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Competition and Consumer Policy
Ministry of Business, Innovation and Employment
PO Box 1473
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By email: competition.policy@mbie.govt.nz

Dear Sir or Madam

ACCC submission to MBIE Discussion Paper on *Protecting businesses and consumers from unfair commercial practices*

The ACCC welcomes the opportunity to make a submission to the Ministry of Business, Innovation and Employment (MBIE) Discussion Paper on *Protecting businesses and consumers from unfair commercial practices*. Our submission is attached, and may be made publicly available.

The ACCC is supportive of the introduction of legislative measures to combat unconscionable conduct into New Zealand law (Option 1 of the Discussion Paper). We have made a number of observations regarding the ACCC's experience regarding the operation of the unconscionable conduct provisions in the Australian Consumer Law, as well as some comments about the consideration of unfair practices more broadly.

Further, we consider that the existing New Zealand law regarding unfair contract terms (UCT) in standard form consumer contracts would be improved by extending its operation to contracts entered into by small businesses (Option 2). To this end, we have included our views on the operation of the Australian UCT laws, and how they might be further improved.

If you would like to discuss this attached submission further, please contact Gabrielle Ford, General Manager – Advocacy, International and Agriculture Branch, on [REDACTED] or gabrielle.ford@accc.gov.au.

Yours sincerely

[REDACTED]
Rod Sims
Chair

ACCC submission to MBIE Discussion Paper on Protecting businesses and consumers from unfair commercial practices

Australia's laws regulating unconscionable conduct and unfair contract terms play a vital role in maintaining trust in Australian markets. Without such protections, market failure can arise from the imbalances in bargaining power between businesses and consumers, and between small and large businesses, as well as the unequal availability of information when making purchasing and contractual decisions. This distorted outcome can reduce the overall efficiency of a market, and reduces the total welfare of its participants.

The ACCC offers the following observations based on its experience with the relevant Australian laws, and recent cases and studies it has undertaken. In particular, small business is a special focus for ACCC, through its enforcement and compliance priorities and through the appointment of a Deputy Chair with knowledge of, or experience in, small business matters.

Option 1: High-level protection against unconscionable and unfair conduct

Unconscionable conduct in Australia

Unconscionable conduct has a long judicial provenance in Australia's equitable jurisdictions, and has continued to develop since the landmark case of *Commercial Bank of Australia Ltd vs Amadio* in 1983.¹ Australian consumer protection legislation (originally embodied in the *Trade Practices Act 1974*) has contained prohibitions against unconscionable conduct in connection with the supply of good or services to consumers since 1986. This protection was expanded in 1998 to protect small businesses from unconscionable conduct. The inclusion of these prohibitions into the Trade Practice Act enabled the regulator to bring actions against parties who acted unconscionably and for the full range of remedies available under the consumer law to be available where unconscionability was proven.

Since the commencement of the Australian Consumer Law (ACL) in 2011, unconscionable conduct has been prohibited under Australian law in two ways. First, section 20 of the ACL broadly prohibits a person from engaging in unconscionable conduct in trade or commerce, within the meaning of the unwritten law (the Australian common law, including future developments through judicial decisions).

Second, section 21 of the ACL prohibits a person from engaging in conduct that is, in all the circumstances, unconscionable in connection with the supply to, or acquisition from, a person of goods or services. As noted in Annex 1 of the Discussion Paper, 'unconscionable conduct' is not defined under section 21, but rather the court is provided with a non-exhaustive list of considerations (set out in section 22) it may take into account when considering a breach of section 21. Importantly, action under section 21 for statutory unconscionability is not limited by the unwritten law relating to unconscionable conduct, and in particular the presence of a special disadvantage or disability is not required, as it is for equitable relief.

There is no overlap between the two provisions, with subsection 20(2) explicitly providing that section 20 does not apply to conduct prohibited by section 21. A breach of either provision can result in a range of court-ordered penalties and remedies, including pecuniary penalties, compensation for loss or damage that is suffered as a result of the conduct, a declaration to vary or void a contract, as well as injunctive relief.

¹ 151 CLR 447

ACCC action on unconscionable conduct

The ACCC considers that the unconscionable conduct provisions in the ACL provide an important level of protection for consumers, particularly vulnerable and disadvantaged consumers. The ACCC investigates allegations of unconscionable conduct across a range of commercial activity, and regularly takes action against traders for breaches of the relevant provisions of the ACL.

The Discussion Paper notes a number of matters brought by the ACCC.² In recent years, the ACCC has taken cases in both the consumer and small business areas, and sought to enforce and extend the protection of the provisions. These actions have resulted in significant positive developments in the law as it applies to consumers and small businesses.

In particular, the *Lux* and *Coles* cases demonstrate the reach of Australia's law regarding statutory unconscionability:

"[T]he operative provisions of the ACL reinforce the recognised societal values and expectations that consumers will be dealt with honestly, fairly and without deception or unfair pressure. ... The norms and standards of today require businesses who wish to gain access to the homes of people for extended selling opportunities to exhibit honesty and openness in what they are doing, not to apply deceptive ruses to gain entry. ... This deception tainted all the conduct thereafter."³

"Coles' misconduct was serious. I reject Coles' submission that these contraventions are somehow distinguishable, or of a less serious nature, because they did not involve vulnerable consumers. Coles' conduct did not involve vulnerable consumers. Coles' conduct did involve vulnerable suppliers – some of Coles' smaller suppliers ... These vulnerable suppliers were up against Coles – the second largest retailer of grocery products in Australia."⁴

The ACCC is continuing to explore the reach of the statutory unconscionability provisions. In the recent Full Federal Court decision of *Australian Competition and Consumer Commission v Medibank Private Limited*⁵ the Court made a number of observations in relation to the operation of sections 21 and 22 of the ACL. The Court held that assessing whether conduct in all the circumstances is unconscionable involves an evaluative judgment and cannot simply be aligned with something not done in good conscience. It stated that "reference to intellectual ideas of customary morality and societal values are at too high a level of abstraction to be practically useful or the objective touchstone" for the purposes of determining unconscionability (paragraph 237).

Further, the Court noted that:

"... although honesty and fairness in dealing with consumers is relevant including acting without deception, it would be wrong to say that unfair conduct in and of itself amounts to unconscionable conduct. But establishing unfair conduct may be a step along the way to showing unconscionable conduct. It would also be wrong to say that because hardship is or may be caused to a consumer by conduct, such an actual or likely consequence in and of itself establishes that the conduct was unconscionable. But again, establishing

² Paragraphs 156-157 of the Discussion Paper make mention of several ACCC actions both in business-to-consumer and business-to-business contexts.

³ ACCC v Lux Distributors Pty Ltd [2013] FCAFC 90 at paras 23, 63 and 65.

⁴ ACCC v Coles Supermarkets Australia Pty Ltd [2014] FCA 1405 at para 102.

⁵ [2018] FCAFC 235

actual or likely hardship may be a step along the way to showing unconscionable conduct, although it is not necessarily required.” (paragraph 246)

The Court concluded that:

“Certainly, Medibank acted harshly. And I am also prepared to conclude that it acted unfairly. But this is not enough to establish statutory unconscionability.” (paragraph 353)

The ACCC is continuing to consider the impact of this decision. It suggests that there is a category of conduct which the ACCC considers to have caused significant consumer detriment (as the ACCC considered to be the case in Medibank) which is not currently caught by the unconscionable conduct provisions. Given this, the ACCC considers that while the unconscionable conduct provisions provide a baseline level of protection for consumers and businesses, close examination should be given into the treatment of ‘unfair’ commercial behaviour. This examination has commenced in Australia, as is discussed further below.

Observations on unfair practices

Consideration of a broad prohibition against ‘unfair practices’ (as distinct from unconscionable conduct and unfair contract terms) was undertaken as part of the 2017 review of the Australian Consumer Law by Consumer Affairs Australia and New Zealand (CAANZ). CAANZ recommended to governments that exploration be done into how an unfair trading prohibition could be adopted within the Australian context to address potentially unfair business practices.

The Australian Consumer Law Review Final Report (March 2017) had found that the value of introducing an unfair trading prohibition was ‘uncertain’, but stated that exploring an unfair trading prohibition in Australia would be an ongoing priority, in particular, in its capacity to address market-wide or systemic unfair conduct. The ACCC is participating in CAANZ’s further exploration and consideration as to whether an unfair trading prohibition should be introduced.

The impact of unfair practices has also been raised in the context of the ACCC’s Digital Platforms Inquiry (DPI).⁶ The DPI is examining the effect that digital search engines, social media platforms and other digital content aggregation platforms have on competition in media and advertising services markets in Australia. In particular, the DPI is looking at the impact of digital platforms on the supply of news and journalistic content and the implications of this for media content creators, advertisers and consumers.

On 10 December 2018, the ACCC released its Preliminary Report for the DPI. It provided examples that illustrate the types of unfair conduct that may not be prohibited by the existing ACL prohibitions:

- conduct by businesses that consumers are not aware of, such as the collection or disclosure of data without express informed consent
- failing to comply with reasonable standards, including failing to put in place ‘reasonable’ security measures to protect data
- changing the terms on which products are provided without reasonable notice or ability for the consumers to consider them, including in relation to products with subscriptions or contracts that automatically renew

⁶ <https://www.accc.gov.au/focus-areas/inquiries/digital-platforms-inquiry>

- inducing consent or agreement by very long contracts or providing insufficient time to consider them or all-or-nothing 'click wrap' consents, and
- business practices adopted to dissuade consumers from exercising their contractual or other legal rights, including requiring the provision of unnecessary information in order to access benefits.

The DPI preliminary report also notes that comparable jurisdictions (including in the EU, UK, USA, Canada and Singapore) adopt a combination of general and specific protections not only in relation to unconscionable and misleading practices, but also to unfair trading practices.

As noted above, the ACCC is continuing to examine the issue of unfair practices, both in the DPI in the context of digital markets, and more broadly as part of the work by CAANZ.

Option 2: Extend unfair contract term protections to businesses

Unfair contract terms in Australia

The Australian law regarding unfair contract terms (UCT) was recently amended to extend protection to small businesses. This recognises that small businesses, like consumers, can be vulnerable to unfair terms in standard form contracts offered to them on a 'take it or leave it' basis, and they often lack the bargaining power, resources and expertise to assess and re-negotiate such terms (Explanatory Memorandum, *Treasury Legislation Amendment (Small Business and Unfair Contract Terms) Bill 2015*). The amended law operates in relation to standard form contracts with small businesses entered into or renewed on or after 12 November 2016.

The ACCC supports the extension of New Zealand's laws relating to unfair contract terms to protect small businesses.

The Discussion Paper notes four matters in which the ACCC has taken action regarding business-to-business UCTs.⁷ In addition, a number of court enforceable and commercially negotiated outcomes have been achieved, which help to illustrate the wide range of commercial activity and contractual terms that the Australian UCT law now covers:

- In May 2017, Sensis Pty Ltd agreed to amend particular terms in its product contract terms relating to its automatic renewal of cancellation processes, which (in addition to concerns Sensis had engaged in misleading or deceptive conduct) the ACCC was concerned were likely to constitute UCTs once the legislation commenced.
- On 14 March 2018, the ACCC announced that, following an investigation, grain marketing organisation AWB Harvest Finance Pools Pty Ltd (AWB) had made changes to its standard form grain pool contracts. The changes addressed the ACCC's concerns that terms allowing AWB to unilaterally increase fees to growers and introduce new fees to growers after the contracts had been signed, and terms allowing AWB to reject grain at its absolute discretion, were unfair.

⁷ Paragraph 127 of the Discussion Paper makes mention of ACCC action against Mitolo (2018), Servcorp (2018), Cardtronics (2018) and JJ Richards (2017).

- On 2 July 2018, the ACCC announced that, following an investigation, Warrnambool Cheese and Butter Factory Company Holdings Limited (WCB) had amended terms in its milk supply agreements and milk supply handbook. The ACCC considered that the following terms in WCB's contracts with farmers were UCTs:
 - terms that allowed WCB to unilaterally vary the milk price and other milk supply terms, with farmers unable to terminate the milk supply agreement early without incurring a financial penalty, and
 - terms that placed restrictions on farmers selling their farm and required farmers to indemnify WCB for loss which could be avoided or mitigated by WCB.
- On 3 December 2018, the ACCC announced that, following an investigation, Visy Paper Pty Ltd (trading as Visy Recycling), Cleanaway Pty Ltd and Suez Recycling & Recovery Pty Ltd had reviewed and amended potentially unfair contract terms in their standard form contracts.
 - These included terms that allowed the waste management companies to unilaterally increase their prices in specified circumstances and impose unreasonable penalties on customers who wanted to exit their contracts before the end of the contract term.
- On 3 December 2018, the ACCC also announced that, following an investigation, dairy processors Brownes Food Operations, Lion Dairy & Drinks, Norco Co-operative Limited, Parmalat Australia and Fonterra Australia had agreed to amend specific terms in their milk supply agreements to address the ACCC's concerns that these terms were unfair to their dairy farmer suppliers.
 - These included contractual terms that allowed the processors to unilaterally vary supply terms (such as price or quality requirements), lengthy notice periods for farmers to terminate their contracts, one-sided termination rights, broad indemnities, and restriction a farmer's ability to lease a farm or sell their cattle.

The adoption of laws prohibiting business-to-business UCTs by New Zealand would also beneficially align the laws of Australia and New Zealand. The two economies are closely interlinked, and harmonising UCT laws would provide a more seamless regulatory environment for the many companies operating (and contracting) across both jurisdictions. It would also enable the ACCC and NZCC to more comprehensively use their existing close cooperation on law enforcement matters when investigating UCTs.

Improvements to the UCT laws

The Australian Government is currently conducting a review of the extension of the UCT laws to small businesses. A discussion paper was released in November 2018,⁸ seeking input from interested parties about the impact of the changes, and whether any further changes are required to improve the operation and effectiveness of the law. Submissions to this review are now closed.

⁸ Australian Treasury, Discussion Paper "Review of Unfair Contract Term Protections for Small Business", November 2018, <https://consult.treasury.gov.au/market-and-competition-policy-division-internal/c2018-t342379/>

Inclusion of a UCT should be a contravention of the ACL

At present, including a UCT in Australian standard form contracts is not a contravention of the ACL, and the outcome for a business that has a UCT in its standard form contract is that a court declares that clause unfair and therefore void.

The ACCC considers that the inclusion of a UCT in a standard form contract should be a contravention of the relevant law, and thereby subject to civil pecuniary penalties and other remedial orders commonly available to the court for such contraventions. The primary reason for this is one of deterrence – penalties should apply if unfair contract terms are included in standard form contracts, otherwise no real incentive exists for businesses to ensure their contracts do not contain such terms.

These limitations have the practical result of the ACCC becoming, in effect, a ‘compliance agency’ for large companies. Under the current arrangements, these companies can simply amend their contracts to remove unfair terms when the ACCC raises an issue with them, and there is nothing that can be done to hold them to account for their prior conduct.

Definition of standard form contract – negotiations

The ACL provides a number of factors that need to be considered to determine whether a contract is standard form. These factors include whether another party was given an effective opportunity to negotiate the terms of the contract.

The ACCC considers that it is unclear whether this factor can be satisfied where it is shown that a term was varied in relation to other consumers or small businesses, such as where a small subset of small business customers were able to negotiate limited changes. It is unclear whether these circumstantial negotiations allow a business to argue their contract is no longer a ‘standard form contract’ across all of its small business customers.

Compliance with and enforcement of the UCT provisions would be assisted by having better clarity on the concept of ‘an effective opportunity to negotiate’⁹ such as requiring that any such negotiation be a common occurrence across the business’ dealings with all of its small business customers.

Thresholds – business size and transaction value

The Discussion Paper raises as a design issue, who and which transactions should be protected, if the UCT provisions were to be extended to businesses.¹⁰ Specifically, what size of businesses should be protected, and (or in the alternative) whether the protections should be limited to contracts of a certain value.

Under the current Australian law, a contract is a ‘small business contract’ if:

- at least one party to the contract is a business that employs fewer than 20 people, including casual employees employed on a regular and systematic basis; and
- either the upfront price payable under the contract does not exceed AUD300,000, or AUD1 million if the contract’s duration exceeds 12 months.

Since the extension of the UCT laws to business-to-business contracts, the ACCC has formed the view that these thresholds restrict the law from applying to contracts and

⁹ ACL, paragraph 27(2)(d).

¹⁰ Discussion Paper, paragraphs 133-137.

transactions that would be reasonably be expected to be covered by a law dealing with small business transactions.

- For example, it is likely that the majority of authorised motor dealers in Australia fall outside the current thresholds because of the high value of the products sold (and, in many cases, the number of employees).
- As part of the ACCC's Dairy Inquiry,¹¹ a number of potentially unfair contract terms in milk supply contracts that allow retrospective changes in farmgate milk prices were noted. For some of those contracts where there is a fixed volume and price for the duration of the contract, the upfront price exceeds the threshold and so the unfair contract term protections do not apply.
- The ACCC is also aware of a number of potentially unfair payment terms in the trucking industry. However, many of the businesses affected employed more than 20 people and so were over the threshold.

The ACCC considers the current thresholds for business-to-business provisions in the ACL should be re-examined. Australia's UCT provisions only apply to standard form contracts. The ability of a business to impose such a contract on a 'take it or leave it' basis demonstrates a lack of countervailing bargaining power or ability to effectively negotiate in the counterparty, such that the UCT protections should apply.

Acknowledging that a statutory 'bright line' threshold may assist businesses in understanding whether their contracts are covered by the regime at a glance, the ACCC considers that a clearer and more effective threshold for the application of the UCT regime would be for it to apply to standard form contracts entered into by businesses with less than AUD10 million annual turnover. We note that this is an issue for discussion in the review of the UCT law being conducted by the Australian Government.

¹¹ <https://www.accc.gov.au/focus-areas/inquiries/dairy-inquiry-0>