MTA Submissions

Protecting Businesses from Unfair Commercial Practices

28 February 2018

Dear Sir / Madam

Submission: Protecting Businesses from Unfair Commercial Practices

This submission is from:

Motor Trade Association (Inc)
PO Box 9244
Marion Square
Wellington 6141

The contact person in respect of this submission is:

Name: Greig Epps
Title: Advocacy & Strategy Manager
Ph:
Email: greig.epps@mta.org.nz

Thank you for the opportunity for MTA to provide comment on unfair commercial practices regarding the views of and its effect on the automotive industry.

If you would like to discuss any issues we have raised in our submission we would be happy to have an in-person meeting to further discuss our position.

Yours sincerely

Greig Epps
Advocacy & Strategy Manager

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Introduction

The Motor Trade Association Incorporated (MTA) was founded in 1917 to represent the interest of garage proprietors, with a focus on 'safety first and always'. Since that time, the Association has expanded its membership and the range of services provided to members and the public. In 2017, we celebrated 100 years of trust with the NZ motoring community.

MTA currently represents approximately 3,600 businesses within the New Zealand automotive industry and its allied services. Members of our Association operate businesses including automotive repairers (both heavy and light vehicle), collision repair, service stations, vehicle importers and distributors and vehicle sales. The automotive industry employs 57,000 New Zealanders and contributes around $3.7 billion to the New Zealand economy.

MTA members are predominantly small businesses and it is not uncommon for them to find themselves backed into a contractual corner by the conduct of a larger organisation whose business is critical for the member. In those situations, the member must accept a contract or conduct on whatever terms the larger organisation determines.

The New Zealand Fair Trading Coalition

In November 2008, MTA was instrumental in the founding of the New Zealand Fair Trading Coalition (NZFTC)[1]. NZFTC believed that:

> A key issue facing the New Zealand economy is the realisation of the full potential of all businesses to contribute to growth, and that small and medium enterprises (SMEs) have a significant role to play in this. However, there are real obstacles to this, as the playing field is not level. There are substantial and unfair barriers that constrain SMEs. This can threaten the viability of SMEs, smother their vitality, and hinder their capacity to grow and contribute fully to our national economic growth. NZFTC promotes liberating the potential of SMEs through legislative reforms in a number of key target areas. Those target areas are: prohibiting unconscionable conduct, allowing codes of practice; granting SMEs the right of collective bargaining; franchise law; and enhancing the SME contribution to the economy.

Much of what NZFTC stood for back then is being consulted on now. MTA has for many years raised its voice in support and defence of our small business members. We are grateful to be given an opportunity to reiterate our long-held position.

Issues with Confidentiality

This submission touches on a range of business arrangements with elements that MTA recommends should be subject to unfair contract terms legislation. However, MTA has faced difficulties in obtaining concrete examples of contractual concern due to confidentiality clauses in the relevant contracts. As a trade organisation we must be cautious not to jeopardise a relationship between parties that include our members and, as

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[1] Also in the Coalition were Road Transport Forum New Zealand Inc; Horticulture New Zealand; New Zealand Contractors Federation Inc; New Zealand Building Subcontractors Federation; Electrical Contractors Association of New Zealand Inc; New Zealand Taxi Federation Inc; Engine Reconditioners Association; Brake and Clutch Specialists Association; Bus and Coach Association (New Zealand) Inc; New Zealand Heavy Haulage Association; Forest Industry Contractors Association; and Refrigeration Air Conditioning Companies Association.

such, we are unable to provide details. Where possible we have provided anonymised examples in confidence and/or aggregated common examples to provide a general idea of some of the issues MTA members reportedly face. We ask that, as an acknowledgment of the limitations of this investigation, aggregated examples are given equal weight to specific examples.

Submission layout

This submission address concerns that MTA (and its members) has identified in the following types of arrangement:

- Supply contracts
- Franchise arrangements
- Service provider contracts

Each of these arrangements broadly align with specific MTA member segments (service stations, new car dealers, and collision repairers), but the characteristics of these agreements can be present across a range of member businesses.

Following general comments on these specific arrangements, MTA provides answers to the questions raised by the consultation paper. The general comments and specific answers should be considered collectively.

Issues with Specific Contractual Arrangements

Supply contracts

Service station fuel supply arrangements are an example of a contract that MTA believes is skewed in favour of the larger party.

For context, the service station sector mainly comprises independent businesses that have taken on a supply arrangement with a particular fuel brand. These arrangements:

- are long term, take-it-or-leave-it, exclusive, highly confidential, and
- contain operational controls (e.g. requirement to accept discount cards) and
- include restraints of trade or personal guarantees that bind the business owner.

Long term contracts (5-10 years, or longer) means that opportunities to review wholesaler/supplier relationships and seek better prices (or terms) are few and far between. Usually these negotiations occur at the expiry of that contract term, which in many cases is ten years. A small business may consider areas of the contract unfair from year one.

Much of the public reporting about problems facing small businesses in their dealings with larger businesses has centred on unfair payment terms, with the larger organisation delaying payment for long periods thus impacting on the small business's cashflow.

On the other side of the coin, service stations can face unreasonable payment terms for the product supplied to them. MTA has received reports of service stations required to pay "cash on delivery" for fuel ***on the day***. Two- or three-day payment terms are not uncommon and most members report needing to settle fuel supply costs within 7 days. When a station is ordering somewhere in the order of 20,000 litres of fuel at a time, operating with narrow margins on terms dictated by the wholesaler/supplier and the market, cash up front terms are a serious burden on cashflow.

Outside of the contract terms, the conduct of brand suppliers can raise concerns. MTA is aware of a fuel retailer who has signed up to a multiple year agreement to operate a manned service station site in provincial New Zealand[2]. Just a couple of years on and the fuel supplier has established an unmanned site with the same branding within a kilometre or so down the road from the manned site. The unmanned site is apparently selling fuel at a price that is lower than the purchase price (wholesale) available to the manned site[3], which suggests differential or even predatory pricing. The manned site cannot compete with this price differential, but without protection through prohibitions on unconscionable conduct or unfair contract terms the small business is unable to negotiate terms or end their relationship with the supplier[4].

[2] Confidentiality clauses within agreements mean we are unable to identify the MTA member or fuel brand.

[3] An unmanned service station site faces much reduced compliance costs due to the lack of staff available to assist the public in the event of a safety incident (no staff with health & safety training, personal protective equipment, etc). As well, the costs of staff are reduced.

[4] For a deeper examination of the service station sector, please see the Commerce Commission's preliminary issues paper on the retail fuel market and the MTA submission on that paper (https://comcom.govt.nz/about-us/our-role/competition-studies/market-study-into-retail-fuel).

Franchise arrangements

MTA vehicle dealer and service station members are most likely to be in a franchise relationship with a larger party. Here, we focus our discussion on the new vehicle dealer sector.

New vehicles – those manufactured and imported specifically for the New Zealand market – are sold by independent businesses (dealers) who hold a franchise from the vehicle brand representative (often a subsidiary company of the foreign parent[5] – eg Toyota or Nissan – or an exclusive distributor business)[6]. It is not unusual for a dealer business to enter into franchise arrangements with several different vehicle brands[7], although franchise agreement terms may mean other franchisor's consent is required for multiple branded sites.

NZFTC's work a decade ago showed us the problems vehicle dealers face. Many of the issues raised then continue to exist here in New Zealand and across the Tasman. The NZ concerns were recently corroborated by the Australian Automotive Dealer Association (AADA)'s *Inquiry into the Operation & Effectiveness of the Franchising Code of Conduct*[8].

There is an inherent imbalance in the levels of bargaining power between the franchisor and the franchisee. Franchise agreements frequently include terms such as:

- The right for the franchisor to terminate the contract for any reason on short notice - historically "90 day no reasons" clauses were common in motor vehicle dealer franchises, and although they are less prevalent now franchisors generally preserve a similarly one-sided right to terminate in some way or another;
- The requirement for the franchisee to purchase certain amounts of the franchisor's products;
- Complex payment and rebate arrangements, which obscure actual prices and tend to shift risk and costs associated with discounts or payment delays onto retailers/dealers/franchisees;
- The requirement for the franchisee to waive many of their rights under the Personal Property Securities Act; and
- The right for the franchisor to unilaterally vary the terms of the contract on short notice through requirements to comply with user manuals/other directives or agree to new/current terms, or otherwise.

The franchise industry in New Zealand is self-regulated. Although there is a Franchise Association of New Zealand (FANZ) which has a Code of Practice, not all franchisors are members of FANZ. A review of FANZ's website member directory indicates that none of the major fuel brands are members, nor are any vehicle brands or distributors[9]. [10]. In any case

[5] Vehicle manufacturers are sometimes referred to as the Original Equipment Manufacturer or "OEM".

[6] In some cases, the brand representative or subsidiary will operate retail vehicle sales (or wholesale to fleet purchasers).

[7] In the answers to specific questions below we will address the concept of relative business size triggering protections against unfair business terms and conduct, as opposed to setting a specific definition for "small business".

[8] AADA Inquiry into the Operation & Effectiveness of the Franchising Code of Conduct, May 2018, available at https://www.aada.asn.au/wp-content/uploads/2018/10/Inquiry-into-the-Operation-and-Effectiveness-of-the-Franchising-Code-of-Conduct-May-2018-update.pdf

[9] See https://www.franchiseassociation.org.nz/members_listing/?level=10808801 accessed on 21/02/2019

[10] See https://www.franchiseassociation.org.nz/members_listing/?level=10808801 accessed on 21/02/2019

it appears that a voluntary organisation like FANZ lacks the teeth that legislation/regulation would provide.

MTA is not suggesting a fully formed Franchising Code of Conduct be implemented in New Zealand at this time. However, we do consider that strengthened protections against unfair conduct and unfair contract terms could have a similar positive effect on the rights of franchisees. If this process does not result in the adoption of such protections, MTA will take steps to further pursue the development of a more wide-ranging franchise code.

AADA's 2018 *Inquiry into the Operation & Effectiveness of the Franchising Code of Conduct* (*Inquiry*) acknowledged the structural power imbalance between car manufacturers (franchisors) and franchised new car dealers (franchisees). In Australia, 85% of car dealership businesses are owned by individual operators or family groups. While we do not have the exact data for New Zealand, based on MTA's history with vehicle dealer members, we consider it likely that a similar composition exists here.

The Inquiry notes that success in the highly competitive industry of car dealing is by no means assured, and franchised new car dealers often run on razor thin profit margins. Dealers who enter into a franchise agreement with OEMs are given the exclusive right to market and sell new vehicles and associated services within a specific geographic location. In return, dealers are bound by the franchise agreements, the terms of which are vey much skewed in favour of the OEM. The imbalance in relationship is reflected in a range of typically one-sided terms and practices, including:

- No security of tenure, with dealers not always given a right of renewal – OEMs/franchisors often have far more extensive rights of termination, with franchisees having few (if any) such rights (perhaps only in the case of franchisor insolvency etc);
- Non-renewal notices which give dealers only a few months' notice that an agreement will not be renewed, leaving very little time for a franchisee to make plans either to find another franchisor or close completely.
- Inadequate capital expenditure protections; for example, a dealer will often be required to fund a store refit to line up with the franchisor's new fitout instructions (due to a brand 'refresh'; new colours or logo).
- Franchisee obligations to accept and seek to comply with changes in sales expectations and/or marketing strategies, even where new "head office" angles might not fit local operations;
- Franchisor exertion of power over authorised repair arrangements which are often part of dealer/repairer franchisees, where franchisees may be forced to accept unreasonable margins or trading terms in respect of car sales in order to maintain their status as an authorised repairer, or where an outgoing dealer franchisee may be excluded from access to authorised parts necessary for repair work; and/or
- End of term arrangements where manufacturers may not buy back vehicle stock, parts, tools or equipment once an agreement expires or is terminated. This leaves dealers vulnerable to further financial hardship.

An OEM/franchise has considerable leverage over a franchisee, particularly where the franchisee has invested substantial funds setting up a compliant branded site and business, on terms that leave the franchisee vulnerable to termination by the franchisor on a whim. Even large well-established franchisee/retail businesses (including well-performing operations) are vulnerable to being arbitrarily culled in a restructure by a substantial franchisor/supplier, with little or no contractual or other legal protection given their one-sided contract terms. Small/medium sized businesses are typically even more vulnerable.

Service provider

The last contract category we consider is that of a service provider to a larger business operation. MTA collision repair members most represent this category[11].

The collision repair industry in New Zealand is heavily controlled by insurance companies, with the three main players being IAG (State, AMI, Lumley & NZI), Suncorp (Vero & AA Insurance) and Tower Insurance. There are several other small players such as YOUI, FMG, MAS, Zurich and Toyota Insurance.

The Collision Repair Industry in New Zealand consists of around 800 business, with the vast majority of these being privately owned small businesses with staff numbers of 20 or less.

Most people will be familiar to how this sector operates, at least in terms of how the public interacts with their insurer. A vehicle owner sustains damage to their vehicle (either through their own driving or the act of another person) and they seek repair of the car. Insurance cover will pay for the costs of this repair work. This sort of "insurance work" makes up around 80 percent of all collision repair work in New Zealand, with the rest made up by vehicle restoration, custom painting and refurbishment of used imports.

The vehicle owner (insurance policy holder) can decide for themselves which collision repair business will fix their vehicle. Insurance companies prefer the policy holder to use a business within the insurance company's own approved repair network. To be considered part of an approved network, a collision repair business must meet a long list of criteria (above and beyond simply being qualified and experienced enough to competently repair a vehicle).

In an approved repairer network, the following issues arise:

- There is no negotiation on the term of the contract with the insurer, it is a take it or leave it contract. In many respects the same applies to the trading relationship generally – the insurer dictates the terms.
- Regardless of the actual damage on the vehicle and the actual work required for a particular repair, the contract has schedules that set out:
    - the time allowed to carry out certain types of repairs,
    - margins available on parts, freight and consumables used,
    - hourly pay rates and
    - paint prices.
- The above elements are not negotiable and must be accepted. There is some ability to add additional work if further damage is found, but it requires undertaking quite a

[11] Collision repair refers to fixing structural damage to vehicles (a.k.a. 'panel beating') rather than mechanical repair of engines and other moving parts.

process by the collision repair business and often results in minimal time being added to the repair.

- Some Insurers offer the policy holder a life time replacement warranty on repairs, which would be greater than the "reasonable" goods and service guarantees available to the consumer under the Consumer Guarantees Act and which will often differ from the repairer's own usual terms and conditions. Approved repairers are expected to honor whatever additional warranty the insurer has offered their insured.
  - MTA collision repair members report that, even *several years after* the initial work was performed, the collision repairer is often required to pay for remediation of these late-developing issues.
- Under the *Land Transport Vehicle Repair Rule 1998* the repairer (not the insurer) is responsible for ensuring that all repairs meet (or are within a safe tolerance of) the state of the vehicle when manufactured. Nevertheless, the contract with an insurer may require compliance with repair instructions *issued by the insurance company*, even if these differ from the approved vehicle manufacturer requirements.
- Collision repairers are required to act in good faith when dealing with the insurer, its staff and customers, yet there is no requirement for the insurer and its staff to act in good faith when dealing with the repairer. This has led to a very one-sided relationship, especially when repairers are dealing with insurance company assessors or insurer appointed loss adjusters. Many members report a feeling that it is 'the insurance company's way or the highway'. Collision repairers are reluctant to complain or push back as they are concerned that they will lose their insurance contracts/status as an approved repairer, or impact adversely on the amount of work they do for the insurer.
- In order to gain an insurance contract, a collision repairer must first be compliant with the insurance company's site requirements. This requires collision repairers to have (among other things) a presentable building with customer waiting areas and toilets that are separate from the staff areas, adequate car parking, specialized repair and paint equipment. This all comes at a great cost to the Collison Repair business. But becoming an approved site is not a guarantee that they will receive any set level of work, or indeed ***any*** work, from the Insurance Company.
- Payment of invoices is stipulated in contracts, yet Insurers often do not stick to these terms and there is no penalty on the insurer when they exceed these timelines. Collision repairers are often small businesses and cannot afford to have payments delayed by insurance companies as it then goes on to affect their suppliers and staff. Equally, these small businesses do not have the commercial leverage to insist on payment on time, and it is perceived that involving debt collectors or the Courts would impact on their status as an approved repairer.

  MTA is aware of contracts with 10-day payment terms where the insurer has not paid until almost 60 plus days after receipt of the invoice.

- Strict requirements on how parts must be sourced. In many cases, if parts are not obtained through the Parts Trader platform[12] then the insurer will not pay for them. While the recent introduction of Parts Trader has provided convenience for some businesses, other businesses have established long-lasting business relationships with local suppliers that are now being affected.

Conclusion

Having provided general comments and descriptions of arrangements that concern MTA, we now move to responding to the specific questions raised in the discussion paper.

[12] https://www.partstrader.us.com/ - PartsTrader is a great NZ success story. It is an online marketplace that provides collision repairers with a single source for procurement of parts from leading OEM dealers, parts recyclers, and alternative parts suppliers. Repairers submit a package of requirements for a repair job and parts suppliers then bid to supply them – the repairer can then select the combination of price and other terms (e.g. delivery) that best suit their needs.

Responses to specific questions in Discussion Paper

1. What types of unfair business-to-business contract terms are you aware of, if any? How common are these?

Unfair business-to-business contract terms faced by MTA members can be classified into three broad categories – supply arrangements, franchise arrangements and service provider arrangements.

Based on accounts from our members, unfair terms are widespread across the motor trade. Confidentiality limitations in contracts mean that we must be careful and exercise restraint in divulging member-specific details. For service stations, one problem we know MTA service station members face is "cash on delivery" provisions, often in the magnitude of $10,000 - $15,000 for deliveries of fuel.

Other provisions include restraints on operational activities, onerous payment terms, lack of ability to prosecute infractions by the larger party, one-sided trading/operational arrangements, obligations to accept changing trading/operational arrangements, and one-sided renewal/termination terms.

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

Unfair contract terms cause small-to-medium businesses to be at a disadvantage when compared to their larger counterparts. It leaves the smaller party (often a "mum & dad" sized operation) at the mercy of every whim of the larger party (often a multinational, a New Zealand subsidiary of a multinational, or a substantial national entity), due to the rigidity of the standard form contract.

The smaller party in many cases relies on the larger party for their livelihood, whether it be through franchise agreements, service provision or supply arrangements. No room for negotiation means that the smaller party must take whatever they are offered, and this means that virtually any unfair contract term will be able to be imposed, and generally relied upon, by the larger party.

Using the "cash on delivery" example from the service station sector, requiring such a large payment immediately can impact a small business hugely. When a service station owner must make the payment, it can become much harder to manage cashflow throughout the rest of the month (or shorter period, depending on delivery schedules), especially as the fuel must be paid for before the cost is able to be recouped through retail sales.

This can seriously affect cashflow, because reconciliation of fuel loyalty cards and discounts are not done at the same frequency so there is a gap to fill.

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

Yes, government intervention is justified. Without a strong signal from government, there will be no impetus for the larger parties to make any change. As it stands, they are naturally benefiting from the arrangement, and will never change without regulatory mechanisms.

MTA acknowledges that a range of unfair business-to-business conduct is already prohibited, including misleading and deceptive conduct, misrepresentations, some forms of harassment, and anti-competitive conduct. But businesses still regularly face precisely the same sorts of “take it or leave it” unfair contract terms that have recently been addressed in the unfair contract terms reforms Fair Trading Act reforms, as they relate to consumers. Basically “take it or leave it” one-sided standard terms are understood to be common in respect of fuel supply contracts, new car/authorised repairer franchises and repairer arrangements with insurers as approved repairers.

Businesses dealing with one-sided terms that are imposed unfairly on a basically “take it or leave it” basis by a business with greater leverage will not be able to seek an “unconscionable bargain” claim or remedy, because the threshold level for such remedies in the Courts is set very high. Existing consumer legislation fills that gap for consumers, but not for business. Also, litigation cost and the likelihood of being “outgunned” or “burned off” by a more substantial counter-party leaves few viable options for businesses with less bargaining power to seek remedies in novel situations. Clarification of the law in this area would at least give businesses a clear yardstick as to what they can expect, some reasonable prospect of requiring fair business-to business contract terms and relief from one-sided contract terms.

4. What types of unfair business-to-business conduct are you aware of, if any? How common is this type of conduct?

Some examples have been outlined above already. Unfair contract terms give businesses more scope, and more leverage, to conduct their business to business (or B to b) trading unfairly. Motor vehicle dealer/authorised repairers, and fuel suppliers, are accustomed to “toeing the party line” when trading terms and conditions, offerings and arrangements, are changed by head office without reference to the franchisee/local conditions.

The imposition of new terms of business is not uncommon. Even further to that, new vehicle dealers can be told to supply their customer list details to the vehicle distributor. This is not just for the new vehicle purchasers, but also for service customers owning a vehicle of that brand, regardless of where the vehicle itself was originally purchased.

As outlined under the service provider heading above, requirements to act in good faith when dealing with the insurer, its staff and customers exist, yet there is no requirement for the insurer and its staff to act in good faith when dealing with the repairer. This has led to a very one-sided relationship when repairers are dealing with insurance company assessors, there is a feeling that it is the insurance company’s way or the highway. If complaints are made, collision repairers feel that they will lose their insurance contracts/approved repairer status.

Further, we have been informed (but have no evidence) of insurance companies pressuring consumers to choose a collision repairer within the insurer’s own approved network. The pressure includes making unsubstantiated claims about the health and safety practices of the consumer’s chosen repairer or offering reduced excess payments if the approved network repairer is used.

Another example of unfair business-to-business conduct which we have heard about anecdotally and in confidence involves a fuel brand supplier opening an unmanned service station which is selling fuel for less than is possible (and allegedly less than the “buy” price) at the nearby existing manned station with which the fuel supplier already has an arrangement.

Another example which we have heard about anecdotally and in confidence involves an MTA member who fits componentry to vehicles. This member had a dispute with a company who acts as a broker between the insurance company and the company working on the vehicle. This company appeared to have shareholders in common with big players in the insurance industry and queried a long-held charge out rate of the member. The company then refused to pay the price and demanded to be told the member’s cost price. It is not normal business practice to share cost prices with consumers or third parties, and the MTA member business in question refused to show the cost price. The claims company told the independent business that they would authorise a payment for all outstanding sums if the business supplied cost pricing. This leaves the independent business in a very difficult situation. The independent business cannot use a debt collector as the amount owing is contested, so the only option is to engage in a long process via the Disputes Tribunal. The terms of the specific contract may not be unfair or oppressive, but the conduct implementing the contract is unfair.

While MTA is not able to determine from the facts provided the extent of the relationship between the claims company and the insurer, if it is one of agency then the actions by the claims company could be inferred to be a misuse of market position by the insurance company. At the least, it appears that the broker entity is exerting unfair leverage. The proposed regulatory regime could prevent or remediate such conduct.

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

From a supply perspective, if the supplier offers differential or predatory pricing to other similar branded sites, this can result in the retailer suffering. Their business is affected because they cannot compete with the pricing offered to the other site. Similarly, issues arise if sales/volume targets, or stock offerings/pricing incentives, are changed unilaterally; that may impact adversely on some sites. A fuel supplier that is suddenly required to honour some sort of fuel/loyalty/discount card scheme arranged by the wholesaler/supplier may find that erodes any possible margin. A car sales yard that was having success selling a particular car at a particular price point may be adversely impacted if that car is no longer available or if the price point changes, to suit the wholesaler/supplier; in some cases, such changes are not fairly implemented. Although a supply arrangement can sometimes be separate from the franchise agreement, in situations where it’s related to a specific product (e.g. a certain brand of fuel or vehicle) this will also affect franchisees.

6. Is government intervention to address business-to-business conduct justified? Why/why not?

Government intervention to address unfairness and poor conduct would improve trading relationships, and competition, at the retail level. An unfair contract terms regime would reduce the leverage available to big business in “B to b” relationships. But further

constraints will also be required to impact ongoing conduct in trade, which is a significant issue.

Larger companies are imposing homogenous, strict terms and conditions across whole sectors, which prevent innovation and competition. Smaller businesses are unable to seek efficiencies in operations that align with their own goals and resources, but instead must allocate resources to achieving another company's objectives (eg dealer site refit costs, collision repair time & rate schedules, and long-term fuel supply arrangements). Many of those constraints and trading conditions are imposed through ongoing trading conduct (not necessarily the underlying contract itself), shifting the balance even further in the favour of the wholesaler/supplier/franchisor.

If there was the ability for the retailer to not only prevent that immediate unfair conduct but also in appropriate cases (where the unfair conduct is more serious) to terminate the underlying contract, then traders adversely impacted by unfair conduct would have the option to seek to be released from the unfair binding terms and conditions and unfair conduct, to seek a better deal (for themselves and their customers).

MTA will not comment on questions 7 – 9 at this time, as our focus is on business-to-business relationships experienced by MTA members.

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?

Overall yes, we do agree. Criterion 2 – 5 (which specifically mention business) are thorough.

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

We agree that having a high-level prohibition provides a safety net, and that catching conduct which is particularly egregious and not addressed by other more specific consumer protection provisions would be preferable.

12. What are the advantages of Options 1A, 1B and 1C? Which option, if any, do you support?

We would lean towards supporting Option 1A, a prohibition against unconscionable conduct. As we have earlier discussed, we consider Australia's model workable in the New Zealand context.

However, if it is accepted that unconscionable conduct (1A), oppressive conduct (1B) and unfair practices (1C) are all examples of undesirable trading conduct, it is difficult to see why *only* one element would be regulated. It is accepted that there will be considerable overlap between each element, but there will be some undesirable trading conduct that would be caught by each of the options that would not be caught by the others. In that context, might it be preferable to regulate against all three types of undesirable trading conduct?

Otherwise, if only one type is regulated is there a risk that regulations would be tacitly accepting the other types? One option might be a regulatory regime focussed primarily on prohibiting one type of undesirable trading (for example unconscionable conduct) but which also captured the other types (say, oppressive and unfair) in some form of catch-all or basket clause.

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.

Yes, a definition should be included in statute to give as much clarity as possible. Care must be taken to ensure that the definition is accessible and clear to "big" businesses with a platoon of lawyers and small businesses with few legal resources.

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

Yes it should. If not, what would otherwise be considered unfair conduct may be "hidden" in the contract where it could then sit without fear of being caught under unfair conduct legislation. Also, if contract terms *and* conduct appear to be undesirable, the affected party ought to have the option as to whether to challenge, the contract terms, the conduct or both. It is for this reason that MTA prefers Package 4.

17. Should any protection against unfair conduct apply to consumers only, consumers and some business (and if so, which ones), or all consumers and business

For businesses, we think where there is a material imbalance in the negotiating power between the relevant business, determined on a case by case basis, as long as this subjective metric is applied consistently. All consumers should have this protection.

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?

Yes, they should be carried over. Consistency between these pieces of legislation will aid in workability and understanding.

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?

Please see our answer to question 17 above.

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

There are situations where even a small business (such as a service station) will have to sign a contract for a high value product (e.g. fuel) but involving low margins such that in terms of profit/scale they are still effectively relatively small businesses (despite handling relatively high gross transaction values). The same may be so in relation to some small car retailers, transacting substantial gross transactions but for modest margins. These businesses are

likely to in many respects still have the same level of sophistication and business systems as other small businesses operating with similar overall profitability, and therefore should still be afforded the UCT protections. It is hard to define “small” in the varied contexts of contractual relationships and parties. A small service station retailer may still be required to strike a long-term supply arrangement with an aggregate (lifetime) contract value in the millions. However, the business itself may net less than $100,000 in annual profit. The size of the transaction does not reflect the business sophistication and capabilities of the counterparties.

A failing in the NZ business education system is a lack of operational training for business owners. Many repair shops are run by extremely competent technicians who may not be particularly comfortable the back-office component of a business. Their ability to negotiate complex contracts, while still delivering quality technical services to customers, will in many cases be limited by their level of business knowledge, and by their business’s limited capacity to bear the costs associated with seeking independent specialist advice.

As well, while some franchise car dealers can be sizeable operations (number of cars sold, staff, etc), the dealer operator is relatively small when compared to the multinational counterparty (or NZ branch of that counterparty) delivering millions of vehicles worldwide, or even a substantial nationwide distributer.

Factors other than transaction value, including relative bargaining power, party positions and capability, and whether terms are negotiable, would better inform when UCT provisions should apply.

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?

Penalties need to be appropriately strong to encourage widespread compliance, so that the cost of compensating for the unfair contract is not simply worked into the cost of doing business. Small/medium businesses in particular, but also larger businesses in unfair/unequal bargaining situations, may not be able to afford to take on David and Goliath legal disputes to establish fair contract terms. Some level of enforcement will be required to seek to impose new norms and standards, and to ensure that compliance is encouraged by a regulatory regime that has teeth when required.

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

We prefer Option 4. We agree with the Discussion Paper that it provides the greatest protections against unfair practices while still seeking to facilitate pro-competitive, welfare enhancing practices by businesses. The Options Package needs to go further than simply minimising risk.

NATIONAL CONTACT DETAILS

Physical address
Level 12,
Nokia House
13–27 Manners
Street Te Aro,
Wellington 6011

Postal address
PO Box 9244
Marion Square
Wellington 6141

Phone
04 385 8859

Members toll free phone
0800 001 144

Mediation Line
0508 682 633

Fax
0800 000 695

Email
mta@mta.org.nz

Website
mta.org.nz