

25 February 2019

Competition and Consumer Policy
Ministry of Business, Innovation and Employment (MBIE)
PO Box 1473
Wellington 6140

By email: competition.policy@mbie.govt.nz

FONTERRA SUBMISSION ON MBIE DISCUSSION PAPER: PROTECTING BUSINESSES AND CONSUMERS FROM UNFAIR COMMERCIAL PRACTICES

Introduction

1. Fonterra welcomes the opportunity to make this submission to the Ministry of Business, Innovation and Employment (MBIE) on the Discussion Paper entitled: 'Protecting Businesses and Consumers from Unfair Commercial Practices', dated December 2018.
2. Fonterra is owned by around 10,000 New Zealand farmer suppliers, many of which are small businesses. In addition, we deal with numerous other small businesses and consumers through our milk processing and various associated operations across New Zealand.

Overview

3. We support MBIE's efforts to work with small businesses and consumers to fully understand the extent and nature of any concerns they may have about commercial practices in New Zealand, with a view to determining if there are any 'gaps' in the current legislative protection. Small businesses and consumers have a key role in the New Zealand economy and we continue to support the Government's focus on promoting a fairer environment for them.
4. Once the nature and extent of any concerns and gaps is understood, then would be the appropriate time to propose options to best address the concerns. Any consideration of options should be deferred until feedback has been received and considered.
5. There is a significant risk that introducing any of the proposed options for additional statutory protection:
 - a. may unnecessarily duplicate protections that already exist such as the Fair Trading Act 1986, the Commerce Act 1986, and otherwise at law through New Zealand court decisions on the concept of unconscionability;
 - b. could lead to (potentially sustained) uncertainty as to coverage and boundaries (a point made by MBIE at paragraph 160 of the Discussion Paper); and
 - c. could result in significant cost implications for the New Zealand economy.
6. Therefore, if gaps in the current legislation are identified, there will need to be clarity and certainty as to the scope and applicability of any new legislation proposed to address those gaps.

Specific Comments

Identification of 'Gaps' and Potential Further Consideration of Options

7. We support MBIE's proactive approach to identify concerns about unfair commercial practices within the New Zealand economy and gaps in the current legislative protections to the extent those concerns affect small business and consumers.

8. We would welcome the opportunity to proactively address any significant concerns arising and consider whether we can address such concerns within our own commercial practices. Our revision of our small vendor payment terms in 2018 has enhanced our engagement with our vendors and the Government. We appreciate the recent opportunity to discuss techniques to advance e-Invoicing and support faster payment times for small business across New Zealand and Australia. We also look forward to supporting the Government as they work to better help small businesses operating in regional New Zealand.
9. Once any concerns are identified, there should be further consultation on what options might best address such concerns. For example, a more appropriate option might be to target legislation at the particular area of 'unfair' practices identified (if any), or a review around how enforcement of current existing legislative protection can be made more accessible to businesses and consumers.

If Government considers 'gaps' exist and Discussion Paper options are appropriate

10. If it is found that significant gaps exist and the options already presented in the Discussion Paper are the most appropriate options for addressing those gaps, then:
 - a. We would be generally supportive of additional legislation provided there is no overlap or duplication of protections already existing in legislation, such as the Fair Trading Act and the Commerce Act. As noted above, once the extent of any gaps are understood, it may be that accessibility of those protections to businesses and consumers should be considered instead.
 - b. Subject to the above, we would support the proposed option to extend **unfair contract term** protection to certain business to business transactions as long as:
 - i. It is framed with sufficient clarity so as to address the unfair commercial practices which the legislation aims to prevent, and does not over-reach into appropriately negotiated terms, or commercial matters such as price (therefore having unintended consequences).
 - ii. It includes a principles based approach to the applicability of the protection – an arbitrary business value or an employee number approach may not achieve the desired results of such legislation. However, we do agree that any protection should apply only to those small businesses with a degree of vulnerability, and for contractual engagements of a relatively 'low' value.
 - iii. It adopts a first step of 'declaration' whereby a term is only 'unfair' once a court (on the application of the Commerce Commission) declares it so (this would align with the current business-to-consumer protection under the Fair Trading Act), and allows a reasonable grace period for businesses to understand the terms at which the legislation is aimed, and align their contracting practices accordingly.
 - c. We would not support Option 1 of the proposed options to address unfair commercial practices. In our view, any proposed new measures should not provide a further back-stop (to that already provided under New Zealand law) for commercial practices being undertaken outside of contractual arrangements. The concept of unfair conduct outlined in the Discussion Paper is aimed at the type of extreme conduct which New Zealand law is already designed to protect. Introducing protection against unfair conduct would lead to real uncertainty in application.
11. If there are any queries relating to this submission, please contact Bridget Service (bridget.service@fonterra.com) or Joanne Finer (joanne.finer@fonterra.com).



Director, Global Stakeholder Affairs