

# Submission template: Protecting businesses and consumers from unfair commercial practices

## Your details

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## Responses to discussion paper questions

Your submission may respond to any or all of the questions from the discussion paper. There is an additional box at the end for any other comments you may wish to make.

*Text boxes will expand as you complete them.*

## 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?

*The Advertising and Illustrative Photographers Association Inc is a recognised professional body for commercial photography in New Zealand. It is a non-profit making incorporated society which was founded in 1978.*

*The AIPA aims to promote excellence in photography and the on-going development of professional industry standards in New Zealand, both by photographers and users of photography.*

*Amongst its objectives are:*

- 1. To promote higher standards in commercial photography.*
- 2. To advance and sponsor advertising and illustrative photography as a means of communication and expression.*
- 3. To actively assist those people working in these areas whose ideals are sympathetic to those of the Association through publications, workshops, exhibitions and other means.*
- 4. To promote and cultivate public interest in photography both as an art form and a communication medium.*

*Membership is open to photographers and photographic assistants whose occupation is mainly advertising and illustrative photography. Such photography includes photography for advertising, editorial (such as magazines and books), travel, press, public relations, fashion, documentary, corporate, industrial and scientific applications. This means that members are generally commissioned by companies or publishers for assignments.*

*For the purposes of this submission we have only answered questions that are directly applicable to our members, namely those in the area of business-to-business contracts and conduct. We have also not answered questions where we do not believe we possess adequate legal knowledge to provide a suitable answer.*

*In order to gather evidence for this submission we conducted our own survey on unfair business practices and asked New Zealand professional photographers who work with commercial clients to take part. 104 photographers had completed the survey by February 24, 2019. This includes both members of the AIPA (56%) and non-members (44%) and represents approximately 10-15% of the local commercial photography industry.*

*We will refer to the results of this survey throughout this submission and include individual responses where appropriate.*

In the photography industry we are aware of many examples of unfair contract terms in accordance with the MBIE's discussion document 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 right under a contract;
- d. Do not provide for a supplier to be paid until after an extended period of time

We are also aware of specific unfair terms in standardised contracts that:

- a. Allow the client to take ownership of all intellectual property while simultaneously placing onerous duties on the photographer in relation to that intellectual property. This could result in significant future costs and/or legal remedy which would be borne solely by the photographer;
- b. Require the photographer to grant the client perpetual worldwide usage rights, or relinquish copyright, for no additional remuneration;
- c. Provide the client with the ability to redistribute the photographer's content to many other entities which are not specifically mentioned in the contract, rather defined by the broad term of associated entities;
- d. Contain ambiguous terms such as "the work must be completed to the client's satisfaction";
- e. Set the price for the contracted services provided by all photographers, regardless of contributory factors, being set by the client due to market dominance. i.e. the photographer has no ability to negotiate the price for the work they provide;
- f. Make no allowance for events outside of the photographer's control such as inclement weather;
- g. Allow the client to make late payment without incurring any penalty interest;
- h. Prevent the photographer from marking up job related expenses;
- i. Require the photographer to return all confidential information to the client but do not require the same of the client in relation to the photographer's confidential information;
- j. Provide options for remedy for the client but not for the photographer;
- k. Provide the client with protection against reputational damage but do not provide the same to the photographer;
- l. Require the photographer to waive their moral rights.

Our survey results indicate that unfair contracts are very common in the photographic industry.

When asked "Have you ever been offered an unfair or one-sided contract by a commercial client?" 68.3% of respondents said "yes".

In certain sectors of the photographic industry, such as magazine publishing, unfair contract terms are widespread. In other sectors, they are less common.

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

The impacts are substantial and varied and include:

- a. Many photographers avoid market sectors where unfair contracts prevail therefore lessening competition;
- b. Photographers who work in the market sectors where unfair contracts are common will often struggle financially, or even go bankrupt, as a result;
- c. Many photographers experience ongoing stress and anguish about how their work may be used in the future by clients, knowing that the contract terms favour the client and don't provide any protection to the photographer;
- d. Where the price for services is largely determined by the client as a result of their market dominance, this has resulted in a stagnation in price. In some cases, this has meant there has been no price increase for services in over two decades.

3

Is government intervention to address unfair business-to-business contract terms justified? Why/why not?

We believe that government intervention is justified, entirely necessary and long overdue.

In the current environment, independent, freelance photographers are extremely vulnerable to exploitation via unfair contracts with large corporations and dominant market clients. New entrants to the photographic industry are particularly susceptible to this and are often targeted by unscrupulous clients.

We are alarmed that there are examples of European corporations operating in the New Zealand market who are prohibited from using the contract terms they use in New Zealand in their home countries.

## 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?

In the photography industry we are aware of numerous examples of unfair conduct in accordance with the MBIE's discussion document in the following areas:

- a. The way a party is inducted into entering a contract;
- b. The way in which a contract is enforced;
- c. Making demands over and above the terms agreed in an existing contract;
- d. Not complying with the terms of an existing contract;
- e. Misleading or deceptive conduct;
- f. Refusal to purchase a service

Our survey results indicate that unfair business-to-business conduct is very common throughout the photographic industry.

When asked "Have you ever been treated unfairly by a commercial client?" 68.3% of respondents said "yes".

When asked "Have you ever been threatened, penalised or blacklisted by a commercial client?" 32.7% of respondents said "yes".

Photographers reported numerous instances of:

- a. Non-compliance with agreed terms;
- b. Deceptive or misleading conduct;
- c. Excessive demands;
- d. Blacklisting;
- e. Harassment, bullying and coercion;
- f. Delayed payment;
- g. Refusal to pay for services rendered.

In some instances, such behaviour was directly encouraged by senior management staff at large corporations.

Below is just a small selection of responses we received via our survey. We have chosen not to name the individuals who made these comments, as by doing so they may be blacklisted and/or penalised by disreputable organisations that regularly use unfair business contracts and conduct when dealing with independent freelance creatives.

*"I was blacklisted for about six months by a magazine client for a miscommunication in delivery, even though I showed evidence of the messages I had sent, the editor was adamant that their staff did not receive the message due to a broken phone. At the time they were my main source of income and I felt as a freelancer that I was at their mercy and not treated in a fair manner. My work ethic is extremely high and it was devastating. In the media industry getting blacklisted is unfortunately quite normal. I think most photographers I know have experienced this, often for incredibly minor reasons."*

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*"Blacklisted by a local DHB who sent an internal email advising staff that they would no longer pay invoices if departments used my services."*

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*"Countless times. On each occasion I've denied false accusations (formally, to parent organisation of staff member involved) only to have my protests ignored, or provable lies compounded by obfuscation & retroactive changing of terms of access. This is in sports & event photography, at a variety of events. It provides the lower percentage of my income so I let it slide; plus there is an astronomic power imbalance which I can't overcome."*

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*"Clients often make threats when you refuse to "play ball" - e.g. sign their one-sided contracts. In one instance I was threatened and verbally abused by a record label executive when I asked for payment following their unauthorised use of my work."*

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*"A large multi-national editorial (magazine) publishing client refused to pay outstanding production expenses and the creative fee for almost 18 months for various reasons unrelated to my performance or the work I had done for them. After taking the case to the disputes tribunal their lawyer finally negotiated settlement on the eve of the hearing and paid most of what was owing. I later learned the Managing Director then ordered the editorial team to blacklist me from working for that magazine title ever again."*

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*"Blackmail threatening to withdraw property release after the fact to extort free work by building owners. Threats to take me to court over made-up accusations, again to blackmail me into releasing images without compensation."*

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*"Went to disputes tribunal because they kept increasing the scope of the work, well outside what we'd agreed and withheld payment until disputes tribunal agreed that their demands were excessively outside the work agreed. They then spoke badly about me to other people in the industry, who would approach me about the tribunal ruling, despite the fact it was in my favour."*

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*"We shot a NZ wide campaign for a major NZ based client through an advertising agency. We did everything by the book and licensed our material and even took a budget cut on the understanding that if the images were needed for another term or to be used else there would be rollover fees as normal. The agency then on sold the images to the UK sister client and never told us. We found out and invoiced them roll over fees nearing \$20,000 which was very, very reasonable given the scope of the initial job. The agency response was, drop this or you will never work with us again."*

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*"A number of editorial publishers frequently use freelance independent contractors as their bank, delaying payments for months, while citing that payment for services and expenses will be, sometimes, up to 1 month following publication of the work supplied. However, the publisher controls the scheduling of when the work will be 'first published' and at times has deferred this out to more than 6 months after the work was completed."*

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*"One client strong armed me into signing away the rights to the images entirely, and I was never allowed to use them in any way shape or form... yet the makeup artist who was their friend was given my images to use for her own promotion on social media."*

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*"Client changed scope of a photography project on the day of shoot, tried to demand twice the level of deliverable work. Happens often despite clear contracts & quotes."*

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*"I was financially penalised for "not fulfilling the brief" despite very deliberately fulfilling the brief. However, aside from going to court you have no option other than to put up with it or never get work from them again."*

## 5 What impact, if any, does this conduct have?

The impacts of unfair business-to-business conduct on freelance photographers are significant and wide reaching. They include:

- a. Stress and anxiety;
- b. Reputational damage;
- c. Depression;
- d. Inconvenience;
- e. Wasted time;
- f. Cashflow issues;
- g. Reduced profitability

As most freelance photographers are sole-traders or small business owners they typically don't have the time or resources required to deal with the unfair business conduct they are subjected to on a regular basis. As a result, they become increasingly frustrated, stressed and depressed.

Over the years many highly experienced talented New Zealand photographers have chosen to leave the profession, as they can no longer put up with the increasingly one-sided business environment where large, dominant corporations act with impunity.

## 6 Is government intervention to address unfair business-to-business conduct beyond existing legislative protections justified? Why/why not?

We believe that government intervention is justified, entirely necessary and long overdue.

In the current environment, independent, freelance photographers are extremely vulnerable to exploitation via commercial clients. New entrants to the photographic industry are particularly susceptible to this and are often targeted by unscrupulous clients.

### 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?

We agree with the proposed high-level objectives.

It would be beneficial for all New Zealanders if we had a business environment where businesses and consumers are confident participants in fair and thriving markets. As this is not currently the case for independent contractors and small business owners, regulatory changes that strengthen the protections against unfair business-to-business practices are required.

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

11 Should a high-level prohibition against unfair conduct be introduced? Why/why not?

At the very minimum, we believe a high-level protection against unfair conduct should be introduced, as greater protections are required to protect small businesses and independent contractors.

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?

We would prefer Option 1C, as this is based on the approach taken by the European Union and offers greater protections against unfair conduct.

Multi-national corporations should conduct their business operations in New Zealand under the same (or very similar) standards that they operate in Europe.

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?

We believe that it is appropriate to require businesses to act in good faith.

15 Are there any other variations on Option 1 that we should consider?



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

Yes, we believe it should be extended to matters relating to contracts, or Option 2 should also be adopted (as per Package 4).

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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

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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?

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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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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?

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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?

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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?

Please investigate the Freelancing Isn't Free Act (<https://www1.nyc.gov/site/dca/about/freelance-isnt-free-act.page>) that was introduced in New York City On May 15, 2017.

This law establishes and enhances protections for freelance workers, specifically the right to:

- a. A written contract
- b. Timely and full payment
- c. Protection from retaliation

## Options packages

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

Our preferred option would be Package 4 – Option 1C and Option 2, as this would provide the greatest protections against unfair business practices, while still seeking to facilitate pro-competitive, welfare-enhancing practices.

Given the results of our recent industry survey, and the many examples of unfair business conduct that we have been made aware of over the past two decades, we believe that far more protections for small businesses and independent contractors are necessary.

## 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?

If businesses can operate successfully in the European Union under their stricter standards for unfair business conduct, there seems no reason why adopting similar standards in New Zealand would adversely affect our market.

Although there is likely to be some initial resistance from businesses that are currently benefiting from the status quo, we believe the short and long term benefits for sole traders, small business owners and New Zealand consumers will be substantial.

## Other comments

26 Do you have any other comments?

With the growth of the “gig economy” worldwide, it is highly likely that we will see an increasing number of New Zealanders working as freelancers and small business owners. These individuals will not receive any of the benefits or protections enjoyed by employees, who are covered by the Employment Relations Act. Therefore, it would seem timely for the New Zealand government to introduce new legislation that protects small business owners and independent contractors from the unfair business practices mentioned in this submission.

Both the MBIE survey and our own survey have revealed that there is a substantial amount of unfair business conduct taking place in New Zealand, and that many large corporations are using their market dominance to exploit local suppliers. We believe these small surveys only scratch the surface of a much larger problem. There are many thousands of freelance creatives working in New Zealand who are not represented by any professional associations (because associations do not exist for creative professionals working as illustrators, make-up artists, stylists, models, etc.) and who likely unaware of this submission process. We believe that their experiences will be similar to those of commercial photographers, but they will have no input in this review.