, in all the circumstances, unconscionable.
  - b. Option 1B: A prohibition against conduct that is ‘oppressive’. This could be based, in part, on the treatment of oppression in the CCCFA, as outlined in Chapter 2. The CCCFA defines “oppressive” as “harsh, unjustly burdensome, unconscionable, or in breach of reasonable standards of commercial practice”.
  - c. Option 1C: A prohibition against ‘unfair commercial practices’ based on the approach taken by the European Union. This provides that a commercial practice is unfair if it is contrary to the requirements of professional diligence, and it materially distorts, or is likely to materially distort, the economic behaviour of the average consumer.
112. Annex 1 sets out these approaches in more detail.

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|----|--|
| 11 | Should a high-level prohibition against unfair conduct be introduced? Why/why not?   |
| 12 | What are the advantages and disadvantages of Options 1A, 1B, and 1C (Refer to Annex 1 for more information)? Which option, if any, do you support?                           |
| 13 | If unconscionable conduct were prohibited (Option 1A), should a definition of unconscionability be included in statute, and if so, how should it be defined?                 |
| 14 | Is it appropriate to require businesses to act in good faith (as per Option 1C – see Annex 1)? Are there situations in which doing so could have negative economic outcomes? |
| 15 | Are there any other variations on Option 1 that we should consider?  |

### Design issue: Should Option 1 also address unfair contracts?

113. While the focus of Option 1 is on addressing unfair conduct, many instances of unfairness may involve both unfair conduct and unfair contracts. Historically, in relation to unconscionability, courts in some jurisdictions have only been willing to make a finding of unconscionability when evidence of both unconscionable conduct and unconscionable contract terms has been present. For example, there might need to be evidence that a party was pressured into entering a contract, *and* that the contract itself is very unfair. However, some courts have now

adopted a 'sliding scale' approach, where a finding of unconscionability may rest on evidence of either unconscionable conduct *or* contract terms without requiring evidence of both.<sup>8</sup>

114. Options 1A, 1B, and 1C have been developed on the assumption that any unfair practices must contain an element of unfair conduct to be a breach of the prohibition. While unfair contract terms could (and often would) also be present, unfair terms alone would not be sufficient for there to be a breach of the prohibition. Essentially, this would mean that, if someone entered into a bad deal, there would not be a remedy unless they had also been pressured, misled, or otherwise subject to unfair conduct.
115. However, Option 1 could also be extended, so that a court may find a contract to be unfair, even if there is not an element of unfair conduct. Based on the courts' approach to oppressive contracts,<sup>9</sup> there would likely be a very high threshold before a court would find a contract to be in breach of a prohibition, without there also being an element of unfair conduct. Nevertheless, given the potential for the courts to adopt a 'sliding scale' approach, Option 1 could be designed to facilitate a finding of an unfair contract alone.
116. This broader approach to Option 1 would have some cross-over with Option 2 (see below), which involves protecting businesses from unfair contract terms. However, unlike Option 2, which focuses on individual terms, it would present the potential for the contract as a whole – including the price and main subject matter of a contract – to be deemed to be unfair.
117. While there are legitimate arguments about why businesses and consumers should be protected from unfair contract terms in some instances, we think that it is harder to argue that they should be protected in respect of the main subject matter or price of a contract, as compared to the 'fine print'. However, it could be argued that there are occasional cases in which, even if the decision to enter into a contract is simply a result of bad judgement or a lack of due diligence, a party should nevertheless be protected from the consequences of a contract, including the main subject matter of the contract. This might be the case in situations where:
  - a. one party is particularly vulnerable; and/or
  - b. the contracts impose very heavy obligations on one party or are otherwise very one-sided, to the extent that they could or did cause significant detriment to a party.
118. We would welcome feedback on whether, if a version of Option 1 is adopted, it should include the potential for a matter to be deemed to be unfair purely on the basis of the contract itself.

16

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

### Design issue: Who should be protected?

119. If a version of Option 1 is introduced, any protections would apply, in the first instance, to business-to-consumer conduct. As discussed in Chapter 3, we think that, generally, the case for protecting consumers from unfair conduct is stronger than the case for protecting businesses.
120. However, the protections could also be extended to all businesses, or to a subset of businesses only. Applying the protections to a subset of businesses would recognise that some businesses are more vulnerable to unfair conduct than others, and that such vulnerability is generally

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<sup>8</sup> Lonegrass, M. (2012). Finding Room for Fairness in Formalism – The Sliding Scale Approach to unconscionability. *Loyola University Chicago Law Journal*, 44(2012).

<sup>9</sup> See, for example, *Prudential Building and Investment Society of Canterbury v Hankin* [1997] 1 NZLR 114 (HC).

likely to be higher among smaller firms. If this approach was taken, the distinction between the firms that receive the protections and those that do not could be made based on:

- a. employee count (e.g. businesses with fewer than 20 employees);
  - b. turnover (e.g. only businesses with a turnover of less than \$2 million); or
  - c. whether there is a material imbalance in the negotiating power between the relevant businesses (this would be determined case-by-case, as opposed to an absolute metric).
121. Applying the protections to some, but not other, businesses could create some difficulties in terms of compliance. For example, some businesses may not distinguish their conduct based on the size/negotiating strength of the other party (and may not be able to easily determine these attributes of the other party). However, it could also be argued that the intent of the protections is not necessarily to alter businesses' conduct before the event (as businesses who are most likely to breach prohibitions against unfair conduct are arguably less likely than others to seek to comply with the law), but to provide for remedies for affected parties after the fact. Approaching the issue this way, it seems that any difficulties faced in identifying whether certain businesses are subject to the protections would be of less concern.
122. Alternatively, the protections could apply to all businesses and consumers, if it was considered that there should be minimum standards of fair commercial conduct that apply across the economy, regardless of the size or sophistication of the affected party. This approach aligns with the proposals set out in respect of unconscionable conduct in the final report of the Australian Consumer Law Review, which recommending extending the protection to all businesses. It also aligns with the approach taken across most of the FTA, which prohibits misleading and deceptive conduct, harassment and coercion in respect of all consumers and businesses.

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?

## Option 2: Extend unfair contract term protections to businesses

123. Option 2 would involve extending the FTA's current protections relating to unfair contract terms in consumer contracts to also protect businesses. This could be in addition to Option 1, or instead of it (see Chapter 6 for a discussion of potential options packages). As set out in Chapter 3, there are a number of reasons that, even if the process around the formation of a contract is fair, parties may nevertheless enter into contracts with unfair terms. This includes where they are unaware of the unfair nature of the contract, and where there are no other viable alternatives.
124. Unfair terms may negatively impact on individual businesses' ability to grow and thrive, and may have broader negative economic impacts. As such, while the threshold at which businesses should be protected against unfair contracts is arguably higher than the threshold for unfair conduct, legitimate arguments can nevertheless be made that parties should be protected from these unfair terms. Ultimately, the aim of extending the UCT provisions to businesses would be to reduce the prevalence of these terms, without unduly undermining the ability of businesses to contract freely between themselves and enter into pro-competitive agreements.

## Features and origin of option

125. This option would prohibit unfair contract terms in business-to-business contracts. As with the FTA's existing protections against UCTs in consumer contracts, this would involve:
- a. limiting the prohibition to standard form contracts, which are contracts in which the terms have not been subject to effective negotiation between the parties;
  - b. the test that a term is unfair if it:
    - i. would cause a significant imbalance in the parties' rights and obligations arising under the contract;
    - ii. is not reasonably necessary in order to protect the legitimate interests of the party who would be advantaged by the term; and
    - iii. would cause detriment (whether financial or otherwise) to a party if it were applied, enforced, or relied on; and
  - c. the same exclusions from the UCT regime, namely terms that:
    - i. define the main subject matter of the contract;
    - ii. set the upfront price payable under the contract; or
    - iii. are required or expressly permitted by any enactment.
126. If Option 2 is selected, we think that the 'grey list' that applies in respect of consumer contract terms should also apply in respect of business contract terms. However, we would welcome input on whether some existing examples should be removed from, or new examples added to, the grey list in respect of UCTs in business contracts.

## Interpretation and coverage of option

127. In Australia, since the UCT protections were extended to businesses in 2016, the ACCC has taken action in a number of situations, including in relation to:
- a. A potato wholesaler which entered into exclusive supply contracts with potato farmers for a specified volume of fresh potatoes each season. These contracts were generally entered into at the time of planting, but the wholesaler did not determine the price it would pay until the potatoes were ready for harvest. The contracts allowed the wholesaler to unilaterally determine or vary the price it pays farmers for potatoes, allowed the declaration of potatoes as "wastage" without proper review, and prevented farmers from selling their own property unless the purchaser entered into an exclusive potato farming agreement with the supplier.<sup>10</sup>
  - b. Contracts for office space that were automatically renewed unless the customer had opted out, allowed the provider to unilaterally increase the contract price, permitted the provider to unilaterally terminate contracts, unreasonably limited the provider's liability, and permitted the provider to keep a customer's security deposit if a customer failed to request its return.<sup>11</sup>
  - c. An ATM provider whose contracts with small businesses included automatic renewal for six years, long minimum notice periods for cancellation, unilateral fee increases, and

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<sup>10</sup> ACCC. (2018). *Action against Mitolo for alleged unfair contract terms*. Retrieved from <https://www.accc.gov.au/media-release/action-against-mitolo-for-alleged-unfair-contract-terms>

<sup>11</sup> ACCC. (2018). *Servcorp's business contract terms declared unfair*. Retrieved from <https://www.accc.gov.au/media-release/servcorp%E2%80%99s-business-contract-terms-declared-unfair>



first right of refusal should businesses seek to change providers at the contract's conclusion.<sup>12</sup>

- d. A waste management company which included contract terms that allowed the company to unilaterally increase its prices, removed any liability for non-performance, allowed the company to charge customers for services not provided, and granted the company exclusive rights to remove waste from a customer's premises.<sup>13</sup>

## Discussion

- 128. The UCT protections as they apply to consumer contracts are out of scope of this document, and will be reviewed as part of the evaluation of the 2010–2015 consumer law reforms. However, at present, we are not aware of evidence to suggest that they are having unintended consequences, such as by significantly impeding pro-competitive or welfare-enhancing transactions.
- 129. Similarly, the Australian cases outlined above are examples of the sorts of contract terms that we would expect a provision relating to UCTs to address in business-to-business contracts in New Zealand. They do not, on the face of it, appear to be over-reaching by targeting terms that are fair or reasonably necessary. As the Australian regime contains tests that are in line with the New Zealand regime, our initial view is that, *if* UCT protections are extended to businesses, they can be carried over largely unaltered, subject to the design options explored below.
- 130. One of the design issues for Option 1 above was whether or not a prohibition against unfair conduct should also extend to the terms of a contract (as in Australia). If this was the case, there would be some cross-over with between Options 1 and 2. However, the key differences are that:
  - a. Option 2 would not extend to the main subject matter or price of a contract; and
  - b. we would expect there to be a higher threshold before Option 1 applied, compared to Option 2.
- 131. At a stylised level, Option 2 would effectively target higher-probability, lower-impact instances of unfair contract terms, while Option 1 would target lower-probability, higher-impact unfair contracts.
- 132. Option 2 could sit alongside an extended Option 1, or instead of it. An extended Option 1 might be preferred instead of Option 2 if it was considered that the general threshold for a term being declared to be unfair under the UCT regime was too low in the business-to-business context. On the other hand, Option 2 is likely to provide greater clarity about what is unfair.

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?

19

If the UCT protections are extended to businesses, should the FTA's 'grey list' for consumer UCTs be carried over 'as is'? Are there any existing examples of unfair terms that should be removed from the list, or any new examples that should be added?

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<sup>12</sup> ACCC. (2018). *Cardtronics to amend unfair ATM contracts*. Retrieved from <https://www.accc.gov.au/media-release/cardtronics-to-amend-unfair-atm-contracts>

<sup>13</sup> ACCC. (2017). *JJ Richards contract terms declared unfair and void*. Retrieved from

<https://www.accc.gov.au/media-release/jj-richards-contract-terms-declared-unfair-and-void>

## Design issue: Who should be protected?

133. If Option 2 was introduced, it could apply to a subset of businesses, or to all businesses. As with Option 1, if it was only extended to some businesses, then the cut-off could be on the basis of:
- employee count (e.g. businesses with fewer than 20 employees);
  - turnover (e.g. only businesses with a turnover of less than \$2 million); or
  - whether there is a material imbalance in the negotiating power between the relevant businesses (this would be determined case-by-case, as opposed to an absolute metric).
134. While arguments can be made about minimum standards of conduct applying across the economy to both small and large businesses, we think that these arguments are harder to justify in respect of the terms of a contract themselves. In particular, while small businesses may be vulnerable to UCTs, we do not see a strong case for protecting larger, better-resourced businesses from unfair terms without there also being an element of unfair conduct (which would be dealt with by Option 1).

20

Should the protections against UCTs apply to consumers only (as at present), consumers and some businesses (and if so, which ones?), or all consumers and businesses?

## Design issue: Which transactions should be protected?

135. Another option is to only apply the protections to contracts below a certain transaction value threshold. As noted in Chapter 3, small businesses have a number of similarities to consumers in that they often lack the resources and bargaining power to adequately review and negotiate contracts for low-value day-to-day transactions. However, unlike consumers, small businesses also engage in high-value commercial transactions that are fundamental to their business.
136. A transaction value threshold would limit the scope of the protections to maintain the onus on businesses to take reasonable steps to protect their interests in relation to high-value contracts. Above this threshold, it would be expected that businesses undertake their own due diligence by, for example, seeking legal advice.
137. This option could be applied as an alternative to, or in addition to, a limit on the size of the business protected.

21

If the protections against UCTs are extended to businesses, should a transaction value threshold be introduced, above which the protections do not apply? If so, what should the threshold be?

## Design issue: Enforcement, penalties and remedies

138. While our presumption for Option 1 is that – if it were to be introduced – contravention of the prohibition would be an offence and subject to FTA’s full range of civil remedies, we have not yet formed such a conclusion for Option 2.
139. The current UCT provisions differ from much of the rest of the Act in respect of civil proceedings. Consumers are not able to have an unfair term declared void unless the Commerce Commission has previously sought a court declaration that the term in question is unfair, and none of the FTA’s other civil remedies apply. Essentially, this means that a business may include an unfair term twice in a contract before there are consequences for doing so. If the UCT regime is extended to businesses, we think that, at a minimum, businesses should be able to seek to have a contract term to be declared unfair and thus void without the Commerce Commission having previously sought a court declaration. However, our

preliminary view is that the FTA's full civil regime (including injunctions, refunds, damages, or having a contract altered or declared void) should apply to business-to-business UCTs.

140. The FTA's treatment of UCTs in consumer contracts also differs from most other provisions in respect of offences. Currently, it is only an offence to include a UCT in a consumer contract if the term has previously been declared to be unfair. A term can only be declared to be unfair by a court on application of the Commerce Commission.
141. If UCT protections are extended to businesses, our initial view is that some sort of penalty should apply if UCTs are included standard-form business-to-business contracts, without the need for that term to have previously been declared to be unfair. We think that applying the current two-stage process to UCTs is likely to lessen the incentive for businesses to remove UCTs from their contracts, and generally increase the cost of enforcement.
142. Given the wide range of contracts that Option 2 would apply to, and the potential for uncertainty about what constitutes a UCT, if the inclusion of UCTs (without needing to have previously been declared unfair) is made an offence, it might be appropriate to provide a defence that, for example, a person believed, on reasonable grounds, that the term was not an unfair contract term. Alternatively, it could only be an offence if the person knew a term was a UCT, or was reckless about whether a term was a UCT. Another option would be for inclusion of a UCT to be subject to a pecuniary penalty, rather than an offence. We welcome feedback on how any offence or penalty should be designed.

22

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

## Other options

143. While this document has focussed on the two main options outlined above, we are also interested in other potential options to address unfair conduct and contracts.

23

Are there other options to address unfair conduct or unfair contracts that we should consider? If so, what are these?

## 6 Options packages

144. In practice, there are a number of ways to combine the options outlined in Chapter 5. This chapter outlines four potential packages. These packages are predicated on establishing that there is a case for government intervention. The packages are high-level only and do not address, for example, which version of Option 1 would be selected, or the design issues under each option.
145. Table 2 outlines possible options packages, and how they would compare to the status quo. Table 3 briefly outlines each package’s key advantages and disadvantages. Further analysis of the packages of options is presented in Annex 2.
146. To recap:
- Option 1** seeks to address **unfair conduct** outside of the terms of a contract itself. This may include the use of pressure tactics, deceptive conduct, or the way a contract is enforced.
  - Option 2** seeks to address **unfair contracts**. This may include contract terms which shift risk from one party to another, make it difficult for a party to terminate a contract, or are otherwise very one-sided.

Table 2: Possible options packages

|                            | Status quo protections  | Package 1  | Package 2   | Package 3                                   | Package 4   |
|----------------------------|---|--|---|---|---|
| Protections for consumers  | FTA prohibits misleading and deceptive conduct, harassment and coercion, UCTs<br>Commerce Act, CGA and CCCFA, doctrine of unconscionability | Option 1: Prohibit either unconscionable conduct (1A), oppressive conduct (1B), or unfair practices (1C) |   |   |   |
| Protections for businesses | FTA prohibits misleading and deceptive conduct, harassment and coercion<br>Commerce Act   | N/A  | AND   | AND   | AND   |
|                            |   |  | Option 1:<br>Prohibit either unconscionable conduct (1A), oppressive conduct (1B), or unfair practices (1C) | Option 2:<br>Prohibit unfair contract terms | Option 1: Prohibit either unconscionable conduct (1A), oppressive conduct (1B), or unfair practices (1C)<br><br>AND<br>Option 2: Prohibit unfair contract terms |

Table 3: High level advantages and disadvantages of each package

|               | Package 1  | Package 2   | Package 3  | Package 4   |
|---------------|--|---|--|---|
| Advantages    | Protects consumers against unfair conduct, while preserving maximum flexibility around business-to-business conduct and contracts. | Protects businesses and consumers against the most egregious conduct, without significantly impacting on the transactions firms can enter into. | Protects consumers against unfair conduct, and businesses against 'fine print', while minimising any risk of deterring pro-competitive bargaining between firms. | Provides greatest protections against unfair practices, while still seeking to facilitate pro-competitive, welfare-enhancing practices. |
| Disadvantages | Does not offer any additional protections for businesses.  | Does not offer any additional protections for businesses against unfair contract terms.   | Some risk of deterring efficient contracts between firms.<br>Does not address egregious business-to-business conduct.  | Greatest risk of deterring pro-competitive, welfare enhancing practices by businesses.  |

24 Do you have a preferred options package? If so, which is your preferred package, and why?

# Annex 1 – Approaches to a prohibition against unfair conduct

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147. This Annex provides further detail on how the three approaches to prohibiting unfair conduct outlined in Chapter 5 could work in practice, and some of their advantages and disadvantages.

## Option 1A: Prohibit unconscionable conduct

### Features and origin of option

148. This option would involve a statutory prohibition against unconscionable conduct. The intention would be to broaden the protections beyond those provided by the doctrine of unconscionability which, as set out in Chapter 2, are limited. This statutory prohibition could be modelled, in part, on the provision in Australia’s Competition and Consumer Act 2010 (CCA), which prohibits unconscionable conduct in relation to the supply (or possible supply) and acquisition (or possible acquisition) of goods or services that is, in all the circumstances, unconscionable.
149. In Australia, the protections are available to consumers and businesses, excluding publicly-listed companies (although a recent review of the law recommended that this exemption also be removed).
150. ‘Unconscionable conduct’ is not defined in the CCA, however there are a number of factors a court is required to consider when assessing whether conduct is unconscionable, including, but not limited to:
- a. the relative bargaining strength of the parties;
  - b. whether any conditions were imposed on the weaker party that were not reasonably necessary to protect the legitimate interests of the stronger party;
  - c. whether the weaker party could understand the documentation used;
  - d. the use of undue influence, pressure or unfair tactics by the stronger party;
  - e. the extent to which the stronger party’s conduct with the weaker party is consistent with its conduct in similar transactions with other parties;
  - f. the willingness of the stronger party to negotiate; and
  - g. the extent to which the parties acted in good faith.
151. As with Australia, the prohibition could explicitly state that it may apply to:
- a. a system of conduct or pattern of behaviour, whether or not a particular individual is identified as having been disadvantaged by the conduct or behaviour; and
  - b. the manner in which and the extent to which the contract is carried out.
152. The Australian prohibition also states that the terms of a contract may be unconscionable. One of the design issues explored in Chapter 5 is whether, if introduced in New Zealand, such a prohibition should also extend to the terms of a contract.

### Interpretation and coverage of option

153. The Australian unconscionable conduct provisions seek to prevent trading practices that are so harsh or oppressive that they go against good conscience, and are clearly unfair and

unreasonable. For some time, the courts commonly described statutory unconscionability as a concept which required ‘a high level of moral obloquy’. However, more recently, courts have distanced themselves from this formulation, and the high standard of moral wrongdoing it appears to envisage.

154. In particular, the decision in *ACCC v Lux Distributors Pty Ltd* (see Box 4 below) led to greater clarity on this point. It essentially 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.

#### Box 4: The *ACCC v Lux* case<sup>14</sup>

This case involved a challenge by the Australian Competition and Consumer Commission (ACCC) to the sales strategy utilised by Lux for the sale of vacuum cleaners. The strategy involved a representative from Lux calling homeowners and offering a free maintenance check of their existing vacuum cleaner. If the offer was taken up, a Lux representative, who was not a trained maintenance technician but a salesperson, would visit the householder. During the visit to the householder’s home, the sales representative would perform a very perfunctory check of the existing vacuum cleaner and then attempt to sell to the householder a new Lux vacuum cleaner. The Court held that this was unconscionable.

This finding was primarily based on the grounds that the sales strategy was premised on a ‘deceptive ruse’, which had the effect of taking advantage of elderly consumers living alone. The court considered that the sales strategy manipulated the emotions and preferences of the consumers in order to create a subtle but real sense of obligation to buy. The vulnerability of the consumers arose from the difficulty in putting an end to the sales process once the salesperson was in their home, especially after that person has spent time and undertaken persuasive effort in a sales pitch.

The court noted that:

*The task of the Court is the evaluation of the facts by reference to a normative standard of conscience. That normative standard is permeated with accepted and acceptable community values. In some contexts, such values are contestable. Here, however, they can be seen to be honesty and fairness in the dealing with consumers.*

155. There is significant overlap between what is unconscionable under statute and in equity in Australia. However, the statutory prohibition – particularly following the Lux case – is broader than the doctrine as it originated in equity. For example, unlike in equity, under the statutory prohibition, conduct can be found to be unconscionable even if there is no conscious targeting of a vulnerable party.<sup>15</sup>
156. In addition to the Lux case, some recent scenarios where the prohibition has been successfully invoked in Australia in the business-to-consumer context include:
- a. The sale of diploma courses through door-to-door sales tactics which deliberately targeted vulnerable and disadvantaged communities, who in many cases were not

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<sup>14</sup> *ACCC v Lux Distributors Pty Ltd* [2013] FCAFC 90 (2015) as summarised in Paterson, J. M. (2015). Unconscionable bargains in equity and under statute. *Journal of Equity* (2015) 9 J Eq 188.

<sup>15</sup> Paterson, J. M. (2015).

aware that they were signing up to anything, and were misled into believing the course was free.<sup>16</sup>

- b. The promotion and supply of medical services and medications to men suffering from sexual dysfunction. The companies involved engaged in conduct that took advantage of vulnerable consumers by exploiting the sensitive and personal nature of their condition. In particular, this conduct involved “frightening men by telling them of the dire adverse consequences of not agreeing to treatment”.<sup>17</sup>
- c. The handling of complaints about quality issues with cars. The company involved told customers that their concerns were a result of their driving style and refused to provide refunds or replacements, despite knowing that there were quality issues with the vehicles in question.<sup>18</sup>

157. In the business-to-business context, recent Australian examples include:

- a. Conduct by a supermarket in relation to its suppliers, including failure to pay agreed prices to suppliers, making persistent demands for additional payments from suppliers, imposing penalties that were not previously negotiated, and threatening to remove products from shelves.<sup>19</sup>
- b. An online business directory misled businesses into entering contracts, and refused to cancel contracts which customers did not want and did not intend to enter into. It used high pressure sales tactics and harassed staff by chasing debts that didn’t exist – one customer was called 993 times over a nine month period.<sup>20</sup>
- c. A cleaning franchisor made false or misleading representations concerning the income that the two prospective franchisees would earn, and failed to pay the franchisees for the work they had completed, while continuing to demand payment for the initial franchising fee.<sup>21</sup>

## Discussion

158. The Australian provisions have recently been reviewed from both a competition policy and consumer policy perspective. In the context of business-to-business conduct, the Australian Competition Policy Review considered that the current provisions were working as intended.<sup>22</sup> The Australian Consumer Law Review noted that there is some uncertainty as to how the provisions apply, and whether particular conduct is unconscionable according to the principles

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<sup>16</sup> ACCC. (2017). *Court finds Unique was misleading and unconscionable*. Retrieved from

<https://www.accc.gov.au/media-release/court-finds-unique-was-misleading-and-unconscionable>

<sup>17</sup> ACCC. (2016). *Full Court upholds unconscionable conduct finding against AMI*. Retrieved from

<https://www.accc.gov.au/media-release/full-court-upholds-unconscionable-conduct-finding-against-ami>

<sup>18</sup> ACCC. (2018). *Court orders Ford to pay \$10 million penalty for unconscionable conduct*. Retrieved from

<https://www.accc.gov.au/media-release/court-orders-ford-to-pay-10-million-penalty-for-unconscionable-conduct>

<sup>19</sup> ACCC. (2014). *Court finds Coles engaged in unconscionable conduct and orders Coles pay \$10 million penalties*

Retrieved from <https://www.accc.gov.au/media-release/court-finds-coles-engaged-in-unconscionable-conduct-and-orders-coles-pay-10-million-penalties>

<sup>20</sup> ACCC. (2018). *ABG Pages admits misleading and unconscionable conduct*. Retrieved from

<https://www.accc.gov.au/media-release/abg-pages-admits-misleading-and-unconscionable-conduct>

<sup>21</sup> ACCC. (2014). *Federal Court declares cleaning franchisor engaged in unconscionable conduct*. Retrieved from

<https://www.accc.gov.au/media-release/federal-court-declares-cleaning-franchisor-engaged-in-unconscionable-conduct>

<sup>22</sup> Australian Government. (2015). *Competition Policy Review, Final Report*. Retrieved from

[http://competitionpolicyreview.gov.au/files/2015/03/Part4\\_final-report\\_online.pdf](http://competitionpolicyreview.gov.au/files/2015/03/Part4_final-report_online.pdf)



used by the courts. Some stakeholders suggested that this has affected the consistent application of the law across different courts and reduced the provisions' deterrent effects and usefulness for consumers. However, overall, the Review considered that the law is continuing to develop in the direction intended by lawmakers.<sup>23</sup>

159. Despite the provisions initially generally being interpreted in a way that imposed a very high threshold before they would be successfully applied, it has now been argued that the prohibitions have significant potential to fulfil their intended 'safety net' function and directly address many predatory business models.<sup>24</sup> As such, our overall impression is that the Australian prohibition appears to be relatively effective in addressing conduct which is particularly unfair and egregious, which can be viewed as the aim of the prohibition.
160. However, it is still possible that introducing a statutory prohibition against unconscionable conduct in New Zealand could lead to a (potentially sustained) period of uncertainty in New Zealand about the coverage and boundaries of a prohibition. Part of the uncertainty in Australia about the boundaries of the prohibition may be averted in New Zealand if New Zealand courts were to draw on the Australian case law. Uncertainty could also be reduced if – unlike Australia – a definition of unconscionable conduct were included in legislation (although this could reduce the ability for the law to flexibly develop over time).
161. It could also be argued that any firm acting fairly and responsibly should have little cause for concern that its conduct would fall foul of a prohibition against unconscionable conduct, and that any concerns about uncertainty should not be overstated given the relatively high threshold for the prohibition under any likely interpretation.
162. We would welcome feedback on whether reference to the 'norms of society' would provide businesses with a desirable level of predictability about the application of the prohibition, and whether it is an appropriate reference point for governing businesses-to-business conduct.

## Option 1B: Prohibit oppressive conduct

### Features and origin of option

163. This option would involve introducing a prohibition against conduct that is 'oppressive'. This could be based, in part, on the treatment of oppression in the CCCFA, as outlined in Chapter 2. The CCCFA defines "oppressive" as "harsh, unjustly burdensome, unconscionable, or in breach of reasonable standards of commercial practice". This option could involve adopting this definition of oppressive, and – again drawing on the CCCFA – prohibit:
  - a. inducing (or attempting to induce) another party to enter into a contract through oppressive means; or
  - b. exercising a right conferred by a contract in an oppressive manner.
164. As with Option 1A, the prohibition could also state that it applies to a system of conduct or pattern of behaviour, whether or not a particular individual is identified as having been disadvantaged by the conduct or behaviour.
165. The CCCFA also states that a court may reopen a credit contract if the contract itself is oppressive. Whether or not this option would extend to the terms of the contract in this manner is considered in Chapter 5 as a design issue.

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<sup>23</sup> Australian Government. (2017). *Australian Consumer Law Review: Final Report*. Retrieved from [https://cdn.tspace.gov.au/uploads/sites/86/2017/04/ACL\\_Review\\_Final\\_Report.pdf](https://cdn.tspace.gov.au/uploads/sites/86/2017/04/ACL_Review_Final_Report.pdf)

<sup>24</sup> Paterson, J. M., & Brody, G. (2015). "Safety Net" Consumer Protection: Using Prohibitions on Unfair and Unconscionable Conduct to Respond to Predatory Business Models. *Journal of Consumer Policy* (2015)38, 331-355.

## Interpretation and coverage of option

166. In practice, the courts have decided that none of the elements of the definition of oppression are particularly meaningful in the abstract, and that the “reasonable standards of commercial practice” is the touchstone for the “harsh” and “unjustly burdensome” elements of the definition. The courts have stated that in most cases, evidence will be required to establish what the reasonable standards of commercial practice are.<sup>25</sup>
167. The courts have stated that the scope of oppression under the CCCFA is broader than the equitable doctrine of unconscionability (as distinct from a possible statutory prohibition). For something to be unconscionable, the stronger party must have knowledge of the weaker party’s disadvantage (or reasonably be expected to have such knowledge). However, something may be oppressive even if the party is following a common industry practice, if that practice is a breach of reasonable standards.<sup>26</sup> On the other hand, the courts have also held that the standard of oppression is higher than simple unfairness, or whether a particular contract is advantageous or disadvantageous.<sup>27</sup>
168. While the CCCFA’s provisions relating to oppression are limited to credit contracts and related transactions, examples of where contracts have been found to be oppressive include:
- a. A woman was induced to enter into an arrangement to prevent her husband being prosecuted for fraud. Under the arrangement, assets were transferred to the defendant and a mortgage was taken over the couple’s home. This was held to be oppressive.<sup>28</sup>
  - b. A couple provided security by way of mortgage over their motel to assist their daughter to acquire a farm. The finance company told the couple that this was an interim measure and once the farm was acquired it would be substituted for the security over the motel. The mortgage fell into arrears. The finance company refused to substitute the security and demanded that the couple remedy the default. This conduct was held to amount to oppression because it was “unjustly burdensome”, and the finance company had broken faith with the couple.<sup>29</sup>
  - c. An elderly woman got into financial difficulty and sold her property to a property company. On the same day, she entered into an agreement to buy her property back from them over a 25 year period. The terms of the buy-back agreement provided for termination if the woman fell into arrears, and allowed the company to recover damages for any breach of contract. The woman defaulted on her instalments early on, and the company took steps to terminate the buy-back agreement. The court found that termination of the agreement was oppressive on the basis that the company likely took advantage of the woman’s age, lack of commercial experience and poor health.<sup>30</sup>
  - d. A lender took advantage of a borrower’s gambling problem and other personal circumstances. She subjected the borrower to unfair pressure by representing that there would be severe consequences if the borrower did not meet the interest payments on a loan. The borrower could not meet the interest payments, resulting in the lender

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<sup>25</sup>Greenback New Zealand Limited v Haas [2000] 3NZLR 341 (CA); Greenback, and Raptorial Holdings Limited (in rec) v Elders Pastoral Holdings Limited [2001] 1 NZLR 178 (CA).

<sup>26</sup>Bartle v GE Custodians Ltd [2010] NZCA 174.

<sup>27</sup>Italia Holdings (Properties) Ltd v Lonsdale Holdings (Auckland) Ltd [1984] 2 NZLR 1.

<sup>28</sup>Gibson v Dealer Discounting (Canterbury) Ltd (1984) 1 NZBLC 102,051.

<sup>29</sup>Manion v Marac Finance Ltd [1986] 2 NZLR 586 (HC).

<sup>30</sup>Robson v Shortt HC Auckland, CIV-2007-404-223.

lending the borrower more and more funds. The court found these contracts to be oppressive and entered into by oppressive means.<sup>31</sup>

169. The examples given above all relate to business-to-consumer transactions. There is nothing preventing business-to-business conduct from being found to be oppressive under the CCCFA (or if an extended prohibition against oppressive conduct were introduced as per this option). However, in practice, the courts have tended to be more reluctant to intervene in business-to-business transactions under the CCCFA and predecessor legislation.<sup>32</sup>

## Discussion

170. A prohibition against oppressive conduct appears to have some advantages, compared to an Australian-style prohibition against unconscionable conduct. This is primarily because – on the face of it – the “reasonable standard of commercial practice” test seems to be a more appropriate way of assessing whether or not conduct is unfair than reference to the norms of society (as under a prohibition against unconscionable conduct). There is also an established body of case law (albeit restricted to credit contracts and related transactions) about how the test should be applied, which appears to strike a suitable balance between prohibiting conduct that is grossly unfair, while not unnecessarily intervening in everyday, reasonable, commercial conduct.
171. Nevertheless, there would still likely be some uncertainty about what constitutes a reasonable standard of commercial practice. Another limitation of this option could be if the courts were to carry over a requirement that evidence be provided about what reasonable standards of commercial practice are. While this might not be a significant barrier to public enforcement of the prohibition, we would welcome feedback on whether this would pose a barrier to businesses or consumers protecting their own interests.

## Option 1C: Prohibit unfair practices

### Features and origin of option

172. Another variant on prohibiting unfair conduct could be a general prohibition against unfair practices. This could be modelled on the European Union’s (EU) general prohibition against unfair commercial practices. These provide that a commercial practice is unfair if:
- a. it is contrary to the requirements of professional diligence; and
  - b. it materially distorts, or is likely to materially distort, the economic behaviour of the average consumer.
173. As adapted for New Zealand, and to include business-to-business conduct, the prohibition could, for example, prohibit conduct which:
- a. is contrary to the requirements of professional diligence; and
  - b. materially distorts, or is likely to materially distort, the economic behaviour of other parties.

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<sup>31</sup> Xiao v Sun [2018] NZHC 536.

<sup>32</sup> Gault on Commercial Law. FC7 Reopening for oppression.

## Interpretation and coverage of option

174. As outlined in EU<sup>33</sup> and United Kingdom (UK)<sup>34</sup> guidance, the first test – that conduct is contrary to the requirements of professional diligence – focusses on the standard of the trader’s practices. Professional diligence is defined in the EU prohibition as the standard of special skill and care which a trader may reasonably be expected to exercise towards consumers which is commensurate with either:
- a. honest market practice in the trader’s field of activity; or
  - b. the general principle of good faith in the trader’s field of activity.
175. According to the guidance, what is professionally diligent will vary according to the context. The guidance notes that even if ‘poor’ current practice is widespread in an industry, it will not amount to an acceptable objective standard of professional diligence because it is not what a reasonable person would expect from a trader who is acting in accordance with honest market practice or good faith.
176. The EU prohibition does not define honest market practice or good faith, although good faith can generally be interpreted as requiring parties to co-operate, act honestly, and be reasonable.<sup>35</sup> There is some cross-over between the concept of good faith and existing New Zealand legislation and common law. For example, the FTA’s prohibition against misleading and deceptive conduct has significant overlap with a requirement for parties to act honestly. Similarly, in some cases, the courts have been willing to imply a standard of reasonableness into commercial contracts where a straightforward interpretation of the contractual clauses would deliver an unreasonable result.
177. Nevertheless, there is the potential for a requirement of good faith to go beyond existing law. For example, if a party to a business-to-business transaction deliberately withholds information to the detriment of the other party, this would not necessarily be a breach of the FTA at present as non-disclosure is not necessarily misleading in and of itself. However, depending on the courts’ interpretation of the provision, it could be deemed to be a breach of good faith.
178. While the EU provisions related to unfair commercial practices are framed as a prohibition, through the wording of the first test, they effectively become a positive obligation on businesses to act with professional diligence. While the implications of this requirement alone are potentially broad, they are tempered by the second test, that conduct is only prohibited if it materially distorts, or is likely to materially distort, the economic behaviour of the average consumer.
179. According to the EU and UK guidance, this second test is concerned with the actual or likely effect the practice has on the average consumer’s behaviour. Material distortion is defined as appreciably impairing the average consumer’s ability to make an informed decision and thereby causing them to take a transactional decision that they would not have taken otherwise. A commercial practice may be considered unfair not only if it is likely to cause the

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<sup>33</sup> European Commission. (2016). *Commission Staff Working Document: Guidance on the implementation/application of directive 2005/29/EC on Unfair Commercial Practices*. Retrieved from: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52016SC0163>

<sup>34</sup> Office of Fair Trading and Department for Business, Enterprise and Regulatory Reform. (2008). *Consumer Protection from Unfair Trading*. Retrieved from [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/284442/oft1008.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/284442/oft1008.pdf)

<sup>35</sup> Mason, A. (2000). Contract, good faith and equitable standards in fair dealing. *Law Quarterly Review* 116(2000), 66-94.

average consumer to purchase or not to purchase a product, but also if it is likely to cause the consumer to, for example, enter a shop, or decide not to switch to another service provider or product.

180. Where a practice is directed to a particular group of consumers, the ‘average consumer’ refers to the average member of that group. Where a practice is likely to materially distort the economic behaviour of only a certain vulnerable group, the ‘average consumer’ refers to the average member of that group. This means that different practices, and even the same practices in different circumstances, may be found to have different effects depending on the type of consumer they reach or affect. The guidance notes that provisions concerning vulnerable consumers are there to ensure that traders do not unfairly exploit vulnerable people, where their practices might not change non-vulnerable consumers’ decisions.
181. We understand that the EU’s general prohibition against unfair practices is not frequently used, and regulators have tended to rely on more specific prohibitions.<sup>36</sup> We do not see this as a problem in itself; as the UK and EU guidance notes, the prohibition is intended to act as a safety net to catch conduct which does not fall into one of the more specific prohibitions.

## Discussion

182. This option, with its two-part test, is arguably the most complex and uncertain option out of the options to address unfair conduct. We see some benefit in only prohibiting practices which are likely to distort the behaviour of other parties. However, we also see some risk in, effectively, introducing a broad requirement of good faith across the economy.
183. As part of the 2010–2015 consumer law reforms, the then Ministry of Consumer Affairs (MCA)<sup>37</sup> consulted on introducing a purpose clause to the FTA that referenced good faith.<sup>38</sup> Ultimately, no such reference to good faith was added to the Act. At the time, MCA noted<sup>39</sup> that there was significant stakeholder concern about the uncertainty that referencing good faith could lead to. While this could be addressed in part through a legislative definition of good faith, there would nevertheless likely be a lack of clarity for some time about the scope of the provision.
184. Even if the meaning of good faith was clearly understood, we think there is the potential for the wide-reaching nature of this change to have unintended consequences. While it is difficult to argue that the concepts of honesty, co-operation and reasonableness are not laudable goals, we are unsure if a requirement of good faith is desirable in all instances. For example, if a duty of good faith limited businesses’ ability to negotiate strategically with their suppliers, then it could potentially lead to higher up-front contract prices, and in turn, higher prices for consumers.
185. We would welcome feedback on the advantages and disadvantages of Option 1C, including whether it is appropriate to require businesses to act in good faith in all instances.

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<sup>36</sup> Paterson, J. M., & Brody, G. (2015).

<sup>37</sup> Now a part of the Ministry of Business, Innovation and Employment.

<sup>38</sup> Ministry of Consumer Affairs. (2010). *Consumer Law Reform: A Discussion paper*.

<sup>39</sup> Ministry of Consumer Affairs. (2010). *Consumer Law Reform Additional Paper – October 2010: Referencing Goods Faith in a Fair Trading Act Purpose Clause*.

# Annex 2 – Impact Analysis

186. This Annex presents a preliminary assessment of the impact of each options package against the criteria set out in Chapter 4. However, the exact impacts would depend on how the options packages are ultimately designed. For each criterion, we have indicated how the package compares to the status quo, as follows:

- ✓✓ = much better than status quo      ✓ = better than status quo      0 = similar to status quo
- ✗ = worse than status quo              ✗ ✗ = much worse than status quo

**Package 1: Protect consumers from unfair conduct**

|  |   |  |
|--|---|--|
| <p><b>Criterion 1:</b> Consumers are protected from high levels of detriment.</p>  | ✓ | <p>This package would improve protections for consumers against unfair conduct. As noted earlier, the additional protections it would provide over and above the status quo would likely be modest, and would generally be limited to only the most egregious conduct.</p> <p>Depending on how the package is designed, it could also offer additional protections to consumers in terms of unfair contracts. However, any additional protections from unfair contracts would similarly be modest, given that consumers are already protected from UCTs in standard form contracts. They would likely be limited to rare cases where the upfront price or subject matter of a contract is grossly unfair.</p>  |
| <p><b>Criterion 2:</b> Businesses are protected from practices which unduly impact on their ability to confidently participate in markets.</p>                               | 0 | <p>No impact.</p>  |
| <p><b>Criterion 3:</b> Businesses are not unnecessarily prevented from competing effectively, negotiating firmly, and entering into contracts that reflect their wishes.</p> | 0 | <p>Given the relatively high threshold at which the protections would apply, we would not expect this package to significantly inhibit businesses’ ability to engage in pro-competitive, welfare-enhancing transactions. Nevertheless, there is chance that this option could inhibit some efficient transactions. We think that this risk is low, and based on our understanding of Australia’s experience with unconscionable conduct, there is little reason to believe that it would have any significant impact on the transactions that businesses are able to engage in. Any risk could also be reduced through statutory and non-statutory guidance, and by the Commerce Commission and the courts applying appropriate discretion in considering cases of potentially unfair conduct.</p> |
| <p><b>Criterion 4:</b> The law is predictable for businesses and compliance costs are reasonable.</p>  | ✗ | <p>This package is likely to reduce certainty for businesses as to their obligations under the law. However, we think that most businesses will be able to be reassured that, if they are acting fairly and reasonably, then they are unlikely to be in breach of any prohibition. Any remaining uncertainty can be mitigated in part through reference to existing case law, and through statutory and non-statutory guidance. Predictability would be expected to increase over time, as case law develops.</p> <p>We would not expect significant compliance costs from this package, as the vast majority of conduct should be unaffected. There could, however, be costs for firms that seek legal advice as to the legality of their business practices.</p>                                 |
| <p><b>Criterion 5:</b> Consumers and businesses have access to effective redress.</p>  | ✓ | <p>Because breaching the prohibition would be an offence, and subject to the FTA’s existing range of civil remedies, it would improve consumers’ access to redress when they are treated in an unfair manner.</p>  |

## Package 2: Protect consumers and businesses from unfair conduct

|   |   |  |
|---|---|--|
| <b>Criterion 1:</b> Consumers are protected from high levels of detriment.  | ✓ | Same as Package 1  |
| <b>Criterion 2:</b> Businesses are protected from practices which unduly impact on their ability to confidently participate in markets.                               | ✓ | Improves protections for businesses against unfair conduct. As with consumers, we expect that the protections for businesses over and above the status quo would be modest, and limited to the most egregious conduct. Depending on how this package is designed, it could also improve protections for businesses against unfair contracts. |
| <b>Criterion 3:</b> Businesses are not unnecessarily prevented from competing effectively, negotiating firmly, and entering into contracts that reflect their wishes. | 0 | Same as Package 1  |
| <b>Criterion 4:</b> The law is predictable for businesses and compliance costs are reasonable.  | ✗ | Same as Package 1  |
| <b>Criterion 5:</b> Consumers and businesses have access to effective redress.  | ✓ | Same as Package 1, but also improves businesses' access to redress.  |

## Package 3: Protect consumers from unfair conduct and businesses from unfair contract terms

|   |    |   |
|---|----|---|
| <b>Criterion 1:</b> Consumers are protected from high levels of detriment.  | ✓  | Same as Package 1   |
| <b>Criterion 2:</b> Businesses are protected from practices which unduly impact on their ability to confidently participate in markets.                               | ✓✓ | This package would significantly expand the protections available to businesses against unfair contract terms.  |
| <b>Criterion 3:</b> Businesses are not unnecessarily prevented from competing effectively, negotiating firmly, and entering into contracts that reflect their wishes. | ✗  | This package may have some impact on the practices that businesses are able to engage in, as it would extend to the substance of contracts. However, given the tests that need to be met before a term is deemed to be unfair under the UCT regime (in particular, that the term is not reasonably necessary), we do not expect this package to significantly deter pro-competitive or welfare-enhancing transactions. We are not aware of evidence from Australia to suggest that their extension of UCTs to small businesses has led to efficient transactions being deterred. The risk would also be reduced by the Commerce Commission and the courts using appropriate discretion. |
| <b>Criterion 4:</b> The law is predictable for businesses and compliance costs are reasonable.  | ✗  | In addition to the impacts outlined in Package 1, this option will likely create some uncertainty for businesses, as there will be some uncertainty as to what constitutes a UCT. However, many businesses will have experience with the consumer UCT regime, and the inclusion of a grey-list should reduce uncertainty. Predictability could also be supported if the Commerce Commission were to review standard form business-to-business contract terms in advance of any legislative changes coming into force, and advise businesses of their intended approach to enforcing the provisions.   |

|  |   |   |
|--|---|---|
|  |   | Based on the experience with consumer UCTs in New Zealand, and with business UCTs in Australia, many standard form business-to-business contracts are likely to contain UCTs. As such, many businesses are likely to face one-off costs of reviewing and amending their contracts to eliminate any UCTs. Based on Australian Treasury estimates <sup>40</sup> , scaled to the number of businesses in New Zealand, we estimate that extending UCT protections to small businesses could involve one-off compliance costs for businesses of around NZ\$13 million. |
| <b>Criterion 5:</b> Consumers and businesses have access to effective redress. | ✓ | Same as Package 1. In addition, at a minimum, businesses would be able to seek a declaration that a contract term is unfair and thus void (without needing to first seek a declaration from a court that a term is unfair), and we propose that some penalties for including unfair terms would apply. As such, it would have a positive impact on businesses' access to effective redress. The extent of this positive impact will depend on the design of any penalties and remedies.   |

#### Package 4: Protect consumers from unfair conduct and businesses from unfair contract terms and unfair conduct

|   |    |                                |
|---|----|--------------------------------|
| <b>Criterion 1:</b> Consumers are protected from high levels of detriment and practices which unduly impact on their ability to confidently participate in markets.   | ✓  | Same as Package 1              |
| <b>Criterion 2:</b> Businesses are protected from practices which unduly impact on their ability to confidently participate in markets.                               | ✓✓ | Combination of Package 2 and 3 |
| <b>Criterion 3:</b> Businesses are not unnecessarily prevented from competing effectively, negotiating firmly, and entering into contracts that reflect their wishes. | ✗  | Combination of Package 2 and 3 |
| <b>Criterion 4:</b> The law is predictable for businesses and compliance costs are reasonable.  | ✗  | Combination of Package 2 and 3 |
| <b>Criterion 5:</b> Consumers and businesses have access to effective redress when things go wrong.   | ✓  | Combination of Package 2 and 3 |

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Do you agree with our assessment of the impact of each package against the criteria? If not, why not? Do you have any further evidence on the costs and benefits of this option?

<sup>40</sup> Consumer Affairs Australia and New Zealand. (2015). *Decision Regulation Impact Statement: Extending Unfair Contract Term Protections to Small Businesses*. Retrieved from [https://static.treasury.gov.au/uploads/sites/1/2017/06/C2015-021\\_Extending\\_UCTs\\_RIS.pdf](https://static.treasury.gov.au/uploads/sites/1/2017/06/C2015-021_Extending_UCTs_RIS.pdf)



# Recap of questions

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## Potential issues

### Issue 1: Unfair business-to-business contracts

|   |  |
|---|--|
| 1 | What types of unfair business-to-business contract terms are you aware of, if any? How common are these? |
| 2 | What impact, if any, do these unfair contract terms have?  |
| 3 | Is government intervention to address unfair business-to-business contract terms justified? Why/why not? |

### Issue 2: Unfair business-to-business conduct

|   |   |
|---|---|
| 4 | What types of unfair business-to-business conduct are you aware of, if any? How common is this type of conduct?                           |
| 5 | What impact, if any, does this conduct have?  |
| 6 | Is government intervention to address unfair business-to-business conduct beyond existing legislative protections justified? Why/why not? |

### Issue 3: Unfair business-to-consumer conduct

|   |   |
|---|---|
| 7 | What types of unfair business-to-consumer conduct are you aware of, if any? How common is this type of conduct?                           |
| 8 | What impact, if any, does this conduct have?  |
| 9 | Is government intervention to address unfair business-to-consumer conduct beyond existing legislative protections justified? Why/why not? |

## Objectives

|    |  |
|----|--|
| 10 | Do you agree with our proposed high-level objectives and criteria for assessing any potential changes to the regulatory framework governing unfair practices? If not, why not? |
|----|--|

## Options for reform

### Option 1: Introduce a high-level protection against unfair conduct

|    |  |
|----|--|
| 11 | Should a high-level prohibition against unfair conduct be introduced? Why/why not?   |
| 12 | What are the advantages and disadvantages of Options 1A, 1B, and 1C (Refer to Annex 1 for more information)? Which option, if any, do you support?                           |
| 13 | If unconscionable conduct were prohibited (Option 1A), should a definition of unconscionability be included in statute, and if so, how should it be defined?                 |
| 14 | Is it appropriate to require businesses to act in good faith (as per Option 1C – see Annex 1)? Are there situations in which doing so could have negative economic outcomes? |
| 15 | Are there any other variations on Option 1 that we should consider?  |
| 16 | If a version of Option 1 is selected, should it also extend to matters relating to the contract itself?  |
| 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?               |

### Option 2: Extend unfair contract terms protections to businesses

|    |   |
|----|---|
| 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?   |
| 19 | If the UCT protections are extended to businesses, should the FTA's 'grey list' for consumer UCTs be carried over 'as is'? Are there any existing examples of unfair terms that should be removed from the list, or any new examples that should be added?  |
| 20 | Should the protections against UCTs apply to consumers only (as at present), consumers and some businesses (and if so, which ones?), or all consumers and businesses?   |
| 21 | If the protections against UCTs are extended to businesses, should a transaction value threshold be introduced, above which the protections do not apply? If so, what should the threshold be?  |
| 22 | Should there be penalties for breaching any new provisions regarding UCTs, and should there be civil remedies available, even if unfair terms have not previously been declared by a court to be unfair? How should any penalties and remedies be designed? |

### Other options

|    |   |
|----|---|
| 23 | Are there other options to address unfair conduct or unfair contracts that we should consider? If so, what are these? |
|----|---|

### Options packages

|    |   |
|----|---|
| 24 | Do you have a preferred options package? If so, which is your preferred package, and why? |
|----|---|

### Impact analysis

|    |  |
|----|--|
| 25 | Do you agree with our assessment of the impact of each package against the criteria? If not, why not? Do you have any further evidence on the costs and benefits of this option? |
|----|--|