NEW ZEALAND
BANKERS ASSOCIATION

Submission

to the

Commerce Commission

on the

Unfair Contract Terms Guidelines Draft

14 October 2014

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Submission by the New Zealand Bankers' Association to the Commerce Commission on the draft Unfair Contract Terms Guidelines.

About NZBA

1. NZBA works on behalf of the New Zealand banking industry in conjunction with its member banks. NZBA develops and promotes policy outcomes which contribute to a strong and stable banking system that benefits New Zealanders and the New Zealand economy.

2. The following fourteen registered banks in New Zealand are members of NZBA:
   - ANZ Bank New Zealand Limited
   - ASB Bank Limited
   - Bank of New Zealand
   - Bank of Tokyo-Mitsubishi, UFJ
   - Citibank, N.A.
   - The Co-operative Bank Limited
   - Heartland Bank Limited
   - The Hongkong and Shanghai Banking Corporation Limited
   - JPMorgan Chase Bank, N.A.
   - Kiwibank Limited
   - Rabobank New Zealand Limited
   - SBS Bank
   - TSB Bank Limited
   - Westpac New Zealand Limited.

Background

3. NZBA is grateful for the opportunity to submit on the draft Unfair Contract Terms Guidelines (Guidelines) on the recent amendments to the Fair Trading Act 1986 (FTA).

4. NZBA commends the ongoing commitment to meaningful consultation and engagement and appreciates the invitation to participate in this consultation.

5. The following submission makes some brief comments on the discussion document.

6. If you would like to discuss any aspect of the submission further, please contact:

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Transparency

7. Transparency is relevant to the prohibition on unfair contract terms in two ways. First, in determining whether a term is unfair a court must take into account the extent to which the term is transparent under the new section 46L(2) of the FTA. Secondly, a court may not declare a term to be unfair to the extent that it sets the upfront price payable under the contract. The new subsections 46K(1)(b) and (2) provide that a price can only be considered to be an upfront price to the extent that it is transparent.

8. The Guidelines state:

> *A term will not be transparent if it is obscured, hidden in fine print or schedules, found on a different webpage or different part of a document from other similar terms, or if it is phrased in complex legal or technical language.*

9. NZBA is concerned that the Guidelines could be interpreted in such a way that would deem any incorporation by reference to a schedule, a different part of the document or a separate document / brochure or to a webpage to not be transparent and therefore unfair. Like many businesses, banks often incorporate terms and conditions into contracts by referring to a schedule, to different parts of the document or to a separate document / brochure or to a webpage by name and location. For example, a product might be covered by a document setting out general terms and conditions and a separate fees and charges brochure. It is often expedient to group information subject to change, such as upfront fees, in an appropriate section in the document, or in a schedule or linked webpage. Such grouping may also enhance transparency and aid consumer understanding of material terms. This is particularly prevalent in the online space.

10. NZBA would like the Guidelines to confirm that material located in a schedule, in a different part of the document or a separate document / brochure or on a webpage and incorporated by reference will be transparent if the material and its location is adequately described. We note that other areas of law facilitate incorporation by reference, such as the Securities Act 1978 and Financial Markets Conduct Act 2013.

Onus Issues

11. For the purposes of s 46L(1)(b), a term will be presumed not to be reasonably necessary to protect the legitimate interest of the party who would be advantaged by the term, unless that party can prove otherwise.

12. In paragraph 45, it is suggested that any advantaged party seeking to claim reasonable necessity "*faces a high threshold, and will need to show that the interest being protected by the term: (i) is a legitimate interest requiring protection; and (ii) cannot reasonably be protected by fairer means.*"

13. NZBA submits that this sets the threshold at a level which is higher than that required by the legislation – in particular, the second limb will place an onus on parties to give consideration to all other alternatives by which they could seek to protect their interest. On this point, the legislation only requires a court to be satisfied that the term "*is not reasonably necessary in order to protect the legitimate interests of the party who would be advantaged by the term*".

14. Under s 46L(3), the onus will be on the advantaged party to prove that the term is reasonably necessary, but there is no requirement in the legislation for the advantaged party to also prove that its interests cannot be protected by fairer means. In our view, there is no basis in the legislation for this guideline.

15. The higher threshold suggested in the Guidelines to give due consideration to not only whether a term is reasonably necessary, but also analyse all possible alternatives, is likely to lead to increased compliance costs.

16. In addition, we note that in the Australian ACCC guidelines there is no equivalent requirement. Instead their guidelines state that "*this limb requires that the party advantaged by the term provide evidence to the court to demonstrate why it is necessary for the contract to include the term. Such evidence might include material relating to the business's costs and business structure, the need for the mitigation of risk or particular industry practices to the extent that such material is relevant*". NZBA submits that this approach is more faithful to the FTA.

Enforcement Approach to Price Terms – Penalties

17. Section 46M(c) confirms that a penalty in New Zealand can only arise in circumstances where there has been a breach or termination of the underlying contract. However, the draft Guidelines discussion of the manner in which a "price term" is determined potentially confuses the question of whether s46M(c) is relevant or not. NZBA submits that the Guidelines should be amended to provide a neutral starting point for the assessment of contractual provisions and that the Commission's enquiry into whether a term is a penalty should be confined to amounts payable for breach or termination. In order to achieve this neutral starting point, we suggest the following:

    a. amend the example at the end of paragraph 82 to delete the final sentence. There is no suggestion that the $250 is payable for a breach of contract or termination, so the question of whether it is a penalty does not arise (at least in the context of section 46M(c));
    b. remove paragraphs 83 through 85;
    c. amend paragraph 86 to read “In relation to unilateral penalty terms, the Act states that:”;
    d. amend paragraph 91 to read “If it is not clear whether an amount payable by a consumer for breach or termination is a penalty or part of the upfront price, we

are likely to require evidence from the business that seeks to justify the term."; and

e. amend paragraph 92 to read "We will look at a term carefully to assess whether it does under law penalise or have the effect of penalising, one party for a breach or termination of the contract".

18. We submit that as amended, this description starts from a neutral point by setting out the wording of the legislation, factors based on current NZ law that are to be considered as to whether a term is a penalty and highlights that terms should be assessed on their facts and circumstances.