NEW ZEALAND
BANKERS ASSOCIATION

Submission

to the

Ministry of Business, Innovation and Employment

on the

Discussion paper: Protecting businesses and consumers from unfair commercial practices

25 February 2019

NEW ZEALAND BANKERS ASSOCIATION
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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 that contribute to a strong and stable banking system that benefits New Zealanders and the New Zealand economy.

2. The following seventeen registered banks in New Zealand are members of NZBA:
   - ANZ Bank New Zealand Limited
   - ASB Bank Limited
   - Bank of China (NZ) Limited
   - Bank of New Zealand
   - MUFG Bank, Ltd
   - China Construction Bank
   - Citibank, N.A.
   - The Co-operative Bank Limited
   - Heartland Bank Limited
   - The Hongkong and Shanghai Banking Corporation Limited
   - Industrial and Commercial Bank of China (New Zealand) Limited
   - JPMorgan Chase Bank, N.A.
   - Kiwibank Limited
   - Rabobank New Zealand Limited
   - SBS Bank
   - TSB Bank Limited
   - Westpac New Zealand Limited

Background

3. NZBA welcomes the opportunity to provide feedback to the Ministry of Business, Innovation and Employment (**MBIE**) on its discussion paper: *Protecting business and consumers from unfair commercial practices* (**Discussion Paper**). NZBA commends the work that has gone into developing the Discussion Paper.

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

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Introduction

5. NZBA supports the overarching objectives of this Discussion Paper – that is, ensuring New Zealand's regulatory systems contribute to an environment where businesses and consumers are confident participants in fair and thriving markets.

6. However, we are not convinced that there is a gap in New Zealand's protections against unfair commercial practices that justifies a Government intervention of the type proposed in the Discussion Paper. That submission is discussed in more detail below.

7. NZBA has some comments on the options presented in the Discussion Paper, should MBIE proceed with these proposals.

Option 1

8. The Discussion Paper notes that there does not seem to be a significant gap in the existing protections against unfair conduct. We agree. Our view is that more objective evidence is required to understand the nature and scale of the problem before legislative solutions are considered. Without that evidence, and without knowing the specific conduct that MBIE is trying to address (that is not already addressed by way of other legislation, for example the Fair Trading Act 1986, **FTA**), we cannot take a view on which of the options to specifically prohibit unfair conduct is preferable.

9. To the extent that there is a gap with respect to egregiously unfair conduct, NZBA would support a high-level protection applying to all consumers and businesses as that would be unlikely to have a significant impact on those businesses that act fairly and reasonably.

10. Beyond that, NZBA considers that the real issue is around business' ability to enforce their rights under contract and through the existing legislation. Accordingly, a better focus for this work may be:

    (a) Educating consumers and businesses about their rights.

    (b) Reviewing tribunal and court processes with a view to increasing efficiency, and empowering businesses to pursue the remedies already available to them.

11. Regarding Option 1, we also wish to note the following:

    - We do not support Option 1C, given the likely cost of implementing this option, as well as the uncertainty of applying and interpreting EU legal concepts (as acknowledged in the Discussion Paper).

    - Regardless of the design of any Option 1 prohibition proposals, NZBA does not support the potential for a matter to be deemed unfair purely on the basis of the contract itself. In other words, we consider that unfair conduct must be present.

      However, we agree that there may be certain limited circumstances whereby a vulnerable party should be protected from the main subject

matter of a contract (while not operating to relieve parties from hard bargains). That may be the case where:

(i) the party is particularly vulnerable;

(ii) the contract imposes very heavy obligations on one party, to the extent that they could or did cause significant detriment to a party; **and**

(iii) the vulnerable party has not had the opportunity to negotiate the terms of that contract.

- Any overlap with existing laws (for example 'oppressive' behaviour under the Credit Contracts and Consumer Finance Act 2003) would also need to be clearly addressed to ensure there is no 'doubling-up' of obligations in a given commercial transaction.

Option 2

12. NZBA does not support an extension of the current FTA unfair contract terms (**UCT**) regime to further business-to-business (**B2B**) contracts.

13. That is, in part, because it is not clear based on the Discussion Paper that this is a particular concern for businesses. As above, further objective evidence should be obtained to ascertain the nature and scope of the problem.

14. Additionally, only a small number of B2B contracts are similar in nature to business-to-consumer (**B2C**) contracts. Most commonly that will occur where a small business is essentially in the position of an individual consumer, receiving services from a more powerful business under a standard form contract. We consider that there may be unintended consequences of extending the regime, the risk of which does not appear to be outweighed by the scale of the issue.

15. The existing FTA UCT regime already applies to certain B2B contracts by operation of the wide FTA definition of 'consumer'. In our view, the introduction of Option 2 would be likely to create significant transitional costs and ongoing costs for businesses.

16. NZBA also has the following specific comments regarding Option 2:

- **B2B contracts:** In general, many of the current 'grey list' terms are common in B2B contracts, and are less likely to be unfair in a B2B context than in a consumer context. For example, if a business hires an advertising agency for a campaign, it may be fair for that business to have the right to unilaterally terminate the contract if the agency cannot achieve milestones or deliver a concept with which the business is happy. In this advertising scenario, assuming the UCT regime applied, it would of course be open to the business to argue that its right to unilaterally terminate was reasonably necessary to protect its legitimate business interests. However, this business would bear this burden of proof (in all such scenarios), in circumstances where the legislation provides little guidance.

- **Small business limitation:** If Option 2 was introduced, we would support a 'small business limitation' as proposed at paragraph 133 of the Discussion Paper. However, we note the following:

(i) Further consultation will be required to determine the best definition of ‘small business’ so that all parties to a contract will be clear on whether parties to it fall into that category.

(ii) Will the regime apply where both parties to the contract fall within the definition?

(iii) A small business limitation may not significantly reduce the scope/burden of the protection, as contracts between larger businesses are more likely to be negotiated (and therefore fall outside of the regime anyway).

(iv) Businesses would incur costs in (a) collecting information they would not usually collect (eg employee count); or (b) making an assessment as to the material imbalance in negotiating power (for which guidance would need to be published). Any legislation would need to be clear as to whether the small business test applied as at the date of entering the contract, or at enforcement.

(v) At a practical level, businesses would face operational decisions between costly options. For example, a business unit may provide services to a range of business customers (small to large) on the same standard terms. The business unit would either have to incur the costs of (a) changing the terms for all customers, including large businesses; or (b) separating functions.

(vi) There might be unintended consequences (eg a business not hiring a 20th person, in an attempt to gain more perceived bargaining power).

We agree also that there does not appear to be a case for protecting larger, better-resourced businesses from unfair terms without there also being an element of unfair conduct.

- **Transaction value:** Any transaction value threshold would need very careful consideration to ensure it could work in practice, although we note that this would be an easier threshold to monitor than employee numbers. In New Zealand, there is not necessarily one contract between parties per transaction so guidance would be needed on variations that might increase transaction value.

- **Remedies:** In terms of enforcement, we do not support the removal of the current two-stage process. The current model is working well – the Commerce Commission has engaged with industries and worked to reduce the presence of unfair contract terms. Under the current model, a business has the benefit of knowing that the relevant term is unfair before commencing proceedings, and is therefore less likely to spend time and money on unsuccessful legal proceedings. On the flipside, larger businesses also currently have more certainty as to litigation risk.