



14 October 2010

Consumer Policy
Ministry of Consumer Affairs
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Comment on Consumer Law Reform – Issues Paper: Unfair Contract Terms

The New Zealand Law Society (Society) welcomes the opportunity to comment on the *Consumer Law Reform Additional Paper – Unfair Contract Terms, September 2010* (Issues Paper).

Unfair Contract Terms

The Society appreciates the additional information and analysis that has been provided in the Issues Paper. As stated in our original submission, the Society does not have a firm position regarding the inclusion of unfair contract terms provisions.¹ However, for the reasons outlined in our first submission we suggest a cautious and carefully considered approach to the inclusion of the unfair contract terms. Despite the additional information which has been provided, the Society continues to believe such an approach is warranted, particularly given the increased transactional costs the introduction of unfair contract term provisions are likely to drive into the market.

The Issues Paper recommends introducing unfair contract terms largely on the analysis which has been carried out in Australia and the United Kingdom. The Society does not consider that parallels with the United Kingdom market are likely to apply to the smaller and interconnected New Zealand consumer marketplace. While the Society acknowledges that a number of parallels exist between the Australian and New Zealand markets, the evidence referred to in the Issues Paper of detriment from unfair contract terms is by its own admission largely anecdotal. Further, similarities across both countries of customer behaviour, the types of unfair clauses used and the legislative framework seem to have been assumed from the absence of evidence to the contrary.

The Society believes that there are some significant differences that should be considered. First, New Zealand has had the statutory, non-contractual Consumer Guarantees Act in force since 1994. Non-contractual guarantees will not be available in Australia until 2011. Thus (as the Ministry's own research confirms) New Zealand consumers are accustomed to having rights outside those given by the contract. Secondly, New Zealand statute law has provided a relatively simple approach to contract disputes since the 1970s and early 1980s by the codification of the formerly complex contract law principles, through the Contractual Mistakes Act 1977, the Contractual Remedies Act 1979 and other contract law statutes which are thus able to be used by the Disputes Tribunals. Thirdly, the effect of the proper use of section 13(i) of the Fair Trading Act 1986 should not be underestimated. This gives Tribunals and Courts the power to strike out (or write down) a contractual term which has not been clearly brought to the consumer's attention, including terms in fine print, and terms in a language with which the consumer is not familiar. In view of the Ministry's success in promoting the Consumer

¹ NZLS Comment on Consumer Law Reform Discussion Paper, 6.8.10.

Guarantees Act, it is perhaps more appropriate to focus on other consumer friendly law which may be underutilized.

The Society would also reiterate that although the UK and Victorian unfair contract terms legislation has been in place for some time, the Australian Consumer Law has not yet come into force. The Issues Paper recommends adopting similar legislation to the Australian Consumer Law, but the actual impact of that legislation in Australia is not yet acknowledged. There is little case law from Victoria, but that which does exist, in the Society's view, supports the difficulties envisaged in this submission and in the Society's earlier submission. See, for example, the Victorian Supreme Court judgment in *Jetstar Airways Pty Ltd v Free* [2008] VSC 539.¹ The adverse effect on the banking industry has been noted: see <http://www.bankers.asn.au/Adverse-impacts-on-business---Unfair-contract-terms-the-Victorian-experience/default.aspx>.

Given some of the differences highlighted above and the significance of this policy decision, the Society would recommend that New Zealand-specific analysis is carried out before making a final recommendation on whether to implement unfair contract term provisions. The Society appreciates the need for, and supports, a speedy conclusion to this consumer law review. However, we consider that at the least an analysis of Disputes Tribunal complaints could be carried out within a short time frame. This would determine the volume and proportion of cases involving contract terms that appear to be unfair in the specific case, which cannot be, or have not been, addressed in the Disputes Tribunals' jurisdiction to make a decision according to the substantial merits and justice of the case (Disputes Tribunals Act, s 18(6)).

The Society notes that the Issues Paper recognises that more detail would need to be worked through if unfair contract terms were introduced. However, the Society offers the following initial comments if New Zealand were to adopt similar provisions to those in the Australian Consumer Law:

- The Society would not recommend giving jurisdiction to the Disputes Tribunal. The Society acknowledges the benefits in providing ready access from a justice perspective and the Disputes Tribunal provides an excellent avenue for resolving disputes. However, the analysis required to determine whether a term is "unfair" is not straightforward. The Australian law requires there to be a significant imbalance between the parties' rights and obligations and that it is not reasonably necessary to protect the legitimate interests on the supplier. The Australian law also enables the Court to have regard to the contract as a whole in determining whether a contract is unfair. These extremely complex questions are better determined by a Court (eg see *Jetstar Airways Pty Ltd v Free*). Further, this approach would place a significant burden upon the Disputes Tribunals in that each individual consumer's contract would be disputed.
- The Society does not think it is appropriate to include a "grey list" of unfair contract terms. This inevitably becomes a black list. Many of the suggested "grey list" terms are quite common terms which protect clearly legitimate trader interests. Further, the Society notes that the Australian Consumer Law "grey list" terms are more detailed than the Ministry's summary.
- The consequence of a clause being unfair under Australian Consumer Law is that it is void. If this unfair contract terms proposal is to proceed, consideration should be given to the clause being read down to make it fair as opposed to removing it completely.
- Unfair contract terms legislation should apply only to consumers. If it applied to businesses there would be an incentive for business customers not to negotiate or review contracts so that they could try to re-open them later, thus creating considerable costs for the businesses offering the contracts.

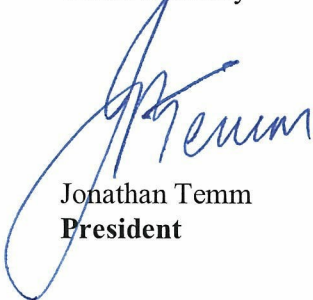
¹ Available at <http://www.austlii.edu.au/cgi-bin/sinodisp/au/cases/vic/VSC/2008/539.html?stem=0&synonyms=0&query=jetstar%20and%20free>.

- The upfront price of goods and services are excluded from being considered an unfair term in Australia. There are other terms of an offer/service, not necessarily price-related, that should also be excluded. For example, the length of term commitment required from a customer to get the stated price (and therefore an appropriate termination fee should the consumer wish to exit the contract ahead of the agreed time), the impact of discounts and special prices, or the necessity for a business to be able to terminate supply of a service after a minimum contract period in order to efficiently offer different services more appropriate to the then current market.

In summary, the Society remains of the view that the unfair contract terms proposal is premature and questions whether indeed it is necessary, considering the remedies readily available to New Zealand consumers. A consumer education approach to unfair contracts is supported by the Society.

This submission has been prepared by the Society's Commercial and Business Law Committee. If you have any queries regarding this submission please contact Vicky Stanbridge, the Committee Secretary, by telephone (04) 463 2912 or email (vicky.stanbridge@lawsociety.org.nz).

Yours sincerely

A handwritten signature in blue ink, appearing to read 'Jonathan Temm', is written over a large, light blue circular scribble.

Jonathan Temm
President