**Discussion paper: Protecting businesses and consumers from unfair commercial practices**
**Submission from Dr Matthew Barber, University of Canterbury**
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The discussion paper suggests the introduction of additional protections to consumers and businesses who purchase from other businesses. I don't hold any settled and comprehensive views on this, and instead submit a few general observations and comments, mostly about extending protections to businesses with respect to contract terms.

1. As the discussion paper recognises, the overall effects of such protections depend upon three elements together: the scope, the definition of the conduct being prohibited and the enforcement mechanisms. The definition is particularly important: it can be narrow, and so only affect the most egregious conduct, or broad, with greater risk of interfering with normal commercial activity. Definitions of unfair contracts/conduct tend to be vague and so cause uncertainty, and the degree to which any such protections will cause economic harm is difficult to measure. These two points suggest that the adoption of any new protections should progress with caution.

2. The extension of protections to small or all businesses is contrary to part of the rationale underpinning the differential treatment of consumers and businesses: that businesses are (or should be assumed to be) in the position to identify and protect their own interests. This, it is thought, is part of the responsibility of doing business, and so the law should not be concerned with protecting businesses from their own negligence or foolishness. This argument caries some weight, but is not entirely true. It is certainly the case that some businesses are in weaker positions in transacting, that this is reflected in the terms of the agreements they enter into, and that the extent of this in some cases may be so unfair as to be illegitimate.

3. As recognised in the discussion paper, legal mechanisms for unfair terms would impose significant costs on businesses, particularly if the protections are extensive and so risk encroaching upon normal commercial practice. In general terms, if you grant a transactional protection to one party then, in the situations to which it may apply, you will tend to increase the costs of others transacting with them. The broader the protection, and the more uncertain and unpredictable its application, the greater the effects of this will be.

   In any particular instance of this, the protections may benefit the party who they are designed to protect, or they may disadvantage that party. To illustrate, if a large business considers entering into a significant transaction with a small business protected by an extensive unfair terms scheme, and the large business believes that there is a possibility that the transaction would be prohibited by the scheme, it may:
   - make no change to the terms and take the risk of a legal remedy for breach of the protection;
   - change the terms so that they are more advantageous to the small business;
   - change potentially unfair terms, while also changing other terms to balance this out; or
   - decide not to transact with the small business.

   In all but the last instance, it may also pass on some or all of the additional costs of transacting to the small business.

   In the extreme, the protection is essentially a cost faced by big businesses dealing with small businesses, and big businesses may respond to it, in some instances at least, by preferring to

deal with other big businesses. Alternatively, particularly for multinational businesses or transactions, the parties may be more likely to agree that the contract be governed by the law of a different jurisdiction.

These difficulties and costs might be seen in a positive light if each affected transaction was genuinely unfair, but the uncertainty around the definition of unfairness means that will not necessarily be so.

If, on the other hand, the protections are not extensive, and affect only the most egregious conduct, then these effects will be greatly reduced or removed.

4. Extreme cases aside, it can be very difficult to look at a particular transaction and determine whether it is sufficiently unfair to warrant legal intervention. The inclusion of a particular term or the proof of a particular type of conduct will seldom be sufficient on its own. These need to be put in the context of the transaction and the market situation as a whole. The courts have commented on this difficulty and have expressed reluctance to engaging in this sort of analysis.

   The discussion paper talks about the potential unfairness of terms that shift risk to one party for events outside its control. It is especially difficult for a court to look back at a transaction that two commercial parties agreed to and determine whether the risks assumed by the parties were such that the contract was unfair. This may require the court to consider how the one party took a particular transactional advantage – was it because of its market position, history, reputation, resources, capacities, acumen, did it merely reflect the price, or was it something else? – and then make a judgment as to whether this was fair. There are, of course, situations where commercial parties legitimately take on risk for events outside their control, such as in insurance contracts.

   As with the previous point, the more extensive the unfairness test is, the more of an issue this becomes.

5. Unilateral variation clauses are also identified as potentially unfair. These are so common now that they may deserve special and separate attention. Like standard form contracting, they allow for lower transaction costs but can be the vehicle for unfair conduct. The power for the other party to terminate an agreement upon the notification of such a variation may be enough in most cases to prevent unfairness. As an illustration of how these are now accepted as a legitimate mode of business, Consumer NZ includes a unilateral variation clause in the terms applying to its paid members.

6. The discussion paper talks about the difficulty of measuring any detrimental commercial consequences of encroaching upon business to business transactions. It may be tempting to adopt a regime from another jurisdiction on the assumption that if there have not been shown to be substantial problems resulting from its application there, then that means that it does not unduly interfere with ordinary commerce. Such reasoning should be applied with caution, as the nature of the interference is such that it may not be easy to identify and measure.

7. Finally, something is made in the discussion and summary documents of the unfairness found in a survey conducted of businesses, although it is accepted that the unfairness was self-identified and that unfairness generally is inherently subjective. I suggest that the ministry goes back to these businesses (or conducts a new survey) and actually asks for the

details about the identified unfairness: e.g. contractual documents, descriptions of the market in which the conduct is taking place etc. (appropriately anonymised). Then, once it has a portfolio of transactions, a team sits down and goes through it, with the object of determining whether additional legal protections are justified in each case. Such a process might help to develop the understanding of: (1) the nature and extent of the problem; (2) the process and challenge of applying the various broad unfairness tests to actual commercial transactions; and (3) the relevance of existing legal protections. This might assist in choosing the appropriate mechanism, could identify particular issues that might better be dealt with by more targeted mechanisms, and might even identify practical problems with using the protections already available.