

## INQUIRY INTO UNFAIR TERMS IN CONSUMER CONTRACTS

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**Date Received:** 11/10/2006

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File No: MCA 5/2/2

11 October 2006

Hon Christine Robertson  
Chair  
Standing Committee on Law and Justice  
NSW Parliament  
**AUSTRALIA**

Dear Hon Christine Robertson

**Submission from the Ministry of Consumer Affairs to the Standing Committee on Law and Justice at NSW Parliament with regard to the Inquiry into Unfair Contract terms in Consumer Contracts**

Thank you for inviting the New Zealand Ministry of Consumer Affairs (MCA) to make a submission to the Inquiry into Unfair Terms in Consumer Contracts.

MCA is currently undertaking a Review of the redress and enforcement of consumer protection law in New Zealand. As part of this review, a discussion paper was released in May 2006 that compared redress and enforcement initiatives from Australia, Canada, the United Kingdom and the United States. The aim was to identify initiatives that may be useful in the New Zealand consumer protection context. One such initiative was a prohibition on unfair terms in consumer contracts.

MCA's views on unfair terms in consumer contracts as outlined in the discussion paper are below followed by a summary of the submissions received on the proposed unfair terms in consumer contracts prohibition. MCA feels that this information may be useful to the Committee.

MCA is currently considering these comments and is taking an interest in developments in Australia on this issue.

### *Unfair Terms in Consumer Contracts*

MCA considers that an unfair term in a contract is one that causes a party (usually the consumer) to be at a disadvantage while the term is not reasonably necessary for the protection of the interests of the other party (usually a business). Typically, an unfair term is a pre-written standard term. Unfair terms have been defined in other jurisdictions as contrary to the requirement of good faith that cause a significant imbalance in the parties' rights and obligations under the contract to the detriment of consumers. A term that states that a trader may change or alter other terms in a contract without consulting the consumer is an example of an unfair term.

Under Part 1 of New Zealand's Fair Trading Act (FTA), misleading and deceptive conduct, false representations and unfair practices are prohibited. Unfair terms in contracts are not specifically prohibited. They are covered under general contract law<sup>1</sup> and common law.

In many instances, consumers do not realise that a term is unfair, or that the term can be negotiated, especially if it is pre-written into the contract. The consequence of a consumer agreeing to a contract with such terms is that they may find themselves bearing most of the cost and/or risk of the transaction.

Consumers may also find they do not have fair and reasonable access to a variety of goods and services in the marketplace. Unfair terms may bind the consumer into a contract where they cannot use other businesses. For example, a contract may bind the consumer to the terms and conditions of the supplier's insurance scheme that the consumer has not looked into and is therefore denied the choice of using another insurer.

MCA and the Commerce Commission (the agency responsible for enforcing the FTA in New Zealand) have received complaints from consumers where the terms in contracts may not be misleading or deceptive but they do appear to be unfair. Even when consumers recognise that the terms are unfair they sometimes feel they have little option but to sign as there is little or no difference in the contracts used by all providers in that sector.

Specifically prohibiting unfair terms in consumer contracts in the FTA, even if they are not misleading or deceptive, would enable the Commerce Commission to take enforcement action against businesses using unfair terms in their consumer contracts. As well, if unfair terms were prohibited, individual consumers would be able to take a dispute about an unfair term in a contract to the Disputes Tribunal (or even to court) on their own behalf.

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<sup>1</sup> For example, the Contract Remedies Act 1979

Currently unfair terms are not defined in the FTA. It is suggested that any amendment prohibiting such terms should follow the approach taken in the United Kingdom and Victoria, Australia, in providing an indicative non-exhaustive list to aid decisions by the court. However, in the United Kingdom the Office of Fair Trading is required to investigate every unfair term complaint. If New Zealand legislation prohibited unfair terms in consumer contracts, it is not proposed that a similar approach be taken. Rather, it would be up to the Commerce Commission to decide how to enforce any breach.

A prohibition of unfair terms would provide an opportunity for the Commission to work with industry groups (in an educative way) to develop fair standard terms. This approach can resolve issues in a pro-active and co-operative manner and may prevent court action being taken.

Prohibiting unfair terms would expand on the current suite of prohibitions including misleading or deceptive conduct, false representations and unfair practices, and this should allow consumers to enter into contracts with greater confidence.

#### *Submitter comments*

Just under half of the twenty seven submissions received on the MCA discussion paper commented on the proposal to include a prohibition on unfair terms in the FTA. This included nine submissions from the business group who did not support the proposed prohibition on unfair terms in consumer contracts.

Concerns were raised that such a proposal to prohibit unfair terms in consumer contracts would be unworkable. Some were concerned about both the compliance and commercial costs associated with this proposal. Some submitters thought amending the legislation was a heavy handed way of dealing with this issue and that an educative approach would be more appropriate.

Other comments included that such an amendment would create uncertainty and that defining a term as unfair would be subjective and therefore problematic. One submitter commented that there would need to be guidance in the legislation as to what an unfair term is and that MCA would need to clarify whether the prohibition applied to both standard and negotiated terms. It was suggested by another submitter that prohibiting oppressive conduct may be an option but that there would be a problem fitting either this or the proposed prohibition into the FTA as it does not define a consumer. Several of the submitters wanted more information on the scale of the problem. One submitter stated that there is little evidence of a problem and that MCA should not legislate for laziness – that people should not expect things to be put right if they do not read contracts before signing.

Two submitters commented that if there is a problem with contracts in a particular sector then this should be dealt with on an industry basis and not in a general way. Others commented that rather than prohibiting unfair terms, businesses should be able to compete with another business to provide a more competitive offer.

Another submitter stated that there was no need for this prohibition and that as the New Zealand Consumer Guarantees Act 1993 guarantees are non-contractual, consumers rights to remedies are not affected by the terms of a contract. This submitter stated that in their view there is nothing in the legislation that would inhibit MCA or the Commerce Commission working with industry groups to develop standard terms.

The proposed prohibition on unfair terms in consumer contracts was supported by all of the consumer group (three submissions). One submitter stated that the prohibition should apply to both standard and negotiated terms in contracts so that the disparity in the bargaining power between a trader and a consumer was recognised. Another submitter considered that there should be a provision in the FTA that prohibits unfair terms generally and allows any person to apply to the court for civil remedy in the event of a breach. In addition, they stated that a further provision should be added to the FTA that specifically identifies a range of unfair terms that, if included in a contract, amounted to a criminal offence. This submitter requested special protection for vulnerable consumer groups, such as the elderly, those with mental illnesses or those who do not have English as a first language. Examples were provided of a range of contracts considered to contain unfair terms.

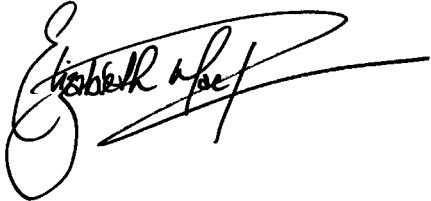
One submitter noted that as part of any consideration of prohibiting unfair terms in consumer contracts, MCA needs to consider the penalties that would apply to such a contravention – and noted the penalties available in the Victorian Fair Trading Act (which prohibits unfair contract terms) are low.

Difficulties with enforcing an unfair term in consumer contracts prohibition were raised by the Commerce Commission. They pointed out that it would take some time to establish legal precedent as to what is unfair and that it is possible that many terms that appear to be unfair may not meet the objective standard of being unfair. However, the Commission stated that such a provision could positively contribute to their activities by enabling them to stop misleading behaviour quickly and therefore reducing consumer detriment. The Commerce Commission stated that for this proposal to be successful that they should be able to decide if and how they investigate a possible breach and that they should not be required to investigate each complaint as occurs in the United Kingdom.

Given the divergent views expressed by submitters on the proposals, MCA's next steps are to conduct further detailed analysis of the proposals and to consult widely with interested parties before recommending that amendments be made to the Fair Trading Act.

Thank you for the opportunity to provide information to the Committee on unfair contract terms in consumer contracts. MCA is very interested in this issue and would like to be kept informed of any outcomes from this inquiry as well as progress in other Australian States.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Elizabeth MacPherson', with a long horizontal flourish extending to the right.

Elizabeth MacPherson  
**General Manager**  
**Ministry of Consumer Affairs**