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Unfair Contract Terms Consultation Paper
Small Business, Competition and Consumer Policy Division
The Treasury
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Extending Unfair Contract Terms Protections to Small Businesses – consultation paper

The New Zealand Law Society (Law Society) welcomes the opportunity to comment on the *Extending Unfair Contract Term Protections to Small Businesses* consultation paper issued by Consumer Affairs Australia and New Zealand (CAANZ) in May 2014.

Unfair contract terms

The consultation paper advocates extending protection against unfair contract terms to small businesses as well as consumers. The consultation paper states that while individual consumers are protected against unfair contract terms in standard form contracts under the consumer law, small businesses are not.¹ This statement is not correct in relation to New Zealand law as from 17 March 2015 when recently enacted amendments to the New Zealand Fair Trading Act will come into force.² The New Zealand Commerce Commission will be able to apply to a Court to have a provision in a standard form contract declared “unfair”. Terms declared unfair cannot be enforced or relied on.

Under those amendments, protection against unfair contracts will be available not only to consumers but also to traders who purchase for their own use goods or services of a kind ordinarily acquired for personal, domestic or household use or consumption. This result arises because New Zealand consumer legislation defines ‘consumer’ in terms of the nature of the goods and services that are supplied rather than the identity of the purchaser. This definition is incorporated in the definition of the ‘standard form consumer contract’ whose terms can be declared to be unfair. In other words, traders who purchase those goods and services for their own use will receive the same level of protection as any other consumer. This applies regardless of the value of the supply transaction: there is no equivalent to the Australian statutory maximum price for goods or services of A\$40,000.

Therefore the question that needs to be asked in a New Zealand context is whether further protection against unfair contract terms should be extended to small businesses and, if so, what should be the nature and extent of that further protection.

¹ See page 6, paragraph 7.

² See NZ Fair Trading Amendment Act 2013, s 36, which inserts a new heading “Declaration of Unfair Contract Terms” as ss. 46H to 46M.

In submissions made to the New Zealand Ministry of Consumer Affairs in 2010 concerning the introduction of unfair contract terms protections, the Law Society stated that it did not have a firm position regarding the inclusion of unfair contract terms. However, the Law Society advocated a cautious and carefully considered approach to this question, particularly since increased transaction costs for traders would likely result from the introduction of unfair contract term provisions. Those increased costs would be borne by all consumers, whether domestic or business consumers. The Law Society remains of this view.

The consultation paper identifies concerns regarding the fairness of certain terms in contracts between big businesses and small businesses. However, in New Zealand nearly all businesses are small businesses. According to the New Zealand Ministry of Business, Innovation and Employment, small enterprises dominate New Zealand's business environment.³ The Ministry of Business, Innovation and Employment defines small businesses as enterprises with fewer than 20 employees. Over 97% of all New Zealand enterprises fall within this definition. The European Commission defines small enterprises to include enterprises that employ fewer than 50 people.⁴ If this definition were applied in New Zealand all but 1% of New Zealand enterprises would be classified as small enterprises.

The relevance of this statistic is that small businesses in New Zealand are inevitably suppliers as well as consumers for the purposes of both business-to-business transactions and consumer transactions. Furthermore, in our experience, small businesses commonly use standard form consumer contracts in their supply transactions, just as their larger counterparts do. There are good reasons for this. Standard form contracts can significantly reduce transaction costs in deals involving relatively low values or standardised products or services. The concerns that the consultation paper raises around the fairness of certain terms in contracts between big businesses and small businesses could equally apply to some transactions conducted by small businesses in their role as suppliers.

A significant part of the consultation paper is directed towards obtaining feedback on the extent of unfair contract terms in standard form contracts and their impacts upon small businesses. However, given that the impact of the changes to the Fair Trading Act to address unfair contracts will be unknown until after those changes come into effect in March 2015, the Law Society considers that it would be prudent to allow a reasonable period of time after these amendments come into force to assess whether and to what extent New Zealand law already adequately addresses the concerns identified in Australia.

If the unfair contract term protection available to New Zealand businesses after March 2015 is considered inadequate, then it would be essential to identify the small businesses, and the particular transactions they conduct, that need legislative protection. In this regard the consultation paper assumes that small businesses may face similar issues to consumers in relation to standard form contracts and unfair contract terms. Conventional justifications for consumer protection legislation include arguments that consumers are at a disadvantage relative to suppliers due to their assumed lower bargaining power and asymmetry of information that may exist between suppliers and consumers.

However, these assumptions are questionable in the case of business-to-business transactions involving small businesses. In our experience, successful small businesses are typically well informed as to the conditions of the markets in which they operate and are able to manage their supply chains through selective acquisition of goods and services from competing suppliers. Therefore an a priori assumption that small business traders are always at a negotiating disadvantage⁵ is unwarranted. We consider that it would be unwise and inappropriate to make any assumptions or draw any conclusions as to whether small businesses in New Zealand are similarly disadvantaged until after further research and input is obtained. The extent to which

³ *Small Businesses in New Zealand – How do they compare with larger firms?* May 2014.

⁴ http://europa.eu/legislation_summaries/enterprisebusiness_environment/n26026_en.htm. Accessed 25/07/2014.

⁵ Consultation paper at [1]: "... the Commonwealth Government is committed to extending unfair contract term provisions for standard form contracts to small businesses. There is considerable support from the small business community and representative organisations based on recurring accounts of small business vulnerability and disadvantage arising from unfair contract terms."

there are economic costs associated with standard form contracts that contain “unfair terms” and how those costs should be addressed should be considered after that research has been completed.

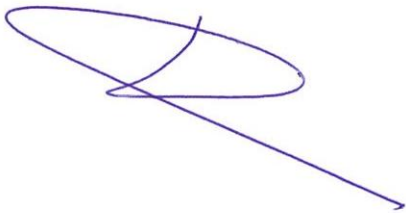
Traders, including small businesses, are already protected by a range of statutory provisions intended to ensure that New Zealand’s markets are fair and competitive, including provisions prohibiting unfair conduct⁶ and provisions regulating restrictive trade practices and anti-competitive conduct.⁷

Unless the threshold for protection is appropriately set, the Law Society considers that there is a real risk that the vast majority of New Zealand businesses will be subject to additional regulation that confers no real benefits upon them but instead creates additional costs for taxpayers through increased government administration and transaction costs for the small businesses whose standard form contracts may face challenges, whether warranted or not.

In summary, the Law Society considers that a review of the unfair contract terms regime in New Zealand legislation is premature and questions whether it is necessary, considering the remedies already available to New Zealand small businesses in their role as consumers.

This submission has been prepared by the Law Society’s Commercial and Business Law Committee. If you have any questions regarding this submission please contact Vicky Stanbridge, the committee secretary, by telephone (+644) 463 2912 or by email (vicky.stanbridge@lawsociety.org.nz).

Yours sincerely



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⁶ Part 1 of NZ Fair Trading Act 1986.

⁷ Part 2 of NZ Commerce Act 1986.