



27 March 2020

Mr Jonathon Young, MP
Chair
Economic Development, Science and
Innovation Select Committee
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Dear Mr Young, MP

Attached are the comments that the New Zealand Food & Grocery Council wishes to present to the Economic Development, Science and Innovation Select Committee on the *Fair Trading Amendment Bill 2019*.

Yours sincerely

Katherine Rich
Chief Executive



Fair Trading Amendment Bill 2019

**Submission by the New Zealand Food & Grocery
Council**

27 March 2020

NEW ZEALAND FOOD & GROCERY COUNCIL

1. The New Zealand Food & Grocery Council (“NZFGC”) welcomes the opportunity to make a submission on the *Fair Trading Amendment Bill 2019* (the Bill).
2. NZFGC represents the major manufacturers and suppliers of food, beverage and grocery products in New Zealand. This sector generates over \$40 billion in the New Zealand domestic retail food, beverage and grocery products market, and over \$34 billion in export revenue from exports to 195 countries – representing 65% of total good and services exports. Food and beverage manufacturing is the largest manufacturing sector in New Zealand, representing 45% of total manufacturing income. Our members directly or indirectly employ more than 493,000 people – one in five of the workforce.

BACKGROUND

3. The Bill contains provisions intended to address further unfair commercial practices such as the use of pressure tactics, deception, one-sided contract terms, and practices that generally exploit a business’s (or consumers) vulnerabilities. Such practices “can prevent markets from functioning effectively by decreasing trust, increasing search and transaction costs and skewing the playing field in favour of businesses that act dishonestly. They may restrict competition and, with it, productivity and innovation. Even where practices are not strictly anti-competitive, they may restrict the ability of firms to grow and thrive, by diverting their attention away from their core business.”¹.
4. To this end, the Bill proposes to prohibit conduct that is unconscionable in trade, amongst other things. This is covered in clause 6 of the Bill which inserts new sections 7 and 8 (Attachment A) to the *Fair Trading Act 1986* (the Act). Section 7 prohibits unconscionable conduct in trade. Section 8 list factors that a court may have regard to when deciding whether conduct is unconscionable. Consequential amendments are proposed to provide for related offences and fines.
5. Unconscionable conduct is serious misconduct that goes far beyond commercially necessary or appropriate. These new provisions in particular, seek to support one of the overall purposes of the Act which is to contribute to a trading environment within which, businesses compete effectively.

COMMENTS

Unconscionable conduct

6. NZFGC supports the prohibition on unconscionable conduct, especially business to business, because of our concern about the abuse of demand-side buyer power in the supermarket supply chain.
7. NZFGC has, over the past 5 years, received reports of harmful practices not addressed by the existing regulatory regime. These have been caused by a lack of competitive pressure on “powerful purchasers” and behaviour that manifests in one-sided contracts (or no contracts at all), but also in related and/or unrelated abuses of highly asymmetric bargaining power. The type of practices include ‘failure to pay agreed prices’, ‘imposition of penalties not previously negotiated’, ‘persistent demands for additional payments from suppliers’ and ‘threatening to remove products from shelves’.
8. NZFGC recognises that the test may still be hard to prove since unconscionability is a high standard and to date there has been a narrow concept of the doctrine of unconscionability used in the New Zealand courts. NZFGC is concerned that, even with the factors that the

¹ *Fair Trading Amendment Bill 2019 Explanatory Note: General policy statement*

courts may have regard to, there is uncertainty about whether the New Zealand courts will read the prohibition too narrowly.

9. NZFGC cited similar measures undertaken by Australia and the United Kingdom in response to earlier consultation on the prospect of an amendment to the *Fair Trading Act 1986*. We are therefore pleased that sections 7 and 8 in the Bill are modelled on, and are similar to, sections 20-22 of Part 2-2 of the Australian *Competition and Consumer Act 2010*.
10. While there is no definition of unconscionable conduct in the Australian *Competition and Consumer Act 2010*, the Australian courts have been clear that unconscionability involves serious misconduct and not just inequality in bargaining power that results in one party being disadvantaged. This is not, in itself, sufficient for a finding of unconscionability. We note that the general policy statement in the Bill states that “Unconscionable conduct is serious misconduct that goes far beyond being commercially necessary or appropriate.”
11. The Federal Court of Australia in *Australian Competition and Consumer Commission v Coles Supermarkets Australia Pty Ltd* [2014] FCA 1405 found Coles had engaged in unconscionable conduct in its dealings with a number of suppliers of products that it sold including demanding and processing a payment for a purported profit gap, imposing penalties for late delivery, unauthorised withholding and retention of money and requiring counterparties to agree to pay for 100% of the cost of waste in relation to their products.
12. In the first paragraph of the judgment the Court states [emphasis added]:

“Coles’ misconduct was **serious, deliberate and repeated**. Coles **misused its bargaining power**. Its conduct was “**not done in good conscience**”. It was contrary to conscience. Coles treated its suppliers in a manner **not consistent with acceptable business and social standards which apply to commercial dealings**. Coles demanded payments from suppliers to which it was not entitled by threatening harm to the suppliers that did not comply with the demand. Coles withheld money from suppliers it had no right to withhold.”
13. NZFGC recommends that Section 7 be amended to:
 - Define unconscionability to mean something not done in good conscience or conduct against conscience by reference to the norms of society
 - This is the Australian test developed by the courts, for example see *Australian Competition and Consumer Commission v Lux Distributors Pty Ltd* [2013] FCAFC 90 at [41].
 - Specify that unconscionable conduct includes:
 - a misuse of bargaining power;
 - demanding payments to which the trader is not entitled to; or
 - withholding money the trader has no right to withhold
 - Specify that conduct does not stop being unconscionable for the sole reason that the trader has acted similarly in the past
 - Refer to unconscionable conduct as being ‘serious misconduct’ instead of relying on the courts to determine the severity of unconscionability.
14. NZFGC also recommends that Section 8 be amended to:
 - Add the following factors the courts may have regard to when assessing whether conduct is unconscionable:
 - whether the conduct was serious, deliberate or repeated; and
 - whether the conduct was inconsistent with acceptable business and social standards which apply to commercial dealings.

15. The alternative is to await the New Zealand courts to proceed through a similar process as the Australian courts possibly over some years to determine unconscionable conduct. As well, Australia does not have the intensity of demand-side buyers in the supermarket supply chain as does New Zealand. We believe inclusion of the term 'serious misconduct' would provide a level of clarification that was not left in the balance.

Remedies

16. The Bill provides that it is an offence to contravene the prohibition against unconscionable conduct in trade subject to a maximum fine of \$200k for an individual and \$600k for body corporate, in line with the current maximums under the existing Act.

17. NZFGC considers these maximums to be entirely inadequate to address demand-side power in the supermarket sector. The reasons for this inadequacy include:

- country-wide impact of actions such as in relation to agreed prices, imposition of un-negotiated penalties and removal of product from shelves
- crippling a business's viability by threatening to remove the business's products from a supermarket chain. New Zealand supermarkets supply about 80% of the food and grocery consumed in New Zealand. Losing half that amount (by losing the business of one of the two big supermarket chains) would be a loss many businesses could not sustain
- the value that unconscionable activity to a multitude of suppliers might generate over time to a supermarket. This is particularly important to ensure that the behaviour of a supermarket in relation to one supplier cannot be absorbed and replicated with many others. The penalty needs to be adequate to change behaviour towards the supplier base.

18. The *Commerce Act 1986* provides for significantly greater penalties for restrictive trade practices ranging from \$500k for an individual to \$5-10m in any other case. While the magnitude of penalty is reflective of industry-wide sectors, the deterrent value is instructive. The food and grocery industry is nationwide and the magnitude of the penalty needs to reflect that, even where a supplier might be regional at the outset. Stifling innovation and economic growth at a regional level has national and export implications over time.

19. NZFGC suggests that maximums of up to \$500k for an individual and up to \$2m in other cases would be more realistic and would generate the deterrent value that needs to be added to the penalty so that behaviour affecting one of several thousand suppliers is not continued or repeated for others. This would bring New Zealand more in line with Australia where maximum penalties for breach of its unconscionable conduct provisions are at the same level as those for breach of its restrictive trade practice provisions.²

20. We note that in the *Fair Trading Act*, section 40A *Additional penalty for contravention of section 24 involving commercial gain* provides that if a person is convicted of certain offences the court may order the offender to pay an amount not exceeding the value of any commercial gain resulting from the contravention if the court is satisfied that the contravention occurred in the course of producing a commercial gain. While inclusion of section 7 and 8 to this provision would be an improvement, it deals with reparation for the individual supplier, not as a deterrent to such future activity or broader application across suppliers.

² *Competition and Consumer Law Act 2010 (cth)*, section 76 and schedule 2 section 224.

Enforcement

21. NZFGC notes that in terms of enforcement of the prohibition on unconscionable conduct, the Commerce Commission will be able to take a case and seek penalties against parties engaging in practices which are unconscionable. NZFGC supports the provision for the government to prosecute market players that are abusing their powers. Not only is it easier for such an authority, since they have extensive expertise and substantial resources to do so, there is also a higher likelihood of such action being taken rather than by a single supplier acting in isolation.

Fair Trading Amendment Bill 2019

Unconscionable conduct

7 Unconscionable conduct

- (1) A person must not, in trade, engage in conduct that is unconscionable
- (2) this section applies whether or not—
 - (a) there is a system or pattern of unconscionable conduct; or
 - (b) a particular individual is identified as disadvantaged, or likely to be disadvantaged, by the contract; or
 - (c) a contract is entered into.
- (3) This section is not limited by any rule of law or equity relating to unconscionable conduct.

8 Court may have regard to certain matters

- (1) When assessing under **section 7** whether a person's conduct is unconscionable, a court may have regard to 1 or more of the following:
 - (a) the relative bargaining power of the person engaging in the conduct (the **trade** and any person (whether or not an identified individual) who is disadvantaged, or likely to be disadvantaged, by the conduct (an **affected person**):
 - (b) the extent to which the trade and an affected person acted in good faith:
 - (c) whether, taking account of the particular characteristics and circumstances of an affected person, the affected or the affected person's representative was reasonably able to protect the affected person's interests:
 - (d) whether the trade subjected an affected person to unfair pressure or tactics or otherwise unduly influenced an affected person:
 - (f) whether the trade unreasonably failed to disclose to an affected person—
 - (i) any intended conduct of the trade that might adversely affect the affected person's interests:
 - (ii) any risk to the affected person's interests arising from the trader's intended conduct, if the trade should have foreseen that the risk would not be apparent to the affected person:
 - (g) if there is a contract to which the conduct relates, anything listed in **subsection (2)**:
 - (h) any other circumstance that the court considers relevant.
- (2) If the conduct involves a contract between the trader and an affected person, the court may have regard to—
 - (a) the circumstances in which the contract was entered into, including—
 - (i) any inducement to enter into it:
 - (ii) the extent to which the affected person had an effective opportunity to negotiate the terms:
 - (b) whether the affected person obtained independent legal advice, or other independent professional advice, about the contract before entering into it:
 - (c) the terms of the contract:
 - (d) the form of the contract, including, in the case of a written contract, whether its terms are transparent:
 - (e) whether the terms of the contract allow the affected person to be reasonably able to meet their obligations under it:
 - (f) whether the affected person's obligations under the contract are reasonably necessary for the protection of the trader's legitimate interest:

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- (g) the conduct of the trader and affected person in complying with the terms of the contract:
 - (h) the length of time the affected person has to remedy any breach:
 - (i) whether any action by the trade in relation to enforcement of the contract was lawful:
 - (j) any other conduct of the trade or affected person, after the contract was entered into, in connection with their relationship.
- (3) To the extent (if any) that no particular individual is identified as disadvantaged or likely to be disadvantaged by the conduct, this section applies with all necessary modifications as if—
- (a) references to an affected person were references to the types of person likely to be disadvantaged by the conduct; and
 - (b) references to the existence of a particular circumstance were references to the likely existence of that circumstance in relation to that type of person.