



# **ROAD TRANSPORT FORUM NEW ZEALAND INC**

## **SUBMISSION TO MBIE ADDRESSING UDP**

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# ROAD TRANSPORT FORUM NEW ZEALAND'S SUBMISSION TO MBIE ADDRESSING UDP

## REPRESENTATION

Road Transport Forum New Zealand (RTFNZ) is made up of several trucking associations for which the Forum provides unified national representation. The Forum members include Road Transport Association New Zealand, National Road Carriers, and New Zealand Trucking Association. The affiliated membership of the Forum is some 3,000 individual road transport companies which operate 16-18,000 trucks involved in road freight transport as well as companies that provide services allied to road freight transport.

The Forum is the peak body and authoritative voice of New Zealand's road freight transport industry which employs 22,600 people (3.0% of the total New Zealand workforce), has a gross annual turnover of \$6 billion and transports about 70% of New Zealand's land-based freight on a tonne/kilometre basis.

## Introduction

1. This submission responds to MBIE's Discussion Paper "*Protecting Businesses and Consumers From Unfair Commercial Practices*" (December 2018) (**the discussion paper**).
2. The submission is made by the Road Transport Forum New Zealand Inc (**the Forum**).

## Summary of the Forum's response

3. The Forum:
  - (a) supports strengthening the protections for business against unfair commercial practices;
  - (b) advocates targeting unfair contract terms as being the most effective legislative solution and therefore supports Option 2 in the discussion paper, as opposed to options 1A-C;
  - (c) does not believe a combination of packages (para 16, discussion paper) is required. That is, the Forum:
    - (i) does not believe further protection against unfair practices are required for consumers (they are already sufficiently protected by the Fair Trading Act 1986 (**the Act**)); and
    - (ii) advocates option 2, creating greater protection for businesses;
  - (d) option 2 should have a similar small-business threshold as applies to the unfair contract terms provisions in Australia in the Australian Consumer Law;

- (e) option 2 should be enacted:
  - (i) by extending the current protections in the Fair Trading Act 1986 (**the Act**) to small businesses; and
  - (ii) removing the exclusive right of the Commerce Commission to challenge a contractual term in the courts as being unfair;
- (f) would support option 1C for consumer protection (combined with option 2 for businesses) (package three) if increased protection to consumers was a prerequisite for option 2 to benefit business.

### **The Road Transport Forum of New Zealand Inc**

4. The Forum is the central representative organisation of the road transport industry in New Zealand. The Forum's members are the geographic and sector industry organisations that represent road transport operators.
5. The road transport industry is critical to New Zealand's economy. The Forum therefore advocates for legal and economic outcomes that allow that industry to trade profitably and perform efficiently. Two-thirds of the membership are enterprises of five employees or fewer.

### **The Road transport industry: why is it concerned about unfair commercial practices?**

6. The profile of road transport operators in New Zealand is consistent with that of SME's in closely held businesses in the economy. The large proportion are family, or personally, owned and are vulnerable to unfair commercial practices from larger debtors.
7. In particular, operators are vulnerable to unjustified cashflow disruption, as is caused by the common commercial practice of *unilateral deferred payment (UDP)*. The well-known example of Fonterra unilaterally announcing that it would delay payment of its creditors to 90 days in 2016 is typical.
8. The identifying feature of UDP is that the contract terms allow the debtor to amend the terms of payment in their favour. It is therefore an example of specific unfair contract terms, rather than more general unfair conduct described in the discussion paper.
9. Road transport operators are particularly susceptible to UDP because:
  - (a) they are often heavily reliant on dominant regional customers using standard contract terms, for example to a large meat processor, and finding alternative load structures and customers is not practical;
  - (b) they pay a disproportionate amount of their costs upfront, before the service is provided, especially Road User Charges (and GST, which is payable on invoiced amounts even if payment has not been received), so cashflow from the customer is critical.
10. The Forum notes the results of the MBIE survey in the discussion paper as being consistent with operators' experiences in the road transport industry.

### **Why the Forum favours option 2: unfair contract terms**

11. Option 2 is the best legislative solution to unfair commercial practices because:

- (a) it will work. It has already done so for consumers under the Act<sup>1</sup>;
- (b) it creates immediate clarity to contract parties - the "grey list" in s46M of the Act prescribes the types of terms that may be unfair. Parties do not need legal advice to know whether a clause will be "unfair" and therefore likely unenforceable. Parties are immediately empowered to object to terms on grounds of illegality, thereby preventing the one-sided effect of standard term contracts;
- (c) lay people can understand it, and apply it, as opposed to equitable concepts of unconscionability or unfairness that require legal advice, are a court-based remedy and are inherently uncertain;
- (d) legislatively, this amendment is easily achieved by addition of one definition (*small-business standard form contract*) and amending the Act to include small businesses;
- (e) it is an efficient intervention in that it targets a specific scenario (unfair, unbalanced and unilateral rights in standard form contracts) as opposed to applying more general concepts of unconscionability or unfairness across all commercial conduct;
- (f) multiple creditors subject to UDP from large debtors have no effective remedy in a "many to one" situation. Collective action by operators to resist unfair standard terms could breach s27 of the Commerce Act 1986;
- (g) it maintains consistency with Australian consumer and small business legal protections.

### **Answers to specific questions in the discussion paper**

12. At paragraph 99 of the discussion paper:

- (a) question 10: *do you agree with our proposed high level objectives and criteria for assessing any potential changes to the regulatory framework governing unfair practices?* - **Yes, especially criteria 4 & 5;**
- (b) question 13: *if unconscionable conduct were prohibited (option 1A), should the definition of unconscionability be included in statute, and if so, how should it be defined?* **No, it is a concept evolved by the courts of equity and adapted to the circumstances where the court grants relief on account of the conscience of the wrongdoer. The Forum prefers the clarity for lay people of the UTC provisions of the Act;**
- (c) question 14: *is it appropriate to require businesses to act in good faith (as per option 1C). Are there situations in which doing so could have negative economic outcomes?:* **No, contractual clarity, rather than good faith, is the better standard for business relations because it provides for less uncertainty and thereby promotes efficiency;**
- (d) question 16: *if a version of option 1 is selected, should it also extend to matters relating to the contract itself?* **No, that is where option 2 should be used;**

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<sup>1</sup> For example see [https://comcom.govt.nz/\\_data/assets/pdf\\_file/0018/86121/Unfair-contract-terms-Telecommunications-contracts-review-February-2016.pdf](https://comcom.govt.nz/_data/assets/pdf_file/0018/86121/Unfair-contract-terms-Telecommunications-contracts-review-February-2016.pdf)

- (e) question 18: *if the UCT provisions are extended to business, do you agree that the current consumer UCT provision should be carried over without major changes?* **Yes, because the same features of consumer standard term contracts, such as unilateral ability to change them, plague small-business standard form contracts;**
- (f) question 19: *should the FTA's grey list for consumer UCTs be carried over "as is"? Are there any existing examples of unfair terms that should be removed from the list or any new examples that should be added?* **Yes, with the possible exception of s46M(j) as there can be legitimate interests in assignment of commercial contracts;**
- (g) question 20: *should the protection against UCTs apply to consumers only (as at present) consumers and some businesses (and if so, which ones?), or consumers and all businesses?* **Consumers and small businesses only, as large enterprises have the resources and sophistication to contract risk with each other;**
- (h) question 21: *if the protections against UCTs are extended to businesses, should a transaction value threshold be introduced, above which the protections do not apply? If so, what should the threshold be?* **The Forum does not have a fixed threshold figure but says it should be set to be equivalent with Australia's and could also be consistent with the 20 employee threshold for the Employment Relations Amendment Bill 2018 (limiting trial periods);**
- (i) question 22: *should there be penalties for breaching any new provisions regarding UCTs, should there be civil remedies available, even if unfair terms have not previously been declared by a court to be unfair? How should any penalties and remedies be designed?* **Breach of section 26A of the Act is already an offence but requires a prior court declaration that a term is an unfair contract term. The Forum advocates removing the requirement for a court declaration but decriminalising a breach unless there has already been a court declaration.**

## Examples

13. The Forum is naturally sensitive to exposing explicit examples of unfair practice through a public consultation process. We can however, report that after some limited publicity on this issue, the very real response we received with strong sentiment in favour of the Government moving to protect small business from unilateral deferred payment practices.
14. Some interesting and possibly useful insights and anecdotal examples are as follows:
- Xero's small business insights points out that cashflow is the biggest issue faced by SMEs – and that they are getting paid later than previously. For instance, in December 2018 55.3% of New Zealand small businesses were cash flow positive, down 1.24% month on month and 0.48% year on year. The data also showed that SMEs are getting paid later.

- In some industries, there are examples of New Zealand firms asking to be taken off international tendering opportunities because the terms of trade are seen as punitive and would destroy cash flow.
- We have examples in provincial New Zealand where a large multi-national has unilaterally informed a customer that their invoices will not be paid for ninety days, but have at the same time demanded that all their invoices are settled within seven days.

## **Summary**

15. We recognise that MBIE will have to do more work to uncover data that would inform us of evidence of frequency. Based on anecdotal evidence, we believe this is a clear and present threat to SMEs in New Zealand and that a small alteration to the Fair Trading Act 1986 would give those businesses the protection they are entitled to. Large, multi-nationals appear to be the main instigators of this practice.
16. Any change needs to be clear, enforceable and understandable, hence our relatively simple suggestion to add to existing legislation.
17. We are keen to be part of your process on an ongoing basis, to supply examples of this unfair practice.