Submission

By

To the

Ministry of Consumer Affairs

On the

Review of the Redress and Enforcement Provisions of Consumer Protection Law

International Comparison Discussion Paper

29 June 2006

PO Box 1925
Wellington
Ph: 04 496 6555
Fax: 04 496 6550

INTERNATIONAL COMPARISON DISCUSSION PAPER
SUBMISSION BY BUSINESS NEW ZEALAND[1]
29 June 2006

1. INTRODUCTION

1.1 Business New Zealand welcomes the opportunity to comment on the Review of the Redress and Enforcement provisions of Consumer Protection Law: International Comparison Discussion Paper. However, Business New Zealand is concerned about the direction and recommendations that the discussion paper outlines.

1.2 Given the increasing impact regulation is having on the economy, Business New Zealand welcomes alternative processes towards achieving desired outcomes without the need for further heavy handed government regulation, whether at the day-to-day operational level, or involving enforcement procedures.

1.3 This submission is broken up into three parts. The first part examines Business New Zealand's overall views on the discussion paper. The second part specifically addresses our views on the seven legislative changes proposed for adoption, while the third part provides comments on the legislative changes that could be considered for adoption.

2. SUMMARY OF RECOMMENDATIONS

2.1 Business New Zealand makes the following **recommendations** that:

(a) The proposal that the Fair Trading Act be amended so that it contains provisions where unfair contract terms are specifically prohibited does not proceed;

(b) The proposal for the Minister of Consumer Affairs to authorise persons to seize potentially unsafe products during investigations into the product's safety and the power for the Minister to issue warnings to the public regarding potentially unsafe products that are the subject of an investigation should not proceed;

(c) The proposal that the Fair Trading Act be amended so that the Commerce Commission can make cease and desist orders does not proceed;

(d) The proposal that the Fair Trading Act be amended so that the Commerce Commission may require a trader to substantiate any claim that they make about a product or service does not proceed;

(e) The proposal for the Commerce Commission to use court enforceable undertakings does not proceed;

[1] Background information on Business New Zealand is attached as Appendix 1.

(f) **The proposal that the Fair Trading Act be amended so that a person can be required to appear before the Commerce Commission and give evidence, with appropriate immunity provisions proceeds on the basis that disruption on a business is kept to a minimal level as possible;**

(g) **The proposal that the Fair Trading Act be amended so that recidivist offenders could be banned from supplying goods or services does not proceed. Instead, other existing mechanisms such as increased fines or new mechanisms such as widespread public notification are instead used;**

(h) **Consideration for small businesses to be included in the definition of consumers is given no further consideration;**

(i) **Consideration for super-complaints to be introduced into the Fair Trading Act is given no further consideration;**

(j) **Consideration for formal cautions is given no further consideration; and**

(k) **Consideration for amending the Fair Trading Act to specifically provide for unconscionable conduct is given no further consideration.**

PART ONE: BUSINESS NEW ZEALAND'S OVERALL VIEWS

3.1 Business New Zealand has never condoned actions by businesses that are illegal. However, New Zealand is a country in which illegal activities whereby enforcement and penalties are required are generally minimal. International rankings show New Zealand is one of the least corrupt countries in the world[2], with the 2005 report ranking New Zealand 2nd equal with Finland in terms of low corruption perceptions. New Zealand has also been near the top of the international rankings for the least problematic issues such as money laundering, unethical behaviour of firms, and organised crime. Those in business who require the heavy arm of legislation because of illegal activity are often counted in the smallest minority.

3.2 Given the position that New Zealand currently stands with ethical business practices, and the fact that the Government has recently started initiatives to review the onerous nature of regulatory creep, we are concerned about the differing directions of this paper in comparison with the industry-led regulation discussion paper that the same Ministry released in October 2005. Business New Zealand submitted on the industry-led regulation paper, which is also mentioned in the enforcement paper. We considered the industry-led regulation paper provided a useful discussion of the issues surrounding industry-led regulation, in particular the potential costs and benefits, and how self-regulation is often a preferred avenue if regulation is strongly warranted in a sector. We also supported more light-handed generic regulation such as the Commerce Act and Fair Trading Act (FTA), and we would also include the Consumer Guarantees Act (CGA) and Securities Act in that grouping.

3.3 In comparison, we found most proposals in the enforcement paper for changes to the FTA and CGA simply not required or called for. While we believe reviewing any legislation is part and parcel of what the Government should do to ensure efficiency and effectiveness, the Government needs to ask itself whether there is a legitimate and overwhelming reason for changes to be undertaken. In most instances, there is no compelling case to answer. The solution to most of the issues raised in the paper is to have more government led regulation, rather than other avenues of self-regulation and/or education, often because there seems to be a perception running through the paper that the issue is much more significant than is actually the case or that we should follow what is occurring overseas.

3.4 Business New Zealand would like to point out that there is an "optimal" amount of consumer protection law, just like there is an optimal amount of waste or resources that should be spent on crime prevention etc. Activity that breaks consumer protection laws cannot be completely eliminated, not at least without great cost. It may be able to be reduced, but beyond a certain point the marginal cost of taking action to minimise such behaviour becomes progressively higher, while the potential returns from taking action become less. In this respect it pays for companies and individuals to invest in risk minimisation strategies up to the point at which the marginal cost equals the marginal benefits of taking action.

[2] The 2005 Transparency International Corruption Perceptions Index.

3.5 While international comparisons can be useful, by providing new ideas and insights on how best things can be done, the adoption of an overseas regime is not always the best outcome, especially given the relative size of New Zealand's economy compared with other countries. The recommendations outlined in the discussion document are often based on the fact they are used overseas. However, if we were to take the example of the U.S.A, whereby reasons for regulations are due to massive market size and issues arising out of multiple federal jurisdictions, those sorts of issues do not affect New Zealand. Overall, we believe New Zealand businesses are very transparent in their practises, compared with some overseas companies, where enforcement procedures are more likely to be warranted.

3.6 Overall, Business New Zealand believes there is a strong incentive for businesses to adhere to regulation and rules currently in place, simply to protect the image of their business and/or their brand name(s). As is mentioned further on in our submission, access to information (positive or negative) is now so easy that there are strong justifications for businesses to follow best practice and ensure any faulty goods or services are rectified as soon as possible, otherwise negative publicity can be disseminated very quickly.

3.7 One recent example is the recall by Toyota in late May of it's Avensis cars because of a failure in its steering component. Although no accidents had so far been reported because of the faulty part, Toyota believed it was in the company's best interests to voluntarily recall the cars to fix the problem. The counterfactual could have been that one or more cars could have experienced an accident because of fault, and in independent tests the problem was found to be because of the steering component. Because Toyota decided to voluntarily recall the cars now, it provides the public with the perception that the company is concerned about the consumers safety, and that they hold a high regard for their image they have of producing safe and reliable vehicles.

3.8 Furthermore, while we agree that transacting with confidence has substantial economic benefits for an economy, we do not believe many of the issues that are raised are as significant problem as to warrant generic regulatory action. There is a clear lack of examples throughout the discussion paper, and in other cases a repeated use of certain examples that back up the call for regulatory change. This indicates that perhaps the problem is not significant in New Zealand, and indeed far less apparent in comparison with overseas.

3.9 The various issues outlined in the paper also all lead to only one type of proposal involving the introduction of new enforcement measures. There has been no attempt to examine changes to existing enforcement mechanisms. For example, in our discussion of banning orders we propose the possibility of the Commission looking at increasing the penalty amounts as an alternative way forward.

3.10 There are also various options available through education and industry-led change that the Ministry is also considering at this stage that we believe should play more of a prominent role if the Government is serious about halting the increasing amount of regulation being introduced into New

Zealand's economy and the consequent compliance and other regulatory costs that impact upon business.

3.11 We are also concerned about the continuing extension of powers and as well as the increasing size of the Commerce Commission (the Commission). Business New Zealand believes that the Commission should investigate issues where there is clearly illegal activity occurring. However, we believe there is no need to keep reviewing settled legislation unnecessarily.

3.12 While some of the proposals outlined below may reduce the amount of consumer detriment that can result from contraventions of the FTA, it may also increase the level of business compliance and uncertainty (typically known as psychic costs), especially if particular proposals such as product safety warnings and cease and desist orders are introduced.

3.13 Overall, we believe the discussion paper treats businesses with suspicion, in that any perceived gaps need to be filled where businesses could take advantage of consumers. The fact that further regulation is the proposed outcome means another layer of complexity, uncertainty and frustration for businesses that try to ensure they are within the bounds of conforming to the rules stated. If the structures and penalties are too onerous, the fear of stepping over the mark can limit a business in its performance, in case heavy-handed penalties are placed upon them.

PART TWO: LEGISLATIVE DIFFERENCES PROPOSED FOR ADOPTION

4. Unfair Terms in Consumer Contracts Prohibition

4.1 Business New Zealand does not agree with the proposal of specifically prohibiting unfair terms in consumer contracts via the FTA. We believe a prohibition of unfair terms would cause considerable angst and uncertainty for consumers, businesses, the Commission and the judicial system.

4.2 The paper mentions that New Zealand consumer protection legislation does not specifically prohibit unfair terms in a contract. It also states *"in many instances, consumers do not realise that a term is unfair, or that the term can be negotiated, especially is it is pre-written into the contract*".

4.3 Firstly, it goes without saying that it should be the responsibility of any party who signs a contract to find out the implications of what they are signing before doing so. If consumers or businesses are unsure or are not confident about signing anything, there are numerous points to turn to for clarification.

4.4 There is also a clear lack of indicating the scale of the issue in New Zealand to justify prohibiting unfair terms in the FTA. Critical questions are not raised, such as are there regular cases of New Zealand consumers not entering into contracts because of perceived unfair conditions? Also, what processes do these consumers go through to reach this point? The discussion paper lacks any notion of the scale of the problem.

4.5 The key word at the heart of this issue is *'fair'.* We believe this word can lead to misleading outcomes because the term can be used very loosely, and what is deemed to be fair or unfair can be very subjective. Fairness can often be used as a convenient label or as a more palatable alternative to self-interested explanations for choices made. What is fair to one person may be perceived as totally unfair to another. There is always the prospect for other players to compete in any field if a perceived gap or an opportunity arises that other players have not identified or understood. If for instance a business provides what a consumer deems to be unfair conditions in a contract. There is often the opportunity for another business to provide a more competitive offer. This underlines the importance of ensuring that there are no undue restrictions on new entrants entering the market.

4.6 Business New Zealand would be extremely concerned if the introduction of the legislation prohibiting so called unfair terms in consumer contracts meant opportunities for transactions were stifled because of fears they could be deemed to have components that are unfair. Such outcomes would benefit no one in the long run.

4.7 We agree with the Ministry that any perceived problem of unfair terms in contracts would provide an opportunity for the Commission to work proactively with industry groups (in an educative way) to develop reasonable standard terms. This approach can certainly resolve issues in a useful and cooperative manner and may prevent court action being taken. If any work on 'unfair

terms' is to take place, then we see this as a far more positive way of solving any perceived issues than the stick approach of including unfair terms in the FTA, which could end up with subjective and perverse outcomes for all concerned.

Recommendation: That the proposal that the Fair Trading Act be amended so that it contains provisions where unfair contract terms are specifically prohibited does not proceed.

5. Product Safety Warning Notice and Powers of Investigation

5.1 Business New Zealand is strongly opposed to the possibility of introducing product safety warning notices to the public and seizing products before an investigation process has been thoroughly completed.

5.2 If an investigation is completed and it is incontrovertible that there is a fault or safety issue then the public have every right to know. Also, there is a responsibility on the business to take every action possible to ensure those customers affected are notified of the problem and have the opportunity to get the product replaced or returned. The speed at which recalls notices are sent out is especially important where products are faulty that may lead to the accidents or deaths.

5.3 However, the paper points out that when a safety problem is recognised during the investigative stage, there are no powers to seize the product from sale, exposing consumers to potential harm because of a time-lag effect. There are also no formal powers by which the Minister or relevant officials can warn the public of the possible harm that may be caused by the products under investigation.

5.4 Business New Zealand has grave concerns about these proposals for two primary reasons. Firstly, how these proposals affect the proper procedures and processes that one should follow to find out if there is indeed a safety issue, and secondly the reputation of a business may be irreparably harmed if the Commission makes an error because a thorough investigation has not taken place. We believe the ability for the Ministry to perform such undertakings as proposed is akin to declaring someone guilty before all evidence has been heard during court proceedings.

5.5 It is interesting to note that the paper points out product safety redress and enforcement in the initial investigation stages relies mainly on the goodwill of businesses to stop selling products identified as unsafe. As stated in part one of this submission, there is a strong incentive for any business to undertake such actions so that there is little damage to the reputation as possible.

5.6 Any recall of a product will cause some damage to the reputation and brand name of a business. However, voluntary recalls that are enacted quickly and are wide ranging can instill a message to consumers that the business is concerned about the welfare of their customers, who only want products in the market that are safe and of a standard the business expects. If the business decides during the investigation process to voluntarily withdraw the product

then that is their decision to make. However, to issue public warnings before a full investigation has been completed provides a far higher likelihood of an incorrect warning being issued. The forced removal of a product before an investigation is thoroughly completed makes a mockery of the process in which a business is investigated to see if a product or service they provide is found to be unsafe or faulty.

5.7 We are also concerned that the Commission may take a less urgent or even dilatory approach to the effects on a business if the product is subsequently found to be safe after search and seizure powers have been instigated during the investigation process.

5.8 Our primary concern is that any incorrect public notification as mentioned above could have severe and in certain cases irreversible damage on the reputation and future viability of continuing to run the business. Often, the notification of a significant fault or safety issue remains much more firmly placed in a consumers mind than any subsequent notice that there was an error in stating there was a fault, simply by the fact that warning notices are more likely to create public interest because of the negative aspect to them.

5.9 Furthermore, we do not believe that a way to circumvent our concerns is to speed up the investigation process, which could lead to poor investigation techniques that would not be so thorough.

5.10 The paper points out that in Australia under the Trade Practices Act (TPA), that while the Australian Competition & Consumer Commission has the ability to issue a warning about a product, it appears that most businesses voluntarily comply with the ACCC on product safety issues. The ability to warn the public may be encouraging the traders to comply. One could argue that without the need for regulatory intervention, that is the case already in New Zealand. Again, the lack of an example or mention of the scale of such problems casts considerable doubt on whether such intervention is justified.

5.11 We also have concerns with the view that because *"the Australian review will have an impact on product safety in this country as many New Zealand manufacturers trade in Australia under the Closer Economic Relations (CER) agreement and the Trans Tasman Mutual Recognition Arrangement which provides that goods legally sold in one country may be legally sold in another"*. Business New Zealand has consistently pointed out in various submissions that the choice to follow any comparable legislation with Australia should at a minimum lead to a net economic benefit for New Zealand. The Government should not make changes to legislation that may increase the regulatory burden on businesses just because there is a desire to follow the Australian regulatory path. A less onerous regulation regime in comparison to many other countries gives New Zealand a competitive advantage that we should ensure continues.

5.12 Again, the scale of the issue has not been discussed. The paper mentions that being able to warn the public that a product is under investigation when a trader refuses to comply voluntarily reduces the chance that harm may occur to consumers. From our perspective this statement raises some important

questions. Firstly, is this a common occurrence amongst New Zealand businesses in that they often refuse to co-operate? If not, then what level of harm is actually being reduced? Also, as stated above it would be in the best interests for business to comply, both from the perspective of if the business is found to have faulty products so that a recall is carried out as quickly as possible, and if the business believes their product is not faulty then a positive approach would reduce the disruption on the business.

5.13 Overall, a court would never declare a person guilty before full court proceedings have been undertaken. Neither should businesses be declared "guilty" before the end of any investigation of potential product safety issues.

Recommendation: That the proposal for the Minister of Consumer Affairs to authorise persons to seize potentially unsafe products during investigations into the product's safety and the power for the Minister to issue warnings to the public regarding potentially unsafe products that are the subject of an investigation should not proceed.

6. Cease and Desist Orders

6.1 Business New Zealand believes the issue of cease and desist orders is similar to that of product safety warning notices and powers of investigation as discussed above, in that another unnecessary step is being considered to be introduced into legislation, that counters proper procedures that need to take place during an investigation process.

6.2 As the paper states, "*cease and desist orders are formal administrative injunctions that require traders/businesses to cease conduct that allegedly breaches the Act"*. Current practice is that while breaches are being investigated during the court process, businesses may continue to engage in conduct that may cause considerable harm. A cease and desist order would prevent the trader/business continuing with the alleged misconduct.

6.3 Again, the key factor is that the Commission <u>believes</u> there has been a breach in the Act rather than an investigation proving beyond doubt that a breach has indeed occurred. The possible breach may never have been proven through proper proceedings.

6.4 We note that in a review of the TPA in Australia, the Australian Treasury concluded there was not enough evidence that cease and desist orders were faster, cheaper or more effective than injunctions with respect to breaches of competition law. Although there was no analysis with regard to consumer protection law, we believe the existing injunctions practices in New Zealand are a sufficient and more appropriate process than the introduction of cease and desist orders.

6.5 While the process for injunctions as opposed to cease and desist orders are very different, in our opinion the scope for injunction notices provides a much more balanced and reasonable process in which a business may be asked to stop trading. A convenience test that occurs for injunction notices is critical for an injunction notice. As the paper points out, *"under this test an*

assessment is made as to what would happen if an injunction was made and the interests of the trader (including commercial loss) are balanced against those of consumers". While the paper complains that this is often biased in favour of the business, the lack of any balancing test for a cease and desist order could lead to far worse outcomes than a loss for some consumers. The effect of a business suddenly having to stop trading affects not only the owners and staff of the business, but also other businesses that trade with them. It is not unusual for a domino effect to take place, whereby a business that is an unsecured creditor of a business that has been given a cease and desist order also have to close, as they cannot be paid.

6.6 We are again very concerned about what would occur if a cease and desist order is issued incorrectly? Given a cease and desist order will be issued without any type of convenience test and that it takes place before a formal investigation has taken place, a business that was forced to stop operations and was subsequently found to be 'innocent' can lead to disastrous consequences for the business. We believe there needs to be serious consideration to the processes that would then follow. For example:

- Who would pay for compensation that the business should be entitled to for loss of earnings and damage to the image of the business/brand?
- What if the business has to close permanently because of the cease and desist orders?
- What flow-on effects could this have to other businesses that are not secured creditors to the business in question? (the 'domino' effect as described above).

The answers to these questions could involve considerable amounts of compensation, not to mention a loss of respect for the Commission in terms of making decisions that are subsequently found to be unwarranted or just simply incorrect. These are questions that would not need to be answered if cease and desist orders were not introduced and any withdraw and desist of operations occurred after an investigation process was fully completed.

6.7 We were surprised to read that the Commission has not yet used the cease and desist provisions under the Commerce Act since they came into force in April 2002, and that it is now the view of the Government that they may be better suited to consumer protection issues than to competition issues. Besides the fact that such regulation should be withdrawn from the Commerce Act if it is inherently a redundant piece of legislation, we also believe that:

(a) There was obviously not enough rigorous analysis of the costs/benefits of introducing unwarranted regulation into an Act, and
(b) If a cease and desist order was seen at one point in time to be useful to introduce in the Commerce Act, could the same eventual outcome also occur with a cease and desist provisions in the FTA Act?

6.8 Overall, Business New Zealand believes the current provisions for injunctions within the FTA are sufficient, and that cease and desist orders are another

example of regulatory overkill as the business should be able to continue operations until a full investigation has proven otherwise.

Recommendation: That the proposal that the Fair Trading Act be amended so that the Commerce Commission can make cease and desist orders does not proceed.

7. Substantiation Notices

7.1 As the paper points out, misleading or deceptive representations are currently prohibited under the FTA. However, there are no statutory powers in the FTA to allow the Commission to require, by way of issuing notices, substantiation of claims or representations from businesses, meaning proof usually falls on the Commission to prove otherwise.

7.2 Business New Zealand agrees that such bogus representations by a minute number of businesses should never take place and are clearly illegal. However, we also believe that consumers today are probably in the best position ever to make a value judgment about the validity of a good or service. The scope of information readily at hand about any claim made about a product or service can now be far easily verified if the consumers are willing to initiate some background investigation themselves.

7.3 Indeed, most consumers are smart enough to make a judgment about whether a product or service does what it says it will. For many consumers, the catch phrase "if it's too good to be true, it probably is" is a tried and true motto to stand by. For instance, the paper provided an example of a slimming product that melted away cellulite, and that claimed it had been tested and approved by experts in Europe and America. A simple Internet search by a would-be customer of the product should in almost all cases provide testimonies and reviews from people who have used the product. As in any significant purchase, background checks and research usually takes place, even for the reason of deciding which of similar products to purchase.

7.4 Apart from existing mechanisms available for a consumer to ascertain the validity of a claim by a business, we also have significant concerns about the proposed transfer of costs associated with the claims process. Costs to the Commission are one of the primary reasons why substantiation notices are being proposed. The paper points out that the costs to the Commission of proving that a product's claim is unsubstantiated can be very high, with the only example in the paper costing around $178,000 for expert and legal expenses. However, there was no attempt at providing figures on what the average cost is over <u>all</u> cases. One would assume that the example is more an extreme case than the typical costs associated with investigating such claims.

7.5 However, let us say that the average costs (both externally and internally) are high, and that the cost for substantiation if the proposals go forward would just mean a transfer of cost from the Commission to the business concerned. An important question then becomes what if the business is found to be making legitimate claims about a product? The business would have gone

through a costly process of proving something that it already deems to be true but without any benefit to come out of the process. Would the business then be compensated by the Commission for the costs of substantiating their claims? Even if the average cost is much lower, the cost to some firms would still proportionally represent a large financial drain, and if like the example the overall costs is extremely high in some instances, it may well cause the firm to close down.

7.6 We are also concerned that asking a business to substantiate a claim could easily change the mindset of the Commission whereby substantiated claims are used far more liberally than with the existing rules as there is no cost element for the Commission to consider. Any type of substantiation notice that means the onus of proof is passed from the Commission to the business places another regulatory cost on business, with almost no upside benefit for the business being investigated.

7.7 If this proposal does go ahead, then we believe there should be restrictions of substantiation notices to only areas that are potentially life threatening or damaging to helath/safety, such as those relating to 'miracle' medical remedies that appear above and beyond what is realistically feasible.

Recommendation: That the proposal that the Fair Trading Act be amended so that the Commerce Commission may require a trader to substantiate any claim that they make about a product or service does not proceed.

8. Court Enforceable Undertakings

8.1 The paper states that at present, the FTA does not currently provide for court enforceable undertakings. Instead, the Commission uses agreements known as settlements.

8.2 Although the paper states that settlements are a cost-effective way of achieving good consumer outcomes and supporting a level playing field for business (which Business New Zealand would agree with), concern is expressed that the inability to hold businesses accountable for their part of the settlement weakens this tool.

8.3 Although the paper points out that court enforceable undertakings provide businesses with an opportunity to rectify their behaviour without being prosecuted, and that the undertakings can be flexible, at the end of the day Business New Zealand believes it is still the stick rather than the carrot approach to regulation. Any breach of an undertaking is an offence and can be prosecuted in court.

8.4 We are also concerned that there is again a lack of providing clear information on the scale of the problem. The Commission has indicated that it would use this type of undertaking frequently. Is this because there are a large proportion of businesses that do not undertake such settlements? If this is the case, how successful have the existing mechanisms generally been for handling such situations? For more regulation to be introduced

there has to be a clear net benefit from a significant issue – there is nothing in the paper that suggests this.

8.5 Also, we are concerned that the voluntary/self-regulated model would have no opportunity to continue to develop as businesses to go through with settlements on a voluntary basis. Instead a stick approach for a problem that has not been clearly shown to be an issue in New Zealand would do more harm than good.

Recommendation: That the proposal for the Commerce Commission to use court enforceable does not proceed.

9. Compulsory Interview

9.1 Of the seven main areas for proposals that the paper discusses, compulsory interviews is one of two in which Business New Zealand could see some merit in, providing a comprehensive cost-benefit analysis is shown that the introduction of the procedure would benefit business, rather than add another layer of regulation.

9.2 We accept that if the Commission had the power to require a person to attend an interview instead of using powers for a search and warrant maybe a better outcome for both the Commission and the business being investigated. It is also interesting to note that the Commission estimates it would use this power in up to 50% of its complex investigations.

9.3 However, we would be concerned if the Commission decided to use this mechanism as the 'easy option' in which to gather information for an investigation. Having a key staff member away for interviews can cause just as much damage to the day-to-day operations of a business as a search warrant can. If the proposal went through, some of the key considerations we would want to see thought through would include:

- Provisions in place that meant the interviewee was given a sufficient notice about being interviewed;
- The Commission was flexible and accommodating in choosing a time for the interview that best suits the interviewee, especially if the interview were to take some time; and
- The length of the interview process was kept to a minimum amount of time.

9.4 Our other concern is that the Commission may decide on even more heavy-handed tactics with now two options available to them, both the powers to issue a search warrant and compulsory interviews on staff. It is important that the Commission be as proactive as possible to ensure minimal disruption on the business being investigated.

9.5 Lastly, we agree with the Commission that if compulsory interviews were introduced then appropriate immunity provisions would have to be set in place.

Recommendation: That the proposal that the Fair Trading Act is amended so that a person can be required to appear before the Commerce Commission and give evidence, with appropriate immunity provisions proceeds on the basis that disruption on a business is kept to a minimal level as possible.

10. Banning Orders

10.1 The paper discusses the fact that at present under the FTA an individual can be fined up to $60,000 for contravening the legislation. However, being fined for the breach does not prevent a person from continuing to supply goods and services, thereby leading to the possibility of a minority of repeat offenders.

10.2 The paper discusses the idea of issuing banning orders, whereby recidivist offenders would be banned from supplying goods or services either for a set period of time or indefinitely would prevent them from being able to continually mislead or deceive consumers. The paper also states that the Commission has identified a small number of individuals that have repeatedly contravened the legislation, and continue to supply goods or services in a manner that breaches the Act. Therefore, it is fair to say that the problem at hand is not a significant one in terms of the proportion of businesses performing such offences.

10.3 While the proposal of banning orders has some merit, it does seem to us to be a cause of action that is at the extreme end of trying to solve the problem. Instead, a more useful approach rather than introducing banning orders may be a change in the fine system for repeat offenders. The paper states that currently an individual can be fined up to $60,000 for contravening the legislation. Given a subsequent fine would also have a cap of $60,000, a system whereby the fine continues to double or triple for the same offence/same offender could act as an equivalent deterrent. For example, if a business is found to be guilty of an offence for the second time, the fine could double to a maximum of $120,000. If this happens again, then the maximum figure is again doubled to $240,000. However, we would not endorse behaviour by the Commission whereby the maximum penalty of $60,000 is repeatedly used in most instances in case the offender performs the same offence.

10.4 Another alternative option (that could also apply to some of the other proposals mentioned above) is public shaming through newspaper notices or website notices. Currently, there are more informal measures of this through magazines such as those distributed by the Consumers Institute, or through television programmes such as ‘Fair Go’. Very public notification that a business has been found guilty of activity that is found to be contravening legislation would often be a stronger deterrent than a fine. Repeat offenders could receive more headlines than normal to notify the public about their track record.

Recommendation: That the proposal that the Fair Trading Act is amended so that recidivist offenders could be banned from supplying goods or services does not proceed. Instead, other existing mechanisms such as increased

fines or new mechanisms such as widespread public notifications are instead used.

PART THREE: LEGISLATIVE DIFFERENCES THAT COULD BE CONSIDERED FOR ADOPTION

The paper states that the Ministry considers that the majority of the provisions outlined in part 4 of their paper are not a priority at this stage. As outlined below, we would argue that most of these provisions should not receive any further consideration in the future, as we see little advantage in including such provisions in legislation.

11. Broadening the Consumer Definition to Include Small Businesses

11.1 Business New Zealand is opposed to the notion of broadening the consumer definition to include small businesses.

11.2 We agree with the Ministry that as there seems to be no information that suggests that New Zealand consumers have been disadvantaged because of the different consumer definition used in the CGA in comparison with other countries, then there is no justification for change.

11.3 We agree that including small business into the definition would change the purpose of the Act. However, we question the need for further exploration of the relationship between small and large business transactions as stated in the paper. Our primary concern if this is conducted is that the possible recommendations or outcomes could be two sets of laws for business, one for small, another for large, which would confuse and muddy the regulatory arena for many businesses, and could tilt the playing field in favour of one type of business structure over another, hence stifling further competition.

11.4 Overall, we see this as a step to create different rules for business, which would undoubtedly cause more problems than solutions.

Recommendation: That the matter for small businesses to be included in the definition of consumers is given no further consideration.

12. Industry Codes of Conduct

12.1 As discussed in part one of our submission, we supported the Ministry's moves to examine industry codes of conduct that are developed by industry associations, as they are in the best position to ascertain what is required for their sector. Business New Zealand will also encourage self-regulation as the primary tool in which regulation (if required) should be introduced.

12.2 Business New Zealand has already submitted to the Ministry on the issue of industry codes of conduct. The submission can also be viewed using the following web link Industry Led Regulation Submission.

13. Super-Complaints

13.1 Business New Zealand agrees with the Ministry that the proposal for super-complaints should not be investigated any further, given the extensive list of changes and additions to Acts that would need to be made to accommodate the proposal, as well as the fact that super-complaints are used overseas due to a different set of circumstances.

13.2 The paper discusses the U.K example where super-complaints are available. However, as pointed out, whereas the U.K has 202 Trading Standards Authorities in which to receive complaints, New Zealand has the Commission as the central processing body, so it is much easier to ascertain whether the issue is one related to market failure or where the fault lies with a particular trader.

13.3 Also, the paper points out that:

- There would have to be significant adaption of the scheme to the New Zealand situation;
- There would be implications for the role of the Commission as an independent Crown entity; and
- There are existing mechanisms through informal arrangements between the Commission and consumer groups to discuss priorities and issues that arise.

13.4 Collectively, these are more than sufficient reasons for super-complaints not to be considered by the Ministry in the future.

Recommendation: That the matter of super-complaints to be introduced into the Fair Trading Act is given no further consideration.

14. Formal Cautions

14.1 Business New Zealand agrees with the Ministry that the proposal for formal cautions should not be investigated any further, given the current legal structure of the powers by the Police and our penalty system.

Recommendation: That the matter of formal cautions is given no further consideration.

15. Unconscionable Conduct Prohibition

15.1 Business New Zealand strongly opposes conduct that is clearly deemed to be ‘unconscionable’ or ‘unreasonable’. However, we believe the issue of ‘unconscionable conduct’ is similar to that of ‘fairness’. Because the term ‘unconscionable’ can be a very emotive word that can be open to wide interpretation, we view such behaviour as that which means actions deemed to be clearly illegal, that is, actions that break current legislation such as those under the FTA. We believe that it is extremely subjective to ascertain whether the behaviour of one party is deemed to be unfair or unreasonable. Therefore, we do not provide support for the factors that

should be taken into account by the court to determine whether 'unconscionable conduct' has taken place.

15.2 The application of the doctrine to SMEs has received little consideration in New Zealand in comparison to other jurisdictions. This perhaps indicates that the issue in New Zealand is not as severe as compared with other countries.

15.3 A deal that is deemed to be unfair by one of the parties who have entered into a deal or arrangement does not automatically mean that 'unconscionable conduct' has taken place. Some of the factors could be taken into account when ruling on 'unconscionable conduct' could also be due to poor process by 'the victim'. We believe that responsibility needs to fall on all parties to follow best business practice when involved in business transactions. For instance, both parties of their own accord should ensure that any documents involved in a business transaction are clearly understood. We also take the view that fundamental business practises such as the willingness to negotiate cannot be deemed to be insufficient or otherwise by an outside party because it is a core right of any business to determine what course is appropriate for their own interests.

15.4 Overall, we believe that like unfair terms, introducing unconscionable conduct at either the consumer or business level will open a Pandora's box of problems. Even the paper points out that although the notion of unconscionable conduct has been raised several times over the last 20 years, unconscionable conduct can be very hard to prove and the associated amendments to the FTA would have implications beyond that legislation. Therefore, we support the Ministry's view that amending the FTA to specifically provide for unconscionable conduct should not proceed.

Recommendation: That the matter of amending the Fair Trading Act to specifically provide for unconscionable conduct is given no further consideration.

APPENDIX 1

BACKGROUND INFORMATION ON BUSINESS NEW ZEALAND

Encompassing four regional business organisations (Employers' & Manufacturers' Association (Northern), Employers' & Manufacturers' Association (Central), Canterbury Employers' Chamber of Commerce, and the Otago-Southland Employers' Association), Business New Zealand is New Zealand's largest business advocacy body. Together with its 60 member Affiliated Industries Group (AIG), which comprises most of New Zealand's national industry associations, Business New Zealand is able to tap into the views of over 76,000 employers and businesses, ranging from the smallest to the largest and reflecting the make-up of the New Zealand economy.

In addition to advocacy on behalf of enterprise, Business New Zealand contributes to Governmental and tripartite working parties and international bodies including the ILO, the International Organisation of Employers and the Business and Industry Advisory Council to the OECD.

Business New Zealand's key goal is the implementation of policies that would see New Zealand retain a first world national income and regain a place in the top ten of the OECD (a high comparative OECD growth ranking is the most robust indicator of a country's ability to deliver quality health, education, superannuation and other social services). An increase in GDP of at least 4% per capita per year is required to achieve this goal in the medium term.