



Submission to the

Ministry of Consumer Affairs

on the

**Consumer Law Reform Additional Paper –
September 2010 – Unfair Contract Terms**

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Contact: Ashlar Colebrook
Policy Advisor
New Zealand Bankers' Association
ashlar.colebrook@nzba.org.nz
DDI: 04 802 3350

SUBMISSION BY THE NEW ZEALAND BANKERS' ASSOCIATION TO THE MINISTRY OF CONSUMER AFFAIRS ON THE CONSUMER LAW REFORM ADDITIONAL PAPER – SEPTEMBER 2010 – UNFAIR CONTRACT TERMS

1. Thank you for the opportunity to comment on the recommendations in the *Consumer Law Reform Additional Paper – September 2010 – Unfair Contract Terms* (the Supplementary Paper).

ABOUT NZBA

2. Established in 1891, the New Zealand Bankers' Association (NZBA) is a non-profit unincorporated association funded by member banks. In conjunction with its members, NZBA develops and promotes the banking industry viewpoint in policy discussions and in the media. NZBA also facilitates good practices in the banking industry.
3. Membership of the NZBA is open to any bank registered under the Reserve Bank of New Zealand Act 1989. This submission is made on behalf of the following members of the NZBA:

ANZ National Bank Limited

ASB Bank Limited

Bank of Tokyo-Mitsubishi UFJ Limited

Citibank, N A

The Hongkong and Shanghai Banking Corporation Limited

Rabobank New Zealand Limited

TSB Bank Limited

Westpac New Zealand Limited.

SUBMISSION

4. The Ministry has released the Supplementary Paper in response to criticism from submitters on the Consumer Law Reform Discussion Paper 2010 (Discussion Paper) that the proposal to include unfair contract term provisions in the Fair Trading Act 1986 did not establish a problem and therefore justification for regulatory intervention.
5. The Supplementary Paper reviews five Australian reports and papers. The review provides some background to explain why unfair contract terms were adopted in Australia. However, Supplementary Paper provides no further evidence of a problem, or further analysis of the situation, in New Zealand.
6. The main thrust of the Supplementary Paper is that:
 - (a) in Australia legislators saw fit to pass unfair contract term provisions;
 - (b) there is no reason to believe that the situation in Australia is different from the situation in New Zealand;
 - (c) in absence of New Zealand evidence or investigation, we should adopt Australian-like unfair contract term provisions.
7. Australia has only recently introduced national legislation for credit contracts (which came into force in July 2010) and consumer rights (to come into force in January 2011). Their unfair contract terms provisions were adopted as part of that national legislation package. That legislation was introduced to both provide consumer rights for Australians nationwide and to ensure harmonisation across the states. The lack of these specific regimes nationally in Australia made for stronger reliance on their Trade Practices Act 1974.
8. Many of the problems Australia is now correcting were addressed in New Zealand much earlier. New Zealand has had national consumer legislation for decades notably the Credit Contracts Act 1981, (replaced by the Credit Contracts and Consumer Finance Act 2003), the Fair Trading Act 1986 and the Consumer Guarantees Act 1993.

9. The Supplementary Paper documents issues for consumers in Victoria. For example, many do not read contracts, those that do read contract terms are likely to misunderstand or overlook important terms, and Victorian consumers generally believe they have no power to challenge unfair contract terms because the contracts are legally binding.

10. In 2006, the Ministry of Consumer Affairs undertook a survey in New Zealand, involving a nationwide random sample of 1000 people aged 18 years and over. That survey found that:

... [New Zealand] consumers are, on balance, generally confident with the cross section of businesses they deal with. Consumers do not on the whole expect to experience frequent or wide-ranging risk. In other words, consumers perceive the New Zealand marketplace as a relatively benign trading environment. This is not to say that problems do not arise. From the consumer's point of view, whether correctly or incorrectly interpreted, adverse effects are quite common. However, they rarely have an economic impact and many are readily resolved by the consumer approaching the trader.

11. This result is encouraging, and we have not seen any evidence that the position has changed. It suggests that consumers in New Zealand do not have the same problems as their Victorian counterparts.

12. Nevertheless, increasing consumers' awareness of their rights (and educating business about what constitutes unfair contract terms) would be more empowering than a power for regulators to seek injunctions.

13. NZBA submits that if a particular problem exists in a certain industry or industries, (which, as noted above, has not been made out) it would be best if those problems were addressed through industry-specific self regulation, or if that is not practicable for reasons specific to a particular industry, through legislation. Targeting problem areas is preferred over amending general legislation such as the Fair Trading Act.

14. Industry-led self-regulation through voluntary codes of practice will usually be a more efficient and effective response to industry-wide consumer issues. It allows a response to be:

- refined in a way that is most relevant to particular consumer and product segments;

- updated faster (since it does not have to compete for government resources for legislative changes and is not subject to government prioritisation of initiatives on the legislative calendar); and
 - amended more frequently, in line with industry-initiated reviews and following feedback received through industry complaints schemes.
15. NZBA notes that the paper contains little cost benefit analysis.
 16. The proposal could undermine certainty for both parties since neither the consumer nor the supplier will know what the bargain is and this is likely to create significant costs.
 17. We would caution about assuming that there will be minimal cost to business and that any cost will only be transferred to consumers in the short term. Particularly in sectors with a high volume of standard form contracts, the cost will be high.
 18. Referring unfair contract terms to the Disputes Tribunal will also result in legal uncertainty and could encourage frivolous and vexatious challenges. Commercial parties cannot be represented, tribunal referees do not have to decide on the basis of strict legal interpretation, and there are no substantive appeal rights. This is likely to result in indeterminable individual variations to standard contracts each settlement or interpretation different from the last.
 19. Financial products and services are heavily regulated in New Zealand. There are many regulatory frameworks and regulators with overlapping jurisdiction, such as:
 - The new financial advisers' regime
 - Securities law (currently under review)
 - The Code of Banking Practice
 - The Securities Commission
 - The Commerce Commission
 - The Banking Ombudsman.
 20. In addition, in the banking industry, brand awareness and consumer concerns are significant drivers of how businesses contract and deal with consumers. Competition provides huge incentives for banks to deal with customers fairly.

21. Given that the Supplementary Paper provides no direct evidence of a problem in New Zealand, it seems unjustifiable to impose a broad-based legislative response, particularly when:

- Australia is following New Zealand in the consumer protection space, rather than the other way around;
- the *Legislation Advisory Committee Guidelines* discourages unnecessary legislation; and
- the *Government Statement on Regulation: Better Regulation, Less Regulation* maintains that Government will only legislate when required, reasonable and robust.

22. For those reasons, the NZBA does not support the Ministry's recommendations to:

- add unfair contract terms provisions to the Fair Trading Act;
- give the Disputes Tribunal jurisdiction to declare contract terms unfair; or
- give the Commerce Commission broad power to apply for injunctions to ban unfair contract terms by individual businesses or entire industry sectors.