COMMERCE COMMISSION NEW ZEALAND
Te Komihana Tauhokohoko

Fair Trading Amendment Bill 2019

Submission to:

Economic Development, Science & Innovation Select Committee

24 April 2020

Commerce Commission submission on Fair Trading Amendment Bill 2019

1. The Commerce Commission (the **Commission**) appreciates the opportunity to make a submission on the Fair Trading Amendment Bill 2019 (the **Bill**).

2. We have approached this submission from our perspectives as:

   2.1. The public enforcer of the Fair Trading Act 1986 (**FTA**); and

   2.2. The sole enforcer of the current unfair contract terms (**UCT**) provisions. The UCT provisions preclude private litigation, so the Commission currently has the exclusive ability to bring UCT challenges. While we have brought to date only limited litigation under the UCT provisions, we have gained some insights from the enforcement programme in that area.

Summary

3. We submit:

   3.1. In support of the proposed unconscionable conduct prohibition, which we consider will provide a valuable supplement to the existing unfair conduct prohibitions in the FTA. However, we submit that price disparity should be added to the list of relevant factors when assessing unconscionability.

   3.2. In support of the policy intention to extend the UCT protections to small businesses, but we have reservations about the enforceability of these provisions as drafted.

   3.3. We recommend:

      3.3.1. Setting clearer thresholds for establishing which firms are "small businesses" that would have the benefit of these protections.

      3.3.2. Setting clearer tests for which contracts are "small trade contracts," so that all parties can determine whether the law applies and modify their behaviour and expectations accordingly.

      3.3.3. In that exercise, clarifying what is a "related party" whose contracts are aggregated to form part of a "trading relationship."

      3.3.4. Simplified drafting to reduce complexity in definitions of the "annual value threshold" and "annual period."

   3.4. In favour of private rights of action being conferred on private parties for both unconscionable conduct and UCTs. As currently proposed, only prohibitions against unconscionable conduct – but not UCTs – would be privately enforceable. We understand that the Ministry of Business, Innovation & Employment (**MBIE**) contemplates making the latter amendment by way of a

separate and subsequent legislative vehicle. We support the change, and would favour its introduction at the same time as the UCT small business amendments, if that is possible.

Unconscionable conduct

4. The Commission has since 2012 advocated to Select Committee[1] for the FTA scheme of unfair conduct provisions[2] to be supplemented to include a flexible and general prohibition against unconscionable conduct.

5. We have also advocated that a new unconscionable conduct prohibition should be based on the Australian prohibition, now contained within the Australian Consumer Law (**ACL**).[3]

6. This remains the Commission's position and so we **support the proposal** before Select Committee to enact proposed sections 7 and 8 of the Bill.[4]

Australian law comparison

7. Australia has had a longstanding and workable prohibition against unconscionable conduct:

   7.1. The Trade Practices Act 1974 (Cth)[5] has since 1986 contained a prohibition against unconscionable conduct.

   7.2. That prohibition has been successfully enforced by the Australian Competition & Consumer Commission (**ACCC**) and by private litigants. A significant body of case-law has accordingly developed the meaning and application of the law.

   7.3. In 1997 the Australian Government amended the Trade Practices Act to extend the prohibition to small businesses.

   7.4. In 2010 the ACL was passed and the prohibitions were re-enacted, essentially unchanged.

8. During MBIE's policy development process in preparation of this Bill, the ACCC submitted in support of the proposed New Zealand reform,[6] drawing from its enforcement experience to say:

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1 Consumer Law Reform Bill, March 2012.
2 Part 1 of the FTA.
3 Schedule 2 to the Competition and Consumer Act 2010 (Cth).
4 Clause 6 would insert into the FTA new sections 7-8 prohibiting unconscionable conduct.
5 Part IVA.
6 12 March 2019 ACCC Submission to MBIE Discussion Paper on *Protecting businesses and consumers from unfair commercial practices* (**ACCC submission**), available at https://www.mbie.govt.nz/business-and-employment/consumer-protection/review-of-consumer-law/protecting-businesses-and-consumers-from-unfair-commercial-practices/

> The ACCC considers that the unconscionable conduct provisions in the ACL provide an important level of protection for consumers, particularly vulnerable and disadvantaged consumers. The ACCC investigates allegations of unconscionable conduct across a range of commercial activity, and regularly takes action against traders for breaches of the relevant provisions of the ACL.
>
> The Discussion Paper notes a number of matters brought by the ACCC.[2] In recent years, the ACCC has taken cases in both the consumer and small business areas, and sought to enforce and extend the protection of the provisions. These actions have resulted in significant positive developments in the law as it applies to consumers and small businesses.

9. The Commission expects similar advantages to accrue in New Zealand as a result of adding this enforcement tool.

10. One obvious advantage of our proposed prohibition is closer regulatory harmony with Australia. Trans-Tasman traders would be regulated by closely similar legal schemes in each country. New Zealand courts, the Commission as enforcer and businesses would derive advantages through application of the principles developed in Australian case-law.

11. It should be noted (for completeness) that what is proposed in the New Zealand Bill is less elaborate than the ACL provisions. In Australia:

    11.1. Section 20 of the ACL prohibits a trader from engaging in unconscionable conduct "within the meaning of the unwritten law." This means case-law, developed through decisions of the Courts.

    11.2. Section 21 of the ACL prohibits a person from engaging in unconscionable conduct in connection with the supply or acquisition of goods or services.

    11.3. "Unconscionable conduct" is not defined, but the ACL includes a non-exhaustive list of considerations that the Court may take into account when considering a breach of section 21.

    11.4. There is expressly no overlap between sections 20 and 21.

12. The Bill proposes a commendable simplification of the ACL, condensing the prohibition down to proposed section 7:

> A person must not, in trade, engage in conduct that is unconscionable.

Australian case-law on "unconscionable"

13. Australian case-law has construed and developed the meaning of "unconscionable" so that it is not untethered, but rather is checked against community standards - as those standards are expressed in law – so that it polices only the most serious departures from those laws.

14. A recent Australian case, *ACCC v Geowash* (2019)[7] shows how meaning has been given to the prohibition of unconscionable conduct.

15. In *Geowash* the ACCC successfully brought enforcement proceedings against the defendant franchisor, Geowash, for (among other breaches) unconscionably charging franchisees for the fit-out of car-wash premises.

16. Justice Colvin in the Federal Court made these statements on the application of the unconscionable conduct prohibition (emphasis added):

> [659]… The focus of the provision is upon proscribing conduct that is against conscience; that is an inner sense of what is right and wrong. Therefore, the statutory provision requires conduct to be measured against norms of commercial behaviour guided by a business conscience 'permeated with accepted and acceptable community values': *Paciocco v ANZ*…. The definition of legal obligations by reference to an objective community standard of usual or reasonable behaviour is well-known and familiar. In such cases it is not the sensibilities or idiosyncrasies of the particular judge that are to be used to evaluate the behaviour nor is alternate language to be applied as a substitute for measuring conduct by reference to the requisite standard.
>
> [660]… **The question to be asked is: what would a person of good commercial conscience do** when selling and acquiring goods and services in the particular circumstances of the case?
>
> [661] Persons of good business conscience are expected to abide by the norms embodied in commercial law. They are also expected to conform to standards of generally accepted commercial behaviour expressed in codes of conduct. They may be expected to take steps that are necessary to reasonably protect and advance their own interests without exploiting a lack of commercial experience or expertise on the part of those they are dealing with in business. In a modern business setting they are expected to be fair, honest and open. The time when the rough and tumble of commerce require the buyer to beware or be left behind without any basis for complaint in the absence of the extremes of fraud or coercion are well behind us**. The business community does not condone sharp practice, a lack of frankness, reliance on technicality, abuse of trust, exploitation of an imbalance in commercial or financial power or tactical steps designed to overbear as a means to secure agreement**.

17. However, lest this statement of unconscionability seem too open-ended, His Honour restores focus to the original issue – the degree of departure from accepted standards (emphasis added):

> [662] However, unconscionability is not the mere breach of accepted standards of commercial behaviour. Section 21 does not have the consequence that any breach of the norms… becomes a contravention of the ACL. Nor is it the case that any conduct that involves an element of hardship or unfairness to the other party is unconscionable. Rather, **unconscionable conduct is characterised by a substantial departure** from that which is generally acceptable commercial behaviour. It is **a departure which is so plainly or obviously contrary to the behaviour to be expected** of those acting in good commercial conscience that it is **offensive**….

18. We regard this and similar Australian case-law as likely to be influential on the New Zealand courts if the proposed amendments are made. We support the amendments as setting an appropriate and applicable standard against which commercial conduct can be measured.

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[7] *ACCC v Geowash Pty Ltd (No 3)* [2019] FCA 72. See also the other leading recent case *Paciocco v ANZ Banking Group Ltd* [2015] FCAFC 50 (Allsop CJ).

Possible applications of prohibition

19. We have identified some examples of conduct known to the Commission, which could indicate possible future applications of the prohibition:

    19.1. **Mobile traders**: traders who habitually seek to trade with buyers, who are struggling to access goods, funds or deferred payment terms from other sources; extremely high prices are often observed.

    Example

    A 2018 Newsroom investigation found a truck shop selling 3kg bags of chicken drumsticks for $59; around 5 x the price then-charged at the Mad Butcher chain ($12).[8] Four packets of basic biscuits sold for $29, again around 5 x the then-market price. An X-Box gaming system was for sale for $1,899, when its then-market price was around $499. Bunk beds priced at $1,199 were comparable to $300 beds at other retailers.

    19.2. **High-pricing of essentials during a crisis:** Committee members will be familiar with reporting in March-April 2020, during the Covid-19 crisis, as to traders who were alleged to be selling food basics or health essentials at unusually high prices.[9] The ACCC was able to draw on the ACL's unconscionable conduct provision, when publicly guiding traders that such conduct may be unlawful.[10]

    19.3. **High-pressure sales tactics**: this can occur in door-to-door settings, but also in public, usually in situations where buyers are given limited disclosure of sales terms.

    Example

    In *CC v Auckland Academy of Learning* (2017) the Commission successfully prosecuted an educational software company for sales tactics that the sentencing Judge described as "egregious"[11] and "deplorable."[12] These included soliciting an invitation into a consumer's home using misrepresentations, and

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8 18 April 2018 Stuff article "Inside NZ's Reprehensible Mobile Shopping Trucks Targeting Poorer Communities": https://www.stuff.co.nz/business/money/103199197/inside-nzs-reprehensible-mobile-shopping-trucks-targeting-poorer-communities

9 This led MBIE to establish a complaints portal called "PriceWatch': https://www.consumerprotection.govt.nz/general-help/covid-19/ https://www.newsroom.co.nz/2020/03/30/1107150/covid-19-govt-launches-price-gouging-tipline

10 "ACCC Response to CoVID-19 Pandemic" 27 March 2020. https://www.accc.gov.au/media-release/accc-response-to-covid-19-pandemic

11 *Commerce Commission v Auckland Academy of Learning Ltd* [2017] NZDC 27148 at [98].

12 Discussion of the case in *Budget Loans Ltd v Commerce Commission* [2018] NZHC 3442 at [86].

then pressure-selling maths-education software through exploiting parents' anxieties and making misrepresentations about their children's attainment.

19.4. **Taking advantage** of unequal bargaining positions.

19.5. **Claims to cure**/ treat serious illness.

19.6. **Punitive conduct** towards consumers.

Example

In *CC v Budget Loans* (2016) the Commission successfully prosecuted a debt-collector for FTA breaches committed in the course of collecting debts. The conduct included:

- Adding costs unlawfully to the debt.
- Repossessing goods without any right to repossess.
- Repossessing valueless goods to punish debtors, not to defray the debt – and then dumping, rather than returning, those goods.

20. The Commission sees an opportunity to challenge conduct of these kinds that is more than merely unfair, but is so contrary to society's standards that the Court should intervene.

Drafting of the prohibition

21. We also agree with the drafting of the proposed section 7 in the following specific respects:

21.1. A system or pattern of conduct is not required (being often but not always present);

21.2. Proof of individual disadvantage is not needed (often harm is provable, but conduct may deserve sanction even if it did not in fact cause harm); and

21.3. The prohibition applies whether or not a contract is involved (thereby capturing sales conduct whether or not it matures into a contract, for example).

22. We also agree with the proposed inclusion of section 8, which creates a non-exhaustive list of considerations to assist the Court in assessing unconscionability.

23. Proposed section 8 is not a direct adoption of ACL s22 but is comparable. Most of the ACL relevant factors are picked up here, even if worded differently. However, one factor that is missing here should, in our submission, be added in: price disparity.

Recommend add price-disparity factor

24. ACL section 22(1)(e) provides the following relevant factor:

> … the amount for which, and the circumstances under which, the customer could have acquired identical or equivalent goods or services from a person other than the supplier…

25. As above at [19.1], the Commission sees an opportunity to discipline egregious high-cost selling where vulnerable consumers' lack of ready alternatives are exploited.

26. The price-disparity factor would, if listed in the Act, speak directly to such cases and allow for their readier enforcement.

27. Traders who are minded towards compliance with the Act would also be usefully guided, by specific provision that grossly divergent pricing may be assessed in determining unconscionability.

28. We accept that the catch-all in proposed section 8(1)(h) *"any other circumstances that the court considers relevant"* allows the court to consider other matters, including price disparity. But it would in our view be preferable if price disparity were itemised, as a helpful guide to traders and an explicitly relevant consideration. If it is excluded, the opportunity exists for defendants to assert that price was purposely excluded from relevance, and therefore the court should not consider it.

Unfair Contract Terms – small business extension

29. **We support the policy intention to extend UCTs to small businesses**. Small businesses can face an insurmountable bargaining disparity when contracting with a much larger or stronger business.

30. But we are concerned with important definitional issues in the drafting. In our opinion the drafting is unclear, and we expect that businesses (large and small) and their advisors would struggle to understand and apply the proposed provisions.

31. We also expect the Commission to find enforcement of the proposed provisions difficult for the same reason.

Definition difficulties

32. A range of complexities are present in the definitions, making the application of the law uncertain.

33. In particular, these are the definitions as to:

    33.1. What is a small trade contract;

    33.2. When are contracting parties 'related'; and

    33.3. When a contract exceeds the 'annual value threshold.'

34. We briefly discuss each difficulty below.

Definition of 'small trade contract'

35. It is helpful for the plaintiff that the proposed section 26C presumes a contract to be a 'small trade contract' unless the defendant proves otherwise. This provision would shift the burden of proof onto the defendant on the issue of whether a contract is a 'small trade contract.'

36. However, where the plaintiff is the Commission, we would wish to establish in our investigation whether we are (or are not) reviewing a small trade contract. If we are not, then enforcement efforts would be misspent in seeking to challenge its terms.

37. The primary difficulty that the drafting presents in this regard, is that limb (c) of a 'small trade contract' (proposed s26C(1)(c)) is established where the contract:

> … does not comprise or form part of a trading relationship that exceeds the annual value threshold when it first arises.

38. Breaking out these ingredients, we see complexity in applying the elements of this limb: what is a 'trading relationship' and what is the 'annual value threshold.'

Definition of 'trading relationship'

39. Proposed section 26D(2) defines 'trading relationship', and is complicated by encompassing a relationship comprising more than one contract *"between the same or related parties."*

40. We apprehend difficulties with the 'related parties' requirement nested within this definition of 'trading relationship.' In particular:

    40.1. Proposed subsection 26D(4)(b) confers on 'related' the meaning found in the Financial Markets Conduct Act 2013 – which means that familiarity with the FTA is not enough to know whether the Act applies. Businesses instead need to refer out to another statute entirely, making interpretation complex.

    40.2. There is no requirement here that both firms know or have a mutual expectation that they are contracting with related parties, across a range of contracts. Each firm may, when contracting, have no or very limited knowledge about how the other firm is structured and to whom the counterparty company is related. This means that the firms, when contracting with each other, cannot know how the law applies to them, because essential details (the counterparty's corporate structure) are outside their knowledge.

    Example 1: small firm has related parties

    Dominant firm D contracts with small firm F for the purchase of fresh fruit for D's stores, with an annual contract value of $120,000. F has a related company, V, which sells fresh vegetables to D, with an annual contract value of $135,000.

    F and V obviously know the companies to which each is related. D is unaware of those relationships, and believes it is contracting with separate companies.

D accordingly gives no thought to the possibility that the UCT laws regulate its standard form contracts with F and V.

D assumes that each of its contracts with F and V are covered by the UCT law, because each is below the $250,000 annual value threshold.

In fact, since F and V are related companies (and the other conditions are met), the combined contract annual values exceed the threshold and the UCT laws do not apply. F and V know this, but D does not.

Example 2: dominant firm has related parties

Dominant firm D contracts with small firm F for the purchase of fresh fruit for D's stores, with an annual contract value of $120,000. D has a related party R, which also purchase fresh vegetables from F for its stores, with an annual contract value of $135,000.

D and R obviously know the companies to which each is related. The smaller firm, F, is unaware of the relationship between its two buyers.

D and R use a standard form food purchase contract which contains terms that may be unfair. But D and R are confident that they can include the unfair terms, because their relatedness means that the contracts form part of the same trading relationship. As their combined annual value exceeds $250,000, they fall outside the UCT laws.

F, being unaware of D and R's relatedness, believes the UCT laws apply to each of these contracts because they are under the annual value threshold.

F launches a legal action against D claiming that its contract contains UCTs.[13] The defence has the burden of disproving that these are small trade contracts, which it does by proving that D and R are related parties.

40.3. The effects of this drafting are that:

40.3.1. The application of the law can depend on matters outside the knowledge of one of the parties.

40.3.2. For Example 1, the outcome might seem benign from a policy perspective: the dominant firm in fact cannot impose unfair terms because the small firms turn out to be related. However, the dominant firm cannot regulate its behaviour to avoid breaching the law, because it does not have the necessary knowledge.

[13] In this example, small firm F is the plaintiff – this supposes that private rights of action have been provided in amendments to the FTA. The example works identically if the Commission is the plaintiff.

40.3.3. For Example 2, the effect is not benign: the weaker firm believes that it has protections that it does not, because the dominant firm has a corporate structure of which it is unaware.

41. We question whether these are intended outcomes in line with the policy intent behind the amendments.

42. As we understand it, the policy design behind aggregating contracts may have been to ensure that a dominant firm could not structure its way out of the law applying to it. We believe that Example 2 demonstrates that the drafting does not have this effect – the dominant firm is able to contract under different corporate guises, and to defend itself by demonstrating that the contracts of related firms taken together exceed the $250,000 annual value threshold and so are not covered by the UCT laws.

Definition of 'annual value threshold'

43. We have several concerns as to how the annual value threshold is defined in proposed sections 26D(3)(b) and 2D(4)(d).

44. First, the proposed law only extends the UCT protections to trading relationships that were, or were likely to be, worth less than $250,000 annually – when the relationship *first arose*:

44.1. If a trading relationship was low-value when it began, then the UCT laws will apply to it in perpetuity thereafter – even if the dominant firm should shrink and the small firm prosper; and even if the annual trade between the parties becomes far more than $250,000. This means that in future, the protections and contractual restrictions in the UCT laws can apply, no matter how high-value the contract becomes.

44.2. Equally, put in the reverse, as a result of the proposed drafting if the annual contract value is over $250,000 at the *outset*, or is likely to become so, the UCT laws will not apply to the trading relationship – even if the contract value becomes significantly smaller over time, and no matter how great the bargaining disparity between the parties. Necessary protections for the weaker party will be unavailable, due to the expected contract value at the outset.

44.3. Arguably what ought to be assessed is the contract value at the time it is entered into. This is the Australian legal approach.[14] It is an appealing approach, because it means that the application of the law is aligned to the contractual disparity between the parties.

44.4. The proposed drafting seems to some extent contradictory with the policy intent. We note Minister David Clark's comments to the House on the First Reading of the Bill:[15]

[14] Section 23 ACL.

[15] Hansard 12 February 2020 First Reading of Fair Trading Amendment Bill https://www.parliament.nz/en/pb/hansard-debates/rhr/combined/HansD_20200212_20200212

> It is not reasonable to expect small businesses to be able to pick their way through routine contracts with a fine-tooth comb to try and detect any unfair contract terms, particularly when they may not have the bargaining power to have them removed in any case.
>
> At the same time, the $250,000 limit on the protections recognises that when businesses enter into large strategic contracts, they do have an obligation to do their own due diligence, seek legal advice and make their own decisions about whether the risks being placed on their businesses are acceptable or not.

45. Second, we are concerned as to how the Commission or a court would assess the 'likely' annual contract value:

    45.1. The proposed test is framed objectively (s26D(3)(b)(ii)):

    > … consideration worth $250,000 or more **is more likely than not to become payable under the relationship**, in relation to any annual period…

    45.2. The defendant has the burden of disproving that the contract at issue is a small trade contract: s26C(2).

    45.3. We are concerned that the combination of the reverse-burden and the 'likely' threshold may make it difficult for a defendant to protect its position. What evidence can a defendant produce to *disprove* the assumed likelihood of the contract having a low present or future annual value? Records, communications or projections may exist which corroborate the parties' expectations. But equally they may not. Where that is the case, a defendant will be exposed to difficulty on this limb of the test.

    45.4. Where such records do exist, as above we suggest that they are likely to go more to the contracting parties' shared or separate *subjective expectations*. But on an objective test, expectations are relevant but not enough.

    Example

    D and S both expect that by Year 2 of their trading relationship demand for S's product will have doubled, and they will be trading more than $250,000 from that year forward. Records confirm their shared expectation.

    But S's business investment is low, and it does not invest in more productive capacity. While demand has grown, S is still producing at Year 1 levels for the next several years. At no stage does S sell more than $250,000 worth of produce to D.

    45.5. In this example, applying the proposed objective test, can it be said that at the start of the trading relationship it was "more likely than not" that the relationship would exceed $250,000 annually? Aside from S's representations as to growing its business, S was making none of the investment commitments necessary to be more productive. Objectively then, this was probably a small trade contract – despite what the parties said and intended. The parties' expectation arguably does not translate into a likelihood.

45.6. We are also uncertain about how common commercial contracting forms would be applied in determining likelihood. For example:

45.6.1. **Non-binding Heads of Agreement**: would these make a future contract value "likely," despite their non-binding character?

45.6.2. **Contractual KPIs:** the dominant firm may commit to increase its purchase volumes (for example) if certain Key Performance Indicators as to quality are met in Year 1. In fact, these are not met and the dominant firm never increases its volumes. Was it "likely" that the larger future sales would happen?

45.7. We submit that the Australian approach is preferable, where the applicability of the law to a contract depends upon its upfront value. We would support a law framed around a clear and readily applicable benchmark like contractual value.

45.8. This has several advantages:

45.8.1. It is clearer and less dependant on the Commission's or a court's assessment of evidence, on what ought to be a straightforward question of determining whether the law applies.

45.8.2. The parties will know whether or not the law applies, and therefore can gauge whether to insist upon or to resist certain terms.

45.8.3. Dominant firms using standard-form contracts will become habituated to exercise restraint on the terms included within <$250,000 contracts.

45.8.4. Conversely, smaller firms will become aware that for contracts >$250,000 they need to take legal advice or adopt measures to protect their interests, because contracts of this value do not have the protections of the UCT laws.

Definition of 'annual period'

46. We submit that there is also an unnecessary complication present in the proposed section 26D(4)(d) definition of "annual period" – used for the purposes of working out the annual value of the contract/s.

47. The drafting defines annual period with reference to the date of the first contract and every anniversary of that date.

48. We anticipate that in many trading relationships, either:

48.1. The date of the commencement of the relationship will be lost or forgotten over time; or

48.2. There is uncertainty or debate over that date.

49. The point is of some importance, because the start and end dates of the "annual period" are used to determine the annual value, and so variation in those dates can, depending on the circumstances, significantly affect the annual value at issue and therefore whether the UCT protections apply.

50. We submit that an invariable and objectively certain definition should instead be adopted. We suggest that the corporate financial year for reporting purposes would be appropriate. This would accord better with how corporate records are kept, and means that parties do not have to try to reconstruct what was the first date of their trading relationship, potentially many years previously.

Private litigation rights

51. We are aware that MBIE is considering conferring rights of action on private parties for UCT breaches.

52. We strongly support that proposal.

53. Private litigation should lead to less dependence on the limited resources of the Commission, and a greater volume of litigation which is productive for developing the law.

54. It would allow the weaker contracting party some countervailing power, through recourse to the law if they are subjected to unfair terms. It will also equip small firms to better seek to resist the imposition of unfair terms on them. Without private rights, the weaker party could only lodge a complaint with the Commission and hope that the matter receives the Commission's enforcement priority.

55. However, we also submit that the effectiveness of private rights of action matches closely to the necessity for clear and unambiguous drafting. Commercial parties will only be able to act in their self-interest if they can reliably interpret the law and understand their rights.

Contemplated Australian UCT reforms

56. As our counterpart agency the ACCC notes in its March 2019 submission to MBIE,[16] Australia's UCT law was extended to small business contracts as of November 2016.

57. The ACCC submission provides examples of a wide range of commercial practices to which the extension has already been applied, in litigated cases, enforceable undertakings and negotiated outcomes with the ACCC.

58. As was contemplated at that time, the effectiveness of that extension is currently being reviewed. The Australian Govt Treasury has been consulting on[17] the impact of

[16] Available online at https://www.mbie.govt.nz/dmsdocument/5290-australian-competition-and-consumer-commission-submission-unfair-commercial-practices-consultation-pdf

[17] The Treasury consultation period has recently closed, but submissions are not (at the time of writing) available: https://treasury.gov.au/consultation/enhancements-unfair-contract-term-protections

the extension, and any potential changes that may improve the operation and effectiveness of the law.

59. We submit that a close watch should continue to be had to how the law in Australia develops, with an eye to achieving all desirable trans-Tasman conformity.

60. A primary expressed concern in that Australian review is to make the application of the small-business UCT law more clearly predicated on tests that the parties can readily apply.

61. Under the current Australian law, a contract is a 'small business contract' if:

    - At the time the contract is entered into, at least one party to the contract is a business that employs fewer than 20 persons; and

    - The upfront price payable under the contract is <$300,000, or $1m if the contract runs for more than 12 months.

62. Turning from the New Zealand drafting before the Committee, these look like desirably bright-line tests. But each limb is being examined by the Treasury.

63. For example, the employee-number threshold is questioned: numbers of employees can grow or contract; may be seasonal or volatile; and in the usual course are unknown to outside firms. From the ACCC's perspective (as recorded in the ACCC submission in New Zealand cited above), this number is also too low – some firms with more employees are in its view nonetheless in a relatively weak position and should receive the protections.

64. It is not possible to reliably predict how the Australian law will develop. As with unconscionable conduct, we submit that closer trans-Tasman regulatory consistency is desirable. This may mean that we model our provisions more closely on Australia's, and consider adjustment to them if and when Australia makes amendments.

Conclusion

65. The Commission supports these proposed reforms.

66. We submit that **unconscionable conduct should be prohibited**, and that the drafting is satisfactory **but should be supplemented with price-disparity** as a listed relevant factor.

67. Our reservations are more complex with regard to the UCT extension to small trade contracts.

68. We support that objective, and we recognise also the drafters' objectives to limit the potential for companies to avoid the law. The drafting is challenging, and the Australian experience indicates that it may be necessary to enact provisions but keep them under periodic review and adjustment.

69. However, we submit that **there are available simplifications that can be made to the draft UCT provisions that would enhance their clarity**. Doing so would improve compliance, through companies more confidently regulating their own conduct; and enforcement of the law would be rendered more straightforward, less costly and less time-consuming for all parties, the Commission and the courts.

70. We thank the Committee for this submission opportunity and would be pleased to provide any further assistance that you may require.

71. If you have any specific questions on this submission please contact Yvette Popovic in the first instance.