



**Submission to the**

**Ministry of Consumer Affairs**

**on the**

**Consumer Law Reform Additional Papers –  
October 2010 – (1) Referencing Good Faith in a  
Fair Trading Act Purpose Clause and  
(2) Unconscionability**

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**Contact: Ashlar Colebrook  
Policy Advisor  
New Zealand Bankers' Association  
[ashlar.colebrook@nzba.org.nz](mailto: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 PAPERS – OCTOBER 2010 - (1) REFERENCING GOOD FAITH IN A FAIR TRADING ACT PURPOSE CLAUSE AND (2) UNCONSCIONABILITY**

1. Thank you for the opportunity to comment on the recommendations in the *Consumer Law Reform Additional Paper – October 2010 – Referencing Good Faith in a Fair Trading Act Purpose Clause* and the *Consumer Law Reform Additional Paper – October 2010 – Unconscionability*.

## **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.
4. This submission is made on behalf of the members of the NZBA:

ANZ National Bank Limited

ASB Bank Limited

Bank of New Zealand

Bank of Tokyo-Mitsubishi UFJ Limited

Citibank, N A

The Hongkong and Shanghai Banking Corporation Limited

Kiwibank Limited

Rabobank New Zealand Limited

TSB Bank Limited

Westpac New Zealand Limited.

## SUBMISSION

### (1) Good Faith

5. NZBA strongly supports the outcome of the Ministry's analysis that any purpose clause to the Fair Trading Act 1986 should not include a reference to good faith. However, we wish to reiterate the reasoning made in our submission on the Discussion Paper.
6. We also note the Supplementary Paper states that one potential unintended effect of introducing a good faith provision is that it could widen the defences in section 44 to include honesty as well as reasonableness. We consider this illustrates the danger of introducing untested provisions when a clear problem has not been identified.

#### *Ministry Additional Questions*

7. In addition, the Ministry has requested feedback on whether:
  - (i) there should be a prohibition on contracting out of the Fair Trading Act 1986; and
  - (ii) knowingly withholding material should be a misrepresentation under the Fair Trading Act 1986.
8. NZBA considers a prohibition on contracting out of the Fair Trading Act 1986 entirely would hinder freedom of contract with unknown transactional costs and effects on economic development.
9. NZBA further cautions against adding a provision in the Fair Trading Act 1986 that knowingly withholding material information is a misrepresentation. This is inconsistent with the current legal definition of misrepresentation, would interfere with general contract law, and might best be covered in more appropriate legislation administered by other government departments (eg Contractual Remedies Act).

## **(2) Unconscionability**

10. NZBA members are obviously opposed to unconscionable conduct and NZBA members consider they do not behave in that manner currently.
11. NZBA reserves its position on the issue of unconscionability in the Fair Trading Act. NZBA notes that, in Australia, section 51 AAB of the Trade Practices Act 1974 excludes financial services from the ambit of sections 51 AB and 51 AC.

## **(3) Consultation Period**

12. NZBA believes that the consultation period of 2 weeks is insufficient and that at least 4 weeks consultation is reasonable and necessary to constitute adequate consultation on follow-up issues.