New Zealand Bankers' Association

Submission to the

Ministry of Consumer Affairs

on the

Consumer Law Reform Discussion Paper

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SUBMISSION BY THE NEW ZEALAND BANKERS' ASSOCIATION TO THE MINISTRY OF CONSUMER AFFAIRS ON THE CONSUMER LAW REFORM DISCUSSION PAPER

1. Thank you for the opportunity to make a written submission to the Consumer Law Reform Discussion Paper (Discussion Paper).

ABOUT NZBA

2. The New Zealand Bankers' Association (NZBA), established in 1891, is a forum for member banks to work together on a co-operative basis. It is a non-profit unincorporated association funded by member banks through subscriptions. Membership of the NZBA is open to any bank registered under the Reserve Bank of New Zealand Act 1989. Currently nine registered banks are members of the NZBA.

3. NZBA provides those services to members which may be most effectively undertaken on an industry basis. These services include:
    - Collective submissions on public policy and regulation which affect banks, in relation to, for example, taxation, consumer credit, privacy, terrorism and money laundering
    - Development of the self-regulatory Code of Banking Practice
    - Development of co-operative inter-bank procedures and standards for retail payment methods such as direct debits and automatic payments
    - Development of collective priority documents for securities over real and personal property.

4. Our members are:
    - ANZ New Zealand Limited
    - ASB Bank Limited
    - Bank of New Zealand
    - Citibank, N.A.
    - Hongkong and Shanghai Banking Corporation Limited
    - Kiwibank Limited

- Rabobank New Zealand Limited
- TSB Bank Limited
- Westpac New Zealand Limited.

SUBMISSION

5. This submission forms the collective view of NZBA's member banks.

6. NZBA supports the objectives of the consumer law review to:
    - Introduce principles-based consumer law
    - Simplify and consolidate the existing law
    - Harmonise consumer law of Australia and New Zealand, but only where there is a demonstrable net benefit to New Zealand.

7. Our submission focuses on the following matters of concern:
    - Whether financial products and services ought to be covered under general consumer laws or specific legislation and regulation designed for application to financial markets
    - The need for a full consultation process which takes into account significant changes in the financial sector including the new financial advisers' regime, the review of securities laws and the establishment of the Financial Markets Authority (FMA)
    - The need to provide robust evidence of the necessity for proposed legislative changes – achieving harmonisation with Australian law is not, of itself, a sufficient reason for legislative change
    - Terms used in the proposed purpose statements which will create uncertainty
    - Whether there is any need for consumer legislation to include proposals on unfair contract terms, unsubstantiated claims, unconscionable conduct or court enforceable undertakings
    - There may be other matters which should be considered in developing proposals for any reform of consumer law.

APPLICATION OF GENERAL CONSUMER LAW TO FINANCIAL SERVICES AND PRODUCTS

8. 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
    - The securities laws (currently under review)
    - The Credit Contracts and Consumer Finance Act 2003 (CCCFA)
    - The Code of Banking Practice
    - The Securities Commission
    - The Commerce Commission
    - The Reserve Bank of New Zealand
    - The Financial Markets Authority (FMA) (currently being established)
    - The Banking Ombudsman.

9. NZBA considers that, where the the regulatory mechanisms already in place for financial services and products contain sufficient consumer protections, there is no need for including these products and services in general consumer law.

10. There has been and continues to be significant change in the financial services industry. NZBA submits that the final form and impact of these changes as they relate to consumer law must be fully known before any changes are made to New Zealand's current consumer laws.

CONSULTATION AND POLICY PROCESS

11. The proposals in the Discussion Paper are substantial and, if implemented, would impact considerably on banks and other businesses. Accordingly, it is appropriate that full consultation occurs which takes into account significant changes in the financial sector including the new financial advisers' regime, the review of securities laws and the establishment of the FMA.

12. NZBA requests that the Ministry incorporates into its timetable for reform public consultation on any exposure draft of the legislation arising from this review, and

includes reasonable timeframes for consultation with affected parties as the review progresses. NZBA also encourages the Ministry to ensure that a robust quality assurance process is followed in undertaking the regulatory impact analysis required for implementing changes of the type suggested in the Discussion Paper.

13. NZBA submits that such consultation and analysis is essential to ensure that any law reform in this area delivers on its stated objectives and does not create unintended and unforeseen consequences.

CLEAR EVIDENCE REQUIRED FOR CHANGE

14. The proposals for change in the Discussion Paper appear more driven by a desire for trans-Tasman alignment than evidence of market failure and sound regulatory impact analysis. The lack of consumer recognition in consumer law legislation is not, of itself, a reason to amend existing law where there is no proven disproportionate ability for the consumer to utilise the existing legislation to seek appropriate redress.

15. Harmonisation with Australian law without sufficient objective analysis is likely to result in unintended consequences. NZBA supports harmonisation, where there is a demonstrable economic benefit to New Zealand. For example, in some areas harmonisation is clearly likely to be beneficial (e.g. financial reporting standards). In other areas competitive advantage may make harmonisation less compelling (e.g. tax and intellectual property).

16. NZBA submits there must be robust evidence of the need for proposed legislative change. Insufficient time has elapsed to allow for analysis of the outcomes from the recent changes to Australian consumer law. The Australian Consumer Law has only just been passed, with some aspects in force from 1 July 2010 and others to be implemented by the end of the year. Federal legislation for credit contracts is also new (the National Consumer Credit Protection Act, in force from July 2010), as is Australia's equivalent of a Consumer Guarantees type regime (the Competition and Consumer Act 2010, which will come into force in January 2011). New Zealand has had these latter regimes in place for over 20 years.

PURPOSE STATEMENTS

1. What are your views on including purpose statements in the Fair Trading Act, the Consumer Guarantees Act, and the Weights and Measures Act along the following lines:

- Fair Trading Act – "To promote consumer well being by fostering effective competition and enabling the confident participation of consumers in markets in which both consumers and suppliers trade fairly and in good faith."
- Consumer Guarantees Act – "To promote consumer well being in markets by:

  a) defining rights that give consumers confidence that their reasonable expectations about a good or service provided by a supplier or manufacturer will be met, including expectations about the good or service's performance, quality, purpose, or safety.

  b) defining rights for consumers to seek redress from a supplier or manufacturer where those reasonable expectations have not been met."
- Weights and Measures Act – "To promote consumer and business confidence and effective market competition through ensuring goods are exchanged using accurate measurement, and regulating measuring instruments in use for trade."

2. Are there other principles or objectives you think should be referred to in the consumer law(s)?

3. Should any purpose statement in the Fair Trading Act include a reference to consumers and suppliers trading in good faith, and for what reasons?

17. NZBA supports the inclusion of purpose statements in legislation where the objectives are clear and they offer flexibility for markets to function efficiently while providing adequate consumer safeguards. However, elements of the proposed purpose statements for the Fair Trading Act (FTA) and the Consumer Guarantees Act (CGA) are ambiguous and, rather than providing a guide to users to interpret the law, they may create confusion.

18. For both the FTA and the CGA, we submit that the concept of 'consumer well being' is undefined and unclear. The questions of what is 'well being', how it is to be 'promoted', and how does 'fostering effective competition result in 'well being' are not explained. We would like to see further elucidation of this concept.

19. The inclusion of the concept of 'good faith' in the FTA purpose statement is also problematic. NZBA does not support its inclusion. The Discussion Paper itself identifies some of the issues relating to its inclusion. It is a subjective and elusive concept which has not been consistently applied by the New Zealand courts. Its inclusion would introduce uncertainty to New Zealand consumer law and is inconsistent with the fundamental principle of freedom of contract.

20. Furthermore, we note the Australian Consumer Law does not include any similar high level consumer policy objectives and the concept of 'good faith' was considered for inclusion but omitted from the operational objectives adopted for consumer policy in Australia by the Ministerial Council for Consumer Affairs.

21. The introduction of a 'good faith' concept would also represent a significant shift in drafting philosophy. It would impose a positive obligation under general law. The standard approach under New Zealand law is to impose negative obligations under general law (e.g. the prohibition against misleading and deceptive conduct in the FTA) and positive obligations under specific law targeted to specific activities in problem areas and sectors (e.g. requirements for standard disclosure in the Credit Contracts and Consumer Finance Act 2003.)

UNFAIR CONTRACT TERMS

4. Do you support including unfair contract terms provisions in the Fair Trading Act along the lines of the Australian Consumer Law, and for what reasons?
5. Is it appropriate to include a "good faith" element in the definition of an unfair contract term (like the United Kingdom and Victorian legislation, and the Productivity Commission recommendation), or is the approach used in the Australian Consumer Law preferable?
6. Do you think the approach used in the Australian Consumer Law of providing examples of unfair contract terms would be appropriate for New Zealand law?

22. NZBA does not support the introduction of unfair contract terms provisions into New Zealand law. NZBA considers such a regime is unnecessary. Redress is already available under normal principles of contract law where a contract term

may be severed if it is manifestly unfair to one party and the existence of this term has not been made reasonably clear to that party. This failure to notify would reasonably likely be regarded as misleading and deceptive and is already subject to the FTA.

23. The introduction of unfair contract terms provisions is not supported in the Discussion Paper by evidence of a clear problem and corresponding policy rationale. No empirical evidence supports the need for the introduction. Instead, the lack of such evidence is noted.

24. As the inclusion of the proposed provisions would have the potential to create large costs and disruption for businesses in order to assess the impact of the regime and ensure compliance, a rigorous assessment of the benefits that would justify those costs is required. We would expect substantial further analysis to be undertaken on problem definition, and options and associated costs and benefits.

25. 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. 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.

26. In the absence of a clear problem definition, we also query how the proposal could be considered consistent with the proposed guide to making good legislation developed by the Legislation Advisory Committee (see www.justice.govt.nz/lac/pubs/2001/legislative_guide_2000/combined-guidelines-2007v2pdf in particular the terms of reference which, among other things, discourage the promotion of unnecessary legislation and guidelines around the need for a clearly defined product objective). We also note the Government Statement on Regulation: Better Regulation, Less Regulation (see www.treasury.govt.nz?economy/regulation/tatement/govt-stmt-reg.pdf) which

states that Government will only regulate once fully satisfied that it is required, reasonable and robust. We further note the principles underpinning the proposed Regulatory Responsibility Bill, in particular that legislation should not be made unless the need has been carefully evaluated and the benefits outweigh the costs.

27. The main reason advanced for introducing unfair contract terms provisions is a desire to achieve harmonisation with Australia. While NZBA supports moves that lead to closer economic relations between New Zealand and Australia, such moves must be appropriate to the New Zealand market, and there must be a clear policy rationale and economic benefit to New Zealand. As noted above, harmonisation in itself is not a sufficient reason for change. Harmonisation may also be complicated by differences in approach to various issues among Australian states, territories and the Commonwealth Government.

28. 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.

29. 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.

30. If a clear problem is identified and legislation is the most effective, efficient and proportionate response to the issues identified, NZBA submits:

- The prohibition should be limited to standard contract terms. In Australia and the United Kingdom, unfair contract terms provisions apply only to standard contract terms and do not apply to negotiated contracts.

- The prohibition should not extend to business contracts as there is a lower risk of unequal bargaining power inherent in this type of contracting. In Australia, the prohibition only applies to consumer contracts (i.e. contracts for the supply of goods and services to an individual whose acquisition is wholly or predominantly for the consumer's personal, domestic or household use).

- It would be helpful to include an indicative non-exhaustive list to aid decisions by the courts as to what is a standard form contract, as is the approach taken in the Australian legislation.

- There should be no requirement for the Commerce Commission to investigate every unfair contract term complaint: rather, it should be up to the Commerce Commission to decide how and when to take action.

- The concept of 'good faith' should not be included in any definition of an unfair contract term. In addition to the reasons already noted above in relation to the inclusion of 'good faith' in the FTA purpose statement, we note that the Australian Consumer Law does not include a 'good faith' element in the definition because it was considered to introduce too much uncertainty and subjectivity.

- A 'grey list' of types of terms included in Australian law should not be included. Such a list would affect most contracts for retail banking products and services which contain standard form elements for a variety of commercial reasons. For example, many insurance product contracts enable the provider to change the premium rates, usually subject to a notice period. Given that life insurance contracts can run for 50 years or more, such contractual flexibility is necessary.

UNSUBSTANTIATED CLAIMS

7. Should there be a general prohibition on unsubstantiated claims under the Fair Trading Act, and for what reasons? 8. Should any general prohibition on unsubstantiated claims (or any other preferred approach) be enforceable by the Commerce Commission and/or privately under the Fair Trading Act?

31. The Discussion Paper refers to the new Australian Consumer Law allowing the Australian Competition and Consumer Commission to issue substantiation notices to require providers to provide information in support of a claim, where such a claim may appear to contravene the law. NZBA does not support the proposal to give similar powers to the Commerce Commission. The main reason given in the Discussion Paper for this proposal is harmonisation with Australia which, as noted above, is not sufficient in itself. Further, the proposal is not appropriate for New Zealand as it would unreasonably transfer the onus of proof from the Crown to providers. As noted in the Discussion Paper, this would likely be a prima facie breach of the New Zealand Bill of Rights Act 1990. Such a requirement would also unreasonably increase costs on businesses.

32. NZBA also opposes the alternative option of introducing a general prohibition on unsubstantiated claims under the FTA. We submit that the current provisions in the FTA that prohibit misleading or deceptive conduct and allow the Commerce Commission to issue investigative notice seeking documentation provide sufficient consumer protection. There is insufficient evidence in the Discussion Paper that these provisions are not working.

UNCONSCIONABLE CONDUCT

17. Is it appropriate to include a prohibition on unconscionable conduct in the Fair Trading Act, along the lines of the Australian Trade Practices Act and the proposed Australian Consumer Law? 18. Should any remedies for unconscionable conduct be restricted to consumers or also available to businesses, and for what reasons? 19. Would it be more effective to amend the Fair Trading Act by applying the broader concept of

"oppression" from the Credit Contracts and Consumer Finance Act to the supply of goods and services generally, rather than amending the Fair Trading Act to extend the application of the case law concept of unconscionability?

33. 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.

34. In the very rare case that unconscionable conduct may be proven, NZBA submits that sufficient protection for consumers and small businesses already exists under section 118 of the CCCFA and in common law. No further remedies are needed.

35. On the question of including the broader concept of 'oppression' in the FTA, instead of unconscionability, NZBA submits that such a change is not necessary. Protection against oppressive conduct is already included in the CCCFA. Under

the recently amended Financial Advisers Act 2008, there are also positive duties for the financial service sector in relation to Category 1 financial products which makes such a legislative change unnecessary.

COURT ENFORCEABLE UNDERTAKINGS

49. What are your views on including in the Fair Trading Act provisions for court enforceable undertakings? 50. What are your views on including enforcement orders in the Fair Trading Act for the banning of recidivist traders from certain activities?

36. While we are cognisant that this proposal is intended to provide regulators with additional options for resolving disputes, we do not consider that enough evidence has been advanced to show that the use of existing tools are insufficient or inadequate. In particular, there is no evidence suggesting settlement agreements used by the Commerce Commission are failing. Adding the ability for court enforcement seems unnecessary and cumbersome in this circumstance.

OTHER ISSUES

37. There are some issues which have been raised by our member banks that are not included in the Discussion Paper. There is no discussion of amendments to the existing substantive provisions of the Fair Trading Act, for example, to clarify whether it is intended to regulate investment products; or how the limitation provisions are intended to function. In particular, there is no discussion of whether the offences provided for in sections 9 to 12 of the FTA ought to remain strict liability offences or whether business-to-business transactions ought to be covered by the FTA. NZBA encourages the Ministry to engage further with industry on these matters.