NEW ZEALAND
BANKERS ASSOCIATION

Submission

to the

Commerce Committee

on the

Consumer Law Reform Bill

29 March 2012

Submission by the New Zealand Bankers' Association to the Commerce Committee on the Consumer Law Reform Bill

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Executive Summary

The New Zealand Bankers' Association (**NZBA**) appreciates this opportunity to submit on the Consumer Law Reform Bill (**Bill**) and we would welcome the opportunity to make an oral submission to the Commerce Committee.

NZBA welcomes consumer law reform initiatives which propose to improve the effectiveness of consumer protection regulation in New Zealand. NZBA recognises the efforts of the Ministry of Consumer Affairs to seriously consider the views of submitters and reflect some of them in the Consumer Law Reform Bill.

NZBA's submission reflects some outstanding issues from NZBA's previous submission to the Ministry of Consumer Affairs on the Consumer Law Reform Discussion Paper dated 3 August 2010 (**2010 Submission**), as well as the view that the impacts of adopting certain provisions in the Bill, for the purpose of aligning with Australian regulation, require further analysis. NZBA's key submission points are as follows:

- NZBA continues to support the exclusion of unfair contract terms and unconscionable conduct provisions from the Bill.
- Uninvited direct sales provisions contained in the Bill should not extend to financial products and services where there are already specific financial markets regulatory mechanisms in place.
- NZBA supports the new provision enabling parties in trade to contract out of certain Fair Trading Act 1986 provisions.
- It would be more efficient for only one regulator, the Financial Markets Authority, to have responsibility for the enforcement of provisions in the Bill which pertain to financial products and services.

About NZBA

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 safe and successful banking system that benefits New Zealanders and the New Zealand economy.

The following thirteen registered banks in New Zealand are members of NZBA:

- ANZ National Bank Limited
- ASB Bank Limited
- Bank of New Zealand
- Bank of Tokyo-Mitsubishi, UFJ
- Citibank, N.A.
- The Co-operative 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.

Issues

1. Trans-Tasman Alignment

NZBA submits that aligning legislation with Australia simply for the sake of developing a 'single economic market' is not appropriate nor is it sufficient to justify that approach without considering the practical implications it will have on the unique New Zealand environment.

NZBA supports the Government's commitment to high quality regulation to encourage "productivity and economic growth" [1]. As identified in the *Government Statement on Regulation: Better Regulation, Less Regulation*, the Government is committed to only introducing regulation once fully satisfied that it is "required, reasonable and robust"[2]. The need for adequate problem definition is also supported by the quality assurance criteria in the current Treasury Regulatory Impact Analysis Handbook, which includes asking, "Do the options offer a proportionate, well-targeted response to the problem?"[3].

While NZBA is generally a proponent of the 'single economic market' approach, any alignment of trans-Tasman regulation must be carefully considered. This necessitates recognising that New Zealand and Australia have unique operating and legislative environments and that this is entirely appropriate in specific cases. In particular, New Zealand already has a range of significant consumer protection measures specifically for financial markets regulation, including:

1. Securities Act 1978 (**Securities Act**)
2. Credit Contracts and Consumer Finance Act 2003 (**CCCFA**)
3. Financial Advisers Act 2008 (**Financial Advisers Act**)
4. Financial Service Providers (Registration and Dispute Resolution) Act 2008 (**FSPA**)
5. Code of Banking Practice
6. Commerce Commission
7. Financial Markets Authority
8. Reserve Bank of New Zealand, and
9. Banking Ombudsman.

Wholesale alignment of the Bill with the Australian approach will unnecessarily complicate this specifically regulated financial markets industry. It will also introduce onerous compliance costs by replicating regulation of already regulated businesses and financial products. To ensure that certain provisions in the Bill are 'required, reasonable and robust', further analysis is needed to consider the impacts that they might have on the unique New Zealand environment, and in particular, the established financial industry regulatory framework.

2. Unfair Contract Terms and Unconscionable Conduct

NZBA supports the Cabinet Economic Growth and Infrastructure's current decision to exclude the unfair contract terms and unconscionable conduct provisions from the Bill on the basis that there is not enough evidence that a problem exists and the need for further

1 http://www.treasury.govt.nz/economy/regulation.

2 Hon. Bill English and Hon. Rodney Hide, *Government Statement on Regulation: Better Regulation, Less Regulation* (17 August 2009), page 1.

3 The Treasury, *Regulatory Impact Analysis Handbook* (2 November 2009), page 39.

consideration of compliance costs. NZBA agrees with Cabinet's direction that the matter be revisited in July 2013 when the Australian experience can be reviewed.[4]

As addressed in the 2010 Submission, redress is already available under normal principles of contract law where a contractual term may be severed if it is unfair to one party and the existence of that term is not made reasonably clear to that party. Consumers are also adequately protected from unconscionable conduct and oppressive contracts under the CCCFA and existing common law. Further remedies are not required as the current New Zealand legislative and common law framework already provide sufficient consumer protection.

As discussed above, trans-Tasman alignment with these provisions should not be undertaken lightly and sufficient analysis is required to determine the impacts of such provisions on New Zealand before they are introduced. This analysis should identify the scale of the problem that exists in New Zealand and consider the costs and benefits of such provisions. NZBA concurs with Treasury's comment outlined in the Cabinet Economic Growth and Infrastructure Committee paper, noting the lack of evidence of a widespread problem with unfair and unconscionable contract provisions:[5]

> *Introducing unfair and unconscionable contract provisions will involve compliance costs for business and the few anecdotal cases identified in submissions suggest that the benefits of these provisions are unlikely to exceed the costs. These provisions also have the potential for significant unintended consequences in relation to the conduct of economic activity and contract enforceability. In light of these risks, Treasury recommends delaying decisions on introducing unfair and unconscionable contract provisions for two to three years to allow evidence from their introduction at the Commonwealth level in Australia to be considered.*

Consistent with this view, NZBA members have also indicated that unfair contract terms and unconscionable conduct provisions will create significant compliance cost for the industry without providing consumers with corresponding benefit. In order to reinforce NZBA's position of support for excluding unfair contract terms and unconscionable conduct provisions from the Bill, key extracts from NZBA's 2010 Submission to the Ministry of Consumer Affairs on the Consumer Law Reform Discussion Paper on 3 August 2010, are included as follows:

Unfair Contract Terms

When eroding the certainty of contract, a fundamental provision of contract law, the justification must be clear. Contractual certainty is an essential element of commercial contracts as it allows the parties to price risk in these transactions. In banking, the industry depends on the market's ability to efficiently price risk, which in turn engenders market confidence. If the agreed allocation of risk is subject to sudden change through the introduction of unfair contract terms provisions, businesses will need to increase costs to compensate. The same consumers the law is designed to protect will ultimately bear these costs.

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[4] Cabinet Economic Growth and Infrastructure Committee, Minute of Decision – EGI Min 10 (30/18), paragraphs 14, 15.1 and 15.2.

[5] Cabinet Economic Growth and Infrastructure Committee. "*Consumer Law* Reform" (1 December 2010), paragraph 114.

The prospect for standard contracts to be varied by the introduction of a prohibition on unfair contract terms has the potential to discourage the development and use of standard industry terms, because it would impose high levels of uncertainty in contractual arrangements. This would have the effect of diminishing the ability for businesses which rely on standard terms and conditions to run efficiently.

The balance accepted in standard homogenous transactions is that even if contract terms could be negotiated to absolutely match a consumer's individual situation, they are not. Contracts for common goods and services are standardised to reduce transaction costs. This is because the negotiation cost would outweigh the product return and thus could not be accommodated in the product or service sale price, making supply unprofitable. The size of the transaction dictates the use of standardisation of terms. For existing standard term contracts, these would need to be comprehensively reviewed. Banks in particular rely heavily on the use of standard form contracts and the size of this task will be massive.

Unconscionable Conduct

NZBA opposes the inclusion of a prohibition on unconscionable conduct in the FTA, for either consumers or small businesses, due to uncertainty about the term's meaning and a lack of evidence or problem definition to support such an amendment. As noted in the Discussion Paper, the legal test for unconscionability is difficult to meet. "Essentially a stronger party needs to be found to have taken advantage of a weaker party, to an extent which is 'against good conscience'." Further, the paper provides no evidence to support the proposal. A consumer survey undertaken in 2006 by the Ministry of Consumer Affairs involving a nationwide random sample of 1000 people aged 18 years and over found:

> *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.*

We have not seen any evidence that the position has changed since this survey.

3. Uninvited Direct Sales

NZBA submits that uninvited direct sales provisions contained in the Bill should not extend to financial products and services where there are already specific financial markets regulatory mechanisms in place. NZBA requests an exemption for financial products and services from the uninvited direct sales provisions on a product specific basis, where disclosure requirements for the product are already regulated by the CCCFA, Securities Act or Financial Advisers Act.

As discussed earlier, New Zealand has an established and specific legislative and regulatory framework to protect consumers entering into financial products and services. This protection extends to the extent and manner in which disclosure must be made to the consumer entering into the contract. The Securities Act provides a specialised consumer protection regime for debt securities. The CCCFA clearly prescribes both initial and

continuous disclosure requirements for consumer credit contracts, as well as an opportunity for consumers to cancel the contract after it is entered into during a 'cooling-off period'.

The general disclosure provisions contained in the Bill will provide minimal additional protection for consumers over financial products and services, as they are already regulated by more specific legislation. If the general disclosure provisions are applied to financial products and services, they will create unnecessary duplication of disclosure requirements and may prove to be more confusing for consumers. Where the regulatory mechanisms already contain sufficient consumer protections for financial products, there is no need to include these products in general consumer law.

In particular, NZBA is concerned that uninvited direct sales provisions contained in the Bill will affect certain bank functions which offer an important service to consumers, including out-bound calling made by bank call centres and any bank business that might take place outside of the normal business premises for the benefit of rural and provincial consumers, for example field days, trade shows, university orientation weeks or visits from mobile bank managers.

4. Contracting out of the Fair Trading Act 1986

NZBA supports the new provision enabling parties in trade to contract out of certain Fair Trading Act 1986 provisions.

Enabling parties in trade to contract out of such provisions recognises established principles of contract law and commercial flexibility where parties in trade should be free to contract with each other on whatever terms they see fit.

5. Enforcement

NZBA submits that it would be efficient for only one regulator, the Financial Markets Authority, to have responsibility for the enforcement of provisions in the Bill in respect of financial products and services.

NZBA notes that there exists an overlap between the Commerce Commission and the Financial Markets Authority enforcement of consumer protection laws. NZBA considers that the Financial Markets Authority is the preferable enforcer of consumer protection law in respect of financial products and services. The reason for this is that the Financial Markets Authority has the appropriate expertise and capacity to enforce consumer protection legislation over financial products and services which can be highly specialised and complicated. Having only one regulator to enforce consumer protection laws for financial products and services is also simpler from a consumer perspective.

NZBA considers that jurisdictional boundaries should be made clear in the Bill, clearly prescribing that the Financial Markets Authority will have responsibility for enforcing consumer protections for financial products and services.

If you would like to contact anyone in respect of this submission, please feel free to contact Matthew Herbert, Policy Adviser, New Zealand Bankers' Association on +64 4 802 3350 or by email at matthew.herbert@nzba.org.nz.