

22 February 2019

Competition and Consumer Policy
Ministry of Business, Innovation & Employment PO Box 1473
Wellington 6140

via email: competition.policy@mbie.govt.nz

Unfair commercial practices

Thank you for the opportunity to submit regarding MBIE's consultation document 'Protecting businesses and consumers from unfair commercial practices' dated December 2018.

Through our three membership brands, the Wellington Chamber of Commerce, Business Central and ExportNZ, our organisation represents around 3,000 businesses across the central and lower North Island. Our organisation is one of the four regional organisations that make up the Business New Zealand family and is also accredited through the New Zealand Chambers of Commerce network.

The Wellington Chamber of Commerce has been the voice of business in the Wellington region since 1856 and advocates policies that reflect the interest of Wellington's business community, and the development of the Wellington economy as a whole.

Business Central represents employers and provides employment, health and safety, and human resources advice, and advocates policies that reflect the interest of the business community.

As a member of Business NZ, we support their submission and have picked out some of the key aspects of Business NZ's positions that are particularly important to our members.

The fundamental problem definition of the harm these policy proposals seek to mitigate is not substantiated. These questions have been discussed over a long period of time under successive governments. If a clear case for change has not been made by now, we question whether it will ever be made in the current business climate. Governments are not able to protect parties to a contract from every possible harm, even trying to do so would result in a severe restriction on freedoms and a loss of dynamism in our economy. Firm negotiating or protecting a commercial position are in no way unfair practices. Even if the government does decide to proceed with some legislative changes, we urge prioritising the minimisation

of unintended consequences and minimising distortions in the economy. We submit that the policy proposals set out in the discussion document are disproportionate to the scale of the problems identified.

The identification of harms in the discussion document relies heavily on MBIE's survey of businesses via their Regional Business Partner network. As declared by MBIE, this survey was opt-in and, therefore, not statistically robust. It cannot form the basis of policy decisions due to it not being a representative sample of businesses across New Zealand.

Mention is made in the discussion document of regimes in other parts of the world, particularly Australia and Europe. While international examples can be illustrative of potential problems and solutions, we urge MBIE to focus first on whether the specific set of regulations and behaviours in New Zealand justify policy action.

Together, the unclear problem definition and the lack of quantitative analysis of its prevalence across the economy results in our recommendation that the proposed policy changes do not proceed.

Standard form contracts are a common feature of commercial transactions. The advantages are obvious: lower transaction costs for suppliers, suppliers' risks are well-managed, and suppliers' certainty around costs are increased. While acknowledging some of downsides MBIE identifies (paragraphs 57-64), no case is made for how widespread this problem is or attempt to quantify the negative harms on businesses, especially small businesses. The example given of the 'truck shop' industry is not illustrative of the wider economy; this industry is well known and subject to existing enforcement proceedings from regulators. Curtailing standard contracts is likely to cause unjustifiable harm and increase costs for businesses and consumers.

The discussion document notes the ability of businesses to be flexible in the face of perceived unfair contract terms being offered. The aforementioned survey shows that even according to the opt-in respondents, many either negotiated the contract further or did not proceed with the contract. Businesses which do not deal with their customers fairly will soon gain a reputation for being poor suppliers and eventually become uncompetitive.

Unfair business-to-business conduct is difficult to define. Such subjective views can depend on a variety of experiences and situations. We support the discussion document's observation that "not all conduct that businesses perceive as unfair is necessarily problematic from a policy perspective" (paragraph 77). As the survey shows, the private sector has various options open to them dealing with these situations. Therefore, the prevalence of harm requiring government intervention is rare and does not justify new legislative changes.

In order to address concerns, we recommend the government starts with enhanced enforcement of existing regulations and seeks to curb business behaviours that are already outside the rules.

Similarly, unconscionable conduct is a subjective view and difficult to define. It has been discussed for many years and no progress has been made. We submit this is because any identification of specific harms is lacking. This could be because New Zealand's business environment is different to other countries. Whatever the reasons, we ask that policies are not progressed until evidence of clear harm is put forward.

The discussion document raises the prospect of treating small businesses differently by offering them greater legal protections. We oppose this on the basis all businesses should be treated equally when dealing with each other. Creating a two-tier regime risks creating regulatory complexity and unintended consequences around how businesses choose to structure and scale themselves. Similarly, we do not support a transaction value threshold makes sense. It takes no account of the importance of the transaction to either party and introduces perverse incentives at the margin of the threshold.

However, concerns remain that small businesses have an inability to deal with larger businesses on equal terms. To address this, we have already mentioned our view that enforcement agencies should seek to police existing regulations more strictly and enthusiastically. To this end, we also suggest greater efforts to educate small business owners on the remedies available to them, and greater stakeholder outreach by the likes of the Commerce Commission. Such engagement with the small businesses community may well result in concrete examples of harm being caused that cannot be addresses under current legislation, which provides policy makers with the ability to make the case for future legislative change.

In summary, we do not support the proposed legislative changes proceeding. We have not seen enough evidence of harm to justify imposing the regulatory burden and cost of implementing subjective commercial restrictions. In lieu of legislative change, we recommend greater enforcement by the relevant agencies against the behaviours identified which already violate existing rules.

Thank you for the opportunity to submit of this consultation.

Yours sincerely,

A handwritten signature in black ink, appearing to read 'John Milford', written in a cursive style.

John Milford
Chief Executive
Wellington Chamber of Commerce, Business Central