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5 September 2025

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ICNZ SUBMISSION ON CHAPTER 3 THE TARGETED CONSULTATION ON PROPOSED AMENDMENTS TO THE FAIR TRADING ACT 1986

This submission is provided in response to the Ministry of Business, Innovation & Employment's (**MBIE**) targeted consultation paper on proposed amendments to the Fair Trading Act 1986 (**FTA**). In this submission we respond to Chapter 3: Unfair Contract Terms (**UCT**) of the consultation paper (questions 15 to 20). Thank you for the extension of time to respond to Chapter 3. We provided a submission to respond to Chapters 1 and 2 on 8 August 2025.

Te Kāhui Inihua o Aotearoa | The Insurance Council of New Zealand (**ICNZ**) represents general insurers. Our members accept the risks of over NZ$2 trillion of New Zealand's assets and liabilities. ICNZ's members provide insurance products ranging from those usually purchased by individuals (such as home and contents insurance, travel insurance, and motor vehicle insurance) to those purchased by small businesses and larger organisations (such as product and public liability insurance, professional indemnity insurance, cyber insurance, forestry and horticulture insurance, livestock insurance, commercial property insurance, and directors' and officers' insurance).

Comments on the consultation process

As ICNZ previously noted in our earlier submission, undertaking this consultation as a targeted consultation is inappropriately narrow given its scope and the far-reaching implications of some of the proposals in it, including the proposals to amend the UCT regime.

The consultation paper is limited in its analysis and this has made providing feedback difficult. The paper has no real evidence or analysis of why legislative changes are required, relying generally on assertions or conceptual arguments.

There is also little analysis of the implications of the proposals, particularly given many of them are interconnected, e.g. changes to the nature of offences combined with higher penalties combined with a reduced ability to insure defence costs – together these proposals would be a very significant change in approach but the interconnections are not analysed.

The consultation paper does not consider the impacts of the proposals on sectors subject to specific UCT legislation, or other relevant legislation, such as insurers. It does not reference or acknowledge the impact of recent legislative changes. We note that two Acts have been passed

in the past year impacting the UCT regime as it applies to insurance – the Regulatory Systems (Economic Development) Amendment Act 2025 passed in March this year and the Contracts of Insurance (Repeals and Amendments) Act 2024 passed in November last year. The changes proposed in the consultation paper were not however signalled when this recent legislation was being developed or progressed.

It is challenging to give robust and comprehensive feedback when the full suite of changes to the UCT regime are provided in a piecemeal manner and the full context of interrelated changes are not known. This prevents stakeholders from gaining a comprehensive understanding when preparing submissions. As a result, submissions may be made without full information, which diminishes the quality and meaningfulness of the consultation process.

If the only further chance for input on these proposals will be through the Select Committee process, then it will be critical that this follows a proper process with time and opportunity for submissions and adequate time for the Select Committee to consider them i.e. a normal six-month report back period.

The consultation paper has no discussion of how and when the changes might be implemented, how this might relate to other legislative changes, or what issues might be generated by the change that need to be further considered. These issues will need to be thoroughly addressed before the proposals are taken any further and before legislation is drafted.

Chapter 3: Unfair Contract Terms: making the rules easier to use and enforce

General ICNZ comments on proposed amendments to the UCT regime

Insurance contracts are already subject to extensive regulation and changes to the application of the UCT arrangements for insurance contracts are already confirmed. Given this and an absence of any specific rationale for changing the UCT arrangements for insurance contracts, we consider that no further UCT changes should be instituted at this time in relating to insurance contracts.

The consultation paper lacks evidence of a problem that requires legislative change. The consultation paper does not provide evidence either quantitative or specific evidence about the prevalence of unfair terms, with the arguments set out in the paper generally being theoretical and/or based on assertions. We consider that policymakers should present evidence of the prevalence of unfair contract terms, and the types of terms, to justify regulatory change in this area and to enable the regulatory impacts to be assessed. If research on the size of the issue has not already been undertaken, it should be.

ICNZ does not support the proposed amendments to the UCT regime. The case for change outlined in the consultation is limited and should it be progressed, it would create uncertainty particularly for insurance contracts. The regulator should remain the gatekeeper of challenges to the fairness of contractual terms, to ensure certainty and to avoid frivolous litigation.

Insurance contracts are unique as the contract is the product. The terms of an insurance policy are integral to the very product itself. This has always been recognised in the design of the UCT regime and this continues to need to be recognised in any further changes made.

There is already direct regulation and regulatory oversight of insurance contracts under the existing law – the FTA, the Financial Markets Conduct Act (**FMCA**) and Contracts of Insurance Act.

Policyholders have the benefit of a range of legal protections, including under the Conduct of Financial Institutions (**CoFI)** regime that came into effect in early 2025. The CoFI regime provides overarching obligations on insurers to treat consumers fairly and provides specific insurance contract related obligations. The 'fair conduct principle' requires insurers to "ensure that the relevant services and associated products that the financial institution provides are likely to meet the requirements and objectives of likely consumers (when viewed as a group)" and an insurer's Fair Conduct Programme needs to provide for "regularly reviewing the relevant services or associated products that are provided to consumers on an ongoing basis to determine whether they are likely to continue to meet the requirements and objectives of those consumers (when viewed as a group)".

Insurers are also subject to a specialist financial sector regulator, the FMA , which will soon acquire new powers to seek declarations that a term is unfair in respect of contracts for financial products which includes a contract of insurance. Sections 85–91 of the Regulatory Systems (Economic Development) Amendment Act 2025 will alter the regulatory oversight of UCTs for contracts of insurance, including by giving the FMA the power to apply for declarations that a term is a UCT. The Commerce Commission must also obtain the consent of the FMA before applying for a declaration that a term is a UCT in a contract of insurance. This is material as unlike the Commerce Commission, which has a whole of economy ambit, the FMA is resourced to focus solely on the financial services sector, including insurance.

If the proposal to allow private parties to challenge the fairness of a contract's terms were to proceed (which we do not support), any consideration of whether a term is unfair needs to be undertaken by the Courts, and not the Disputes Tribunal or other dispute schemes. The application of the UCT regime is complex and a decision that a clause is unfair could have consequences well beyond the individual customer concerned. Therefore, these cases should be determined only by the courts with sufficient skills to undertake the evaluation and, therefore, should be limited to the High Court at least for insurance contracts. We acknowledge the District Court can currently consider UCT cases, but this is only on the application of the Commerce Commission, which provides a degree of process and certainty.

There should only be penalties for applying unfair terms after they have been declared unfair by a court.

MBIE is, through this targeted consultation, seeking views on a series of interconnected changes (including to FTA penalties) and it is critical for good policymaking that if changes are progressed the cumulative impact is carefully considered.

Responses to consultation questions

15. Do you support allowing private parties to challenge unfair contract terms? Why or why not?

ICNZ does not support this proposal. It would introduce unnecessary uncertainty for insurers and other commercial entities that are subject to the UCT regime.

The consultation paper presents no evidence of research into the prevalence of contacts with unfair terms or any examples of terms that might be unfair aside from the two case study examples. There is also no analysis of the practical consequences of what would happen after a term is found to be unfair.

The first paragraph of this section of the consultation paper (paragraph 79) provides an unnecessarily pejorative and loaded description of standard form contracts, which is unjustified and fails to recognise the huge number of customer interactions across multiple sectors which would be completely impractical in the absence of standard form contracts. While it is accurate to say standard form contracts are provided on a "take or leave it" basis, it would be completely impractical for these to be negotiated at point of sale. Equally, even though such contracts (like any contacts) could contain unfair terms, the drafting of this introductory paragraph appears to reveal an unjustified, troubling pre-determined perspective.

The consultation paper outlines some arguments in favour of the proposed change but does not list the arguments against, which include:

- Allowing private challenges rather than regulator challenges may lead to inconsistent outcomes, especially if different courts/tribunals interpret the UCT regime differently.
- There is a risk of uncertainty potentially affecting a wide range of insurance policies. One solution to mitigate risk is potentially to reduce cover or make terms more complex and legalistic.
- Businesses may face legal unpredictability, especially if standard terms are frequently challenged, and potentially as part of wider disputes.
- The risk of challenge could lead to over-cautious contract drafting, reducing efficiency or innovation in service delivery.
- There is a risk of vexatious or strategic lawsuits, where parties challenge terms not out of genuine concern but to gain leverage in disputes.
- Judicial decisions may vary (for example, where the court is not bound to follow its own past decisions or when a judgment is appealed), leading to inconsistent interpretations of fairness.
- Insurance contracts often involve technical language and risk assessments. Specialist regulators may therefore better-placed to bring an action, and to assess the implications of doing so, than private parties.

- Some sectors, such as insurance, are subject to other specific regulation and regulatory oversight that impacts on the content and drafting of standard form contracts, for example the CoFI regime.

We note that unlike less regulated businesses, such as gyms, financial institutions are already subject to strong commercial incentives and regulatory requirements, now flowing clearly from the FMCA's fair conduct principle, to proactively review and improve their contracts in response to practical experience, feedback and events. In fact, proactive product reviews for existing offerings are a current key focus area identified by the FMA in its inaugural Financial Conduct Report. These priorities directly shape the FMA's monitoring approach, and this particular priority appears to be the first in line for the 2025–2026 monitoring cycle. It is the central focus of Stage 1 in a newly launched two-stage thematic monitoring review, which covers products (i.e. contracts), services, and complaints.

In the context of the insurance sector, concerns about unfairness or regulatory gaps that may arise in other industries not subject to the CoFI regulatory regime are not evident in those subject to it. The FMA is already actively engaged in whether insurers treat consumers fairly and the discussion document does not provide a compelling rationale for additional regulatory intervention.

Overall, we consider that in relation to insurance contracts, the current approach where the regulator may seek a declaration that a contract is unfair is appropriate.

In our view, regulators should remain the gatekeeper of challenges to the fairness of contractual terms, to ensure certainty and to avoid frivolous litigation. Properly resourcing them would be a more effective means of addressing any concerns with unfair contract terms.

Unlike private parties, regulators are well placed to identify systemic issues and recurring patterns. This allows regulators to take a risk-based approach, focusing on areas that cause the greatest harm in a proportionate and strategic way. Private parties do not assess issues from a strategic perspective.

Under the proposals, a decision that a term in a standard form insurance contract is "unfair" has significant implications for the defendant and potentially for other insurers. At any time when a Disputes Tribunal or court decides that a term is unfair, the defendant insurer is likely to have many identical standard form contracts in force with other customers and be in the process of managing claims under those contracts. The consultation paper does not consider such practical implications or start to explore how the insurer should treat those other contracts and claims.

The Disputes Tribunal is not an appropriate forum to determine UCT matters

As outlined elsewhere, we recommend no changes to the current legislative settings to provide certainty. If a change is made to allow private parties to challenge UCT matters, which we do not support, any consideration of UCTs for insurance contracts should only be able to be heard in the High Court, given the complexity of the regime and potentially wide implications of any case.

Allowing the Disputes Tribunal to make a ruling on an unfair contract term in the context of a single lower-value claim would be completely inappropriate.

The application of the UCT regimes to insurance contracts is technical and complex (as shown in the Australian *ASIC vs Auto General* cases) and requires a sophisticated court with its associated processes to properly consider it. The implications of a finding that a term is unfair both across an insurer's suite of products and across the insurance industry and with immediate effect must be underpinned by rigorous legal analysis. We note that in Australia only the courts can consider unfair contract terms.

The Disputes Tribunal does not have the appropriate expertise to make these decisions, especially considering the impact that the decisions will have on other contracts (i.e. beyond the immediate dispute between the insurer and the customer). Where a contractual term is used by several insurers for example, a case against one insurer will impact all other insurers who use the same or a similar term. However, it is unclear whether it is intended that a single decision made on a certain set of facts would have wider application and if so, how this decision would be communicated to other insurers.

We do not support the Disputes Tribunal determining UCT matters for the following further reasons:

- Disputes Tribunal Referees are not necessarily legal professionals and are not experts in businesses' legitimate commercial interests and will need to assess detailed evidence on this requirement. The Tribunal process is not intended for defendants to have to *routinely* submit extensive evidence.
- The Disputes Tribunal is only required to have regard to the law but is not bound to give effect to strict legal rights or obligations or to legal forms or technicalities. This is therefore not an appropriate jurisdiction to assess and issue declaratory determinations as to whether contractual terms are unfair or not, as such questions are inherently a matter of legal interpretation and assessment.
- Furthermore, legal representatives cannot appear in the Disputes Tribunal. This means referees will not have the benefit of legal representatives making submissions in what is a complex and largely untested area.
- The Disputes Tribunal is not bound by its own precedent so there could be inconsistent decisions made by the Disputes Tribunal referees leading to uncertainty for insurers and customers as to whether terms are unfair or not (and whether they need to be amended).
- The Disputes Tribunal is also subject to limited appeal rights, which is inappropriate given the potentially significant implications of a decision about the fairness of a contractual term.

  Under section 50 of the Disputes Tribunal Act 1988, a party may appeal to the District Court against a Tribunal's order on the grounds that the referee conducted the proceedings in a manner that was unfair to the appellant and that unfairness prejudicially affected the outcome. The leading authority on appeals is *NZI Insurance New Zealand*

> *Ltd v Auckland District Court*[1], in which the High Court confirmed that the right of appeal is confined to cases of procedural unfairness and does not extend to correcting errors of law. The District Court does not have jurisdiction to reconsider the merits of the referee's decision. The merits of a referee's decision may only be revisited where the decision is so obviously wrong that it cannot be regarded as a determination made in accordance with the substantial merits and justice of the case.[2]

We note that paragraph 87 of the consultation paper refers to section 46H of the FTA which applies to grocery supply contracts, in the context of individuals or SMEs challenging unfair contract terms directly. However, section 46H simply allows a person to apply to the High Court or the District Court for a declaration, not the Disputes Tribunal.

The grocery sector has a very specific set of issues that the Government is trying to address and the relatively new section 46H needs to be viewed in the context of this and not be used as basis for making changes to the whole UCT regime or to other sectors subject to specific statutory requirements.

External Disputes Resolution Schemes are not appropriate forums to determine UCT matters

ICNZ met with officials from MBIE on 5 August 2025. At that meeting officials indicated that they were also considering whether External Disputes Resolution Schemes (**EDRSs**) should be able to declare that a term in a standard form contract is unfair. This is not referred to in the consultation paper, however, given it has been raised we provide feedback on this also. As with the Disputes Tribunal, we consider that the financial services EDRSs do not have the requisite expertise to determine this type of issue, nor do they have the discipline of the rules of court, the rules of evidence, the ethical obligations of lawyers, or a right of appeal.

It would also be inappropriate as determinations by the financial services EDRSs cannot be reviewed or appealed externally and are binding on insurers. A framework that may result in a contractual term being declared unfair requires robust, consistent decision-making that adheres to the law. We are not confident that these standards would be met.

We have similar concerns for EDRSs as arbiters of unfair contract terms as we have for the Disputes Tribunal, as outlined above, and these issues are compounded by the fact that there are four financial services EDRSs, three of which deal with general insurance disputes.

As with cases before the Tribunal, it is unclear how the EDRSs would communicate a finding of unfairness to other insurers who use the same or a similar term, particularly as two competing schemes are involved. An insurer who is a member of the Insurance & Financial Services Ombudsman scheme, for example, should not be bound by a decision of the Financial Services Complaints Limited scheme and vice versa.

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[1] [1993] NZHC 1800

[2] See *New Zealand Insurance Ltd v Blenheim District Court* (2001) 16 PRNZ 493 (HC)

The implications for a business of a term being declared to be an unfair contract term are significant and should not be underestimated. Every similar contract with a customer will need to be amended and customers then notified. This should only be done in circumstances where the Court has had the opportunity to properly consider the matter and provide a reasoned judgment, which can be appealed if appropriate.

A regulator taking regulatory action because of a Disputes Tribunal (or EDRS) decision is inappropriate given the issues raised above yet this is what Scenario 1 in the consultation paper envisages.

16. What types of parties should be able to take action (e.g. individuals, businesses party to a small trade contract)?

We do not support the proposal that parties to a standard form contract should be able to take this type of action. Retention of the current approach where the regime is enforced thorough the regulator is more appropriate, with it being better resourced if necessary to perform this function.

We also note that a business party to a small trade contract is likely to have used a broker and to have received advice prior to entering the contract. Therefore, it is even less appropriate for businesses to be extended this ability.

17. What impacts would this change have on your organisation or sector?

The proposed change would materially change the way the UCT regime operates in New Zealand and would create increased uncertainty for insurers.

In relation to insurance contracts there are a number of features that need to be taken into account:

- With insurance the contract is the product itself – and so all of its benefits, terms and conditions make up the product and impact the price paid for it. This is recognised in the specific provisions under the FTA for insurance contracts.
- Most insurance policies are standard form contracts. It is impractical for them to be otherwise.
- Claims are made on insurance policies and so, if any relevant terms are found to be unfair by a court, then the effect is retrospective in nature as it could change the application of potentially numerous claims already in process, or to be made under the remaining period of current insurance contracts that were issued and priced on the basis that term applied.
- Insurance contracts are based on longstanding domestic and international precedents and so often have similar terms that are required to meet international reinsurance requirements.
- At any point in time an insurer will have:
    - a large number of a type of contract in force (could be hundreds of thousands)

- a significant number of a type of contract agreed to and potentially paid for but not yet in force e.g. renewals, contracts for upcoming period (could be tens of thousands)
- a potentially material number being entered into on the day that a contract term is declared unfair.

- Unlike most other sectors insurers are subject to statutory product design and review requirements under CoFI and have a dedicated regulator (the FMA) which supervises insurers individually and is resourced to undertake thematic reviews and other supervisory activities.
- Insurers have been encouraged, including by policy makers, regulators and other stakeholders, to adopt plain language wordings which this leads to simpler and easier to understand wordings. However, in the context of a complex legal relationship, this creates the risks of accusation of oversimplification or misstatement.

  This tension was acknowledged in Federal Court of Australia decision *Australian Securities and Investments Commission v Auto & General Insurance Company Limited*. Justice Derrington stated, "The policies of Auto & General Insurance Company Limited which are the subject of this action were drawn with a careful eye to informing insureds of their legal position vis-à-vis the insurer. No doubt, keeping in mind the broad characteristics of the market in which policies of this nature are offered, the expression of the scope of the cover provided to the insureds descended to a level of simplicity such that any person whom may be interested to know their rights, might easily and quickly understand them. Of course, in attempting to provide an easily understood articulation of the parties' respective rights in a complex legal relationship, the insurer encountered the risk of the simplified expression being viewed by those with an eye zealously attuned to the detection of error, to assert the existence of a misstatement. This is what has occurred here."[3]

Many contracts from the same insurer and/or across multiple insurers could have very similar clauses – for example common administrative type clauses, such as cancellation or notification clauses, could apply across multiple product lines. This means that a finding of an unfair term in one policy against one insurer could have much wider application – creating uncertainty and compliance costs across the sector.

The consultation paper gives the example of Sarah's gym membership and states "If the gym continued to use the same term in future contracts, the Commerce Commission could then take enforcement action and seek penalties. (emphasis added)" The example does not explore or illustrate what could and should happen with respect in other sectors or the situation of insurance where there are policies that are already in force.

[3] *Australian Securities and Investments Commission v Auto & General Insurance Company Limited* [2025] FCAFC 76, paragraph 2.

Reviewing and revising insurance policies takes time. They cannot be amended instantly. Once the standard terms are amended, as insurance policies are generally renewed annually, it generally takes 12 months for updated terms to be applied across all contacts.

Experience overseas for insurance contracts is that if a term is found to be unfair, it is sometimes because of the way it is drafted (e.g. broader and simply drafted) rather than the general intent or application of the clause – and so the solution to make the term not unfair is to draft it to make it more specific or detailed to make it more transparent, which takes time and means the clause would be replaced rather than simply removed.

We are also concerned that there might be unforeseen impacts on insurer's reinsurance arrangements if the enforceability of policy terms is called into question. Insurance policy terms may reflect the requirements of an insurer's reinsurance arrangements. If such a term were deemed to be unfair, the insurer would either have to re-negotiate its reinsurance contracts or bear the costs and risks itself if that is possible – either scenario is likely to increase the cost to consumers.

Insurers are currently in the process of reviewing their insurance contracts in response to the Contracts of Insurance Act 2024 and refinements to the UCT regime made through the Contracts of Insurance (Repeals and Amendments) Act 2024, which will come into effect on 15 November 2027. Assuming any further changes to the UCT regime (which we do not support) are finalised and communicated at least 18 months prior to 15 November 2027, it would make sense for the changes to come into force for insurance contracts at the same time so that insurers are able to accommodate any further changes within their planning processes. We would welcome the opportunity to engage with MBIE further on how commencement and implementation periods could be provided that appropriately balance the progression of regulatory reform without unduly impacting insurers or their customers.

18. Do you support introducing penalties for including unfair terms, even if they haven't been declared unfair by a court in a previous case?

We do not support this proposal. Decisions on the fairness of a term may be finely balanced. This means that a responsible business that intends to comply with the UCT regime could nonetheless be inadvertently in breach, even if it did not rely on or apply the term in that way.

It may be appropriate for a term found to be unfair to be unenforceable henceforth but making it an offence (potentially subject to significant penalties) immediately on such a ruling is impractical.

Whether a term is "unfair" can require complex analysis and be disputed through the courts – as demonstrated through the recent *Australian Securities and Investments Commission v Auto & General Insurance Company Limited* litigation in Australia.

Having penalties immediately come into effect gives entities no chance to practically respond. For the reasons noted above, entities such as insurers with a significant number of contracts and large distribution systems cannot change a contract immediately, and even if they do there

would likely be large numbers of contracts with similar wordings still in force. There are many internal processes and quality controls that must be completed before a contract can be modified. It is not just a matter of revising a document.

The inability of a business to rely on a term found to be unfair is the critical element (rather than the application of a penalty).

Should a contractual term be found to be unfair then the issuer of that contract will be incentivised to update it quickly as it will likely need to fill that gap to address whatever the purpose of the term was with a similar term that is not likely to be found to be unfair.

It would be more practical to require that such terms can no longer be applied, enforced, or relied on but not immediately prohibit the inclusion of the unfair contract term in a standard form contract or to apply penalties. Otherwise, the latter could require insurers to stop offering a type of insurance contract until they were able to update and re-release it through their distribution systems, which could have adverse impacts for customers and potentially the financial system.

In summary, if there were to be penalties then they should apply only where a business applies, relies on, or purports to apply or rely on, an unfair contract term. If a term that is commonly used was found to be unfair it would not be possible for insurers to instantly change their policies.

19. If so, what types of penalties (e.g. pecuniary penalties, offences) would be appropriate?

As the determination of whether a contractual term is unfair may be finely balanced and nuanced, we consider that it would only be appropriate to impose a penalty if the business knew or was reckless in using an unfair term. The penalty should therefore be an offence requiring proof of intent or recklessness.

20. Should penalties be restricted to where a business knew or was negligent in using a term that was unfair?

We consider that penalties should be restricted to where a business knew or was *reckless* (rather than negligent) in using a term that was unfair. Whether a term is fair or not can be a finely balance assessment so recklessness is a more appropriate threshold for applying penalties.

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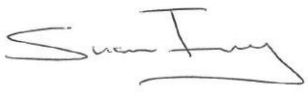

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