



26 April 2020

## **Submission to the Economic Development, Science and Innovation Committee**

### **Introduction: the submitter**

1. Road Transport Forum New Zealand Inc (**the Forum**) is the peak body, and authoritative voice, of New Zealand's road freight transport industry.
2. That industry 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.
3. The Forum's members include the several trucking associations for which the Forum provides unified national representation. They 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. They operate 16-18,000 trucks involved in road freight transport as well as companies that provide services allied to road freight transport.

### **Importance of road freight**

4. Road freight is critical to New Zealand's economy. Road freight will have a substantial role to play in New Zealand's immediate and mid-term COVID-19 recovery to ensure that supply chains remain connected. Support for road freight transport must be prioritised at this critical period.

### **This submission**

5. This is the Forum's submission to the Economic Development, Science and Innovation Committee (**the Committee**) on the Fair-Trading Act Amendment Bill (**the Bill**) to amend the Fair-Trading Act 1986 (**the Act**).
6. The Forum notes the deadline for submissions is 26 April 2020.
7. The Forum wishes to be heard by the Committee on this submission.

### **Summary of submission:**

8. The Forum supports the overall intent of the Bill. That is, to extend the current protections under the Act against unfair contract terms (**UCT**) to small trade contracts.
9. This submission makes four points:
  - (a) the contract value threshold should be increased to \$500,000;
  - (b) the Commerce Commission's monopoly on enforcement of UCT should be removed;
  - (c) the amendment should apply to all existing standard form small trade contracts, not just when they are varied;

- (d) extending the UCT provisions to small businesses is more important than the prohibition on unconscionable conduct. Prohibiting unconscionable conduct is unlikely to be effective.

10. The detail for those points is explained below:

**Support for the Bill:**

- 11. The Forum welcomes this Bill to extend protections against unfair contract terms to small trade contracts.
- 12. For road transport operators, the common practice of unilateral deferred payment by their customers (**UDP**) is a commercial scourge. UDP occurs when the contract terms allow the operator's customer to amend the terms of payment in the customer's favour. Like Fonterra did in 2016, when a customer can unilaterally and lawfully defer payment, it is the transport operator's cash-flow that suffers.
- 13. UDP exemplifies why businesses subject to standard form contracts require the protection of the unfair contract terms provisions in the Act. It will prevent the bigger party from exercising the right to defer payment.
- 14. Road transport operators in New Zealand are like most SMEs; closely held businesses that are crucial to the economy. Two-thirds of the Forum's membership are enterprises of five employees or fewer. The large proportion are family, or personally, owned and are vulnerable to unfair commercial practices from larger debtors.
- 15. Road transport operators are particularly susceptible to UDP because:
  - (a) they are often heavily reliant on dominant regional customers who issue standard form contract terms; for example, a single large meat processor in a region, and
  - (b) they pay a disproportionate amount of their costs upfront, before the service is provided, especially Road User Charges (**RUC**), and before they get paid, so cash-flow is critical;
  - (c) margins are thin, again making them reliant on cash-flow;
  - (d) finding alternative loads for the vehicles and new customers is not practical;
  - (e) they serve "many to one", meaning several operators may carry for one large customer, but they cannot act collectively to resist unfair contract terms.
- 16. For these reasons, the Forum supports the overall intent of the Bill to extend UCT to small trade contracts, subject to the following suggested amendments.

**Definition of small trade contracts:**

- 17. The Forum submits the definition of small trade contracts should be increased to so the threshold is \$500,000, not \$250,000.
- 18. The definition of small trade contracts in s26C(1)(c) is an agreement that does not comprise or form part of a trading relationship that exceeds the specified **annual value threshold** when it first arises. This is a convoluted and difficult definition to apply so compliance will be compromised.

*\$250,000 is too low*

19. Too many contracts whose parties deserve protection from unfair contract terms will be worth more than \$250,000. Many transport operators will have contracts with an **annual threshold value** well in excess of that amount. Many commercial contracts of far higher value will still be imposed on small businesses as a standard form document.
20. Unless the threshold is increased, a significant number of small businesses that deserve the protection of the Act will not get it.
21. The Forum recommends an increase to \$500,000 for the **annual value threshold** in the proposed s26D (clause 7 of the Bill).

*A confusing prospective definition:*

22. The **annual value threshold** requires:
  - (a) a *transparent term or terms* providing for consideration of \$250,000 or more in an annual period; or
  - (b) consideration worth \$250,000 is *more likely than not to become payable* under the relationship in any annual period; see s26D(3)(b), (clause 7).
23. This confusing and lacks commercial reality. Few contracting parties, particularly in the road freight industry, contract with a prospective gross figure of consideration already known to them. Instead, they will contract according to the volumes to be carried and the frequency of delivery. Rates are often amended by the customer and the ultimate value of the contract is unlikely to be known at its start.
24. These alternatives in the definition, or even the threshold of the contract value, creates uncertainty for operators about whether the UCT protections will apply. That is doubly so if an operator is required to know the value of the contract when the parties first enter into it (and the trading relationship arises).
25. Larger commercial customers could use this uncertainty to their advantage to ensure they remain above the annual value threshold. Further vexing is that a customer could still include a provision in a contract permitting unilateral amendment to the price it pays for goods or services to remain over the value threshold.
26. The Forum is separately concerned that the inverse of UDP could be deployed to achieve this based on the wording of "*become payable*". Large commercial operators could unilaterally change *when* they make payment to remain above the value threshold in any annual period.
27. The definition provides an opportunity for businesses to circumvent the UCT protections by structuring their contracts to include an annual value threshold or to alter their payment terms to remain over the value threshold annually.

*The application of the \$250,000 threshold is unclear:*

28. The Forum considers that in its current form, the value threshold is set too low, will exclude too many SMEs and create uncertainty about its application. This concern is heightened by the definition of trading relationship in the Bill.

29. Whatever test is applied, if the value is increased to \$500,000 it will significantly improve the protection of the Act by unequivocally covering more business contracts. In effect, it will cast a bigger, and hence more effective, net.

### **Remove the Commerce Commission's monopoly on enforcement:**

30. In the Bill, the Commission retains its exclusive right to seek a declaration from the Court that a contract term is unfair. This limits the effectiveness of the Bill's protections for UCT because;
- (a) there is only relief if the Commission chooses to take up the cause. That is, transport operators must persuade the Commission to act, and it has its own priorities;
  - (b) it prevents parties:
    - (i) asserting the term is unlawful directly to their customer when presented with the contract; and
    - (ii) establishing that in court; and
  - (c) it makes enforcement of UCT a long, slow process, dependent on the Commission.
31. The Forum acknowledges that the Government is considering the Commission's wider enforcement powers as part of a broader review of the Act. However, this bill is an opportunity to remove the logjam at s46I of the Act by allowing the contract party, themselves, to seek a declaration the term is unlawful, as well as the Commission.
32. That would have a salutary effect on large customers that use standard form contracts when dealing with small businesses. They would know that overbearing terms in the contract were susceptible to challenge both in and out of court.
33. The Forum supports making enforcement of UCT accessible for SMEs, including making the inclusion of UCT in small trade contracts subject to civil pecuniary penalties or remedies that are more flexible.
34. The current absence of penalties creates an inadequate framework for compliance and general deterrence.

### **Transitional provisions:**

35. The protections against unfair contract terms should apply to all existing contracts, not just if, and when, they are varied.
36. Schedule 1AA (transitional, savings and related provisions) (**the transitional provisions**) provides that cl 26B – 26E do not apply to contracts entered into before the commencement date that are not varied or renewed after that date. The bill needs to protect SMEs on long-term contracts that are still subject to unilateral deferred payment and other UCT. The Bill should cover all eligible contracts from its commencement date.
37. One example of an unfair contract term in 46M(d) of the Act is a term that permits, or has the effect of permitting, one party (but not another party) to vary the terms of a contract. That is how UDP occurs.

38. The effect of the current transitional provisions is that large commercial operators can avoid the effect of the Bill by continuing to rely on their right to vary terms in existing contracts, without varying the contract itself. That conduct would not be proscribed, as the contract itself had not been varied or renewed.
39. The Forum submits a better approach is that the Bill be amended to apply to all contracts in existence at from the Bill's commencement date.
40. Further, the Forum considers there is another unintended effect of the transitional provisions. Large commercial operators may force SMEs they contract with to accept unfavourable varied or renewed terms that expressly include a transparent term providing for consideration of over \$250,000 in order to avoid the threshold for protection under the Act.

### **Unconscionable conduct**

41. The Forum supports the prohibition on unconscionable conduct to protect SMEs from stand-over tactics and other undesirable commercial practices.
42. However, the concept of unconscionable conduct is not well understood by small businesses, nor well-suited to legislation like the Act. Unconscionable behaviour, or unconscionability, is a concept developed by the ancient Courts of Equity, where conduct is judged according to the conscience of the sovereign, rather than a strict rule of law.
43. Unlike the rest of the Act's relatively plain language, the meaning of unconscionability will not be understood easily by the layperson. It would be difficult for SMEs to rely on the Bill's protections against unconscionable conduct without significant legal advice and assistance. That stops a business person asserting to their counterparty that a term is prohibited when presented with a standard form contract. That in turn limits the effectiveness of the protection the prohibition is to provide.

**Nick Leggett**



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