

NEW ZEALAND RESPONSE TO
QUESTIONNAIRE
ON ABUSE OF SUPERIOR BARGAINING POSITION
(SPECIAL PROJECT)

This is the New Zealand Commerce Commission's (NZCC) response to the questionnaire on the analysis and treatment of "abuse of superior bargaining position" in business to business relations. For the purposes of this response, the concept of "an abuse of a superior bargaining position" includes, but is not limited to, a situation in which a party makes use of its superior bargaining position relative to another party with whom it maintains a continuous business relationship to take any act such as to unjustly, in light of normal business practices, cause the other party to provide money, service or other economic benefits. A party in a superior bargaining position does not necessarily have to be a dominant firm or firm with significant market power.

A. How, if at all, is "abuse of superior bargaining position" defined in business to business relations in your jurisdiction? Does the definition apply to (a) both supplier and buyer sides of the market or (b) to one of these sides only? If option (b) is chosen, to what side of the market does it apply in your jurisdiction and what are the reasons for applying the concept solely to it?

New Zealand does not have a specific prohibition against an abuse of a superior bargaining position in a business to business context. However, the New Zealand legal system draws on the English rules of common law in relation to commercial and contract law. These common law rules include some equity law protections relating to such matters as oppression and unconscionability. Common law unconscionability relates to the formation of a contract, while oppression may apply more generally to include the performance of the contract.

The basis of unconscionability is more than an inequality of bargaining power, but rather requires evidence of some misconduct and inappropriate taking advantage of a weaker party. For example, Tipping J in *Bowkett v Action Finance*¹ suggested that in any case of an unconscionable bargain the following features would exist:

- (a) the weaker party is under a significant disability;
- (b) the stronger party knows or ought to know of that disability;
- (c) the stronger party has victimized the weaker in the sense of taking advantage of the weaker's disability, either by active extortion of the bargain or passive

¹ *Bowkett v Action Finance Ltd* [1992] 1 NZLR 449

acceptance of it in circumstances where it is contrary to conscience that the bargain should be accepted;

- (d) there is a marked inadequacy of consideration and the stronger party either knows or ought to know that to be so;
- (e) there is some procedural impropriety either demonstrated or presumed from the circumstances.

Common law is privately enforced through the courts and relevant tribunals. For example, under section 19 of the Disputes Tribunal Act 1988, the Disputes Tribunal is specifically empowered in respect of claims within its jurisdiction to make the following orders:

- (a) where it appears to the Tribunal that an agreement between the parties, or any term of any such agreement, is harsh or unconscionable, or that any power conferred by an agreement between them has been exercised in a harsh or unconscionable manner, the Tribunal may make an order varying the agreement or setting it aside (either wholly or in part); and
- (b) where it appears to the Tribunal that an agreement between the parties has been induced by fraud, misrepresentation or mistake, or any writing purporting to express the agreement between the parties does not accord with their true agreement, the Tribunal may make an order varying, or setting aside the agreement (either wholly or in part).

If the superior bargaining position arises through the exercise of a statutory power or function, the weaker party may also have redress under administrative law through judicial review. Administrative law requires parties exercising statutory powers or functions to do so in accordance with the law, fairly and reasonably.

B. 1.

(1) Does your jurisdiction have:

a. Competition laws and/or guidelines that apply to the prohibition of “abuse of superior bargaining position” in business to business relations?

Effectively no. New Zealand’s competition law, the Commerce Act 1986, includes two general prohibitions relating to taking advantage of substantial market power and entering into anticompetitive arrangements that could apply to some forms of abuse of a superior bargaining position, but that is not its primary focus. Section 36 of the Act provides:

- (2) A person that has a substantial degree of power in a market must not take advantage of that power for the purpose of –
 - (a) restricting the entry of a person into that or any other market; or

- (b) preventing or deterring a person from engaging in competitive conduct in that or any other market; or
- (c) eliminating a person from that or any other market.

More generally, section 27 of the Act prohibits persons from entering into, or giving effect to, provisions of a contract, arrangement or understanding that have the purpose, effect or likely effect of substantially lessening competition. Although market power is not specifically referred to as an element of section 27 it is generally recognised that market power concerns underlie the ‘substantial lessening of competition threshold’. A substantial lessening of competition is a lessening of competition which creates, enhances or maintains market power. In addition, a finding of an anticompetitive purpose does not require that all the parties had to that agreement had that purpose. Consequently, this prohibition could apply to some forms of abuse of a superior bargaining position.

However, under both sections 36 and 27, abusive conduct arising from an inequality in bargaining positions would only contravene these provisions if the conduct harmed competition. In particular, under section 36 it is not the relative bargaining positions of each of the parties that is relevant to determining a breach, but rather whether a person has a substantial degree of power in the market as a whole and has taken advantage of that power. In addition, in order to harm competition, the target of the proscribed conduct would need to be an existing or potential competitor of the firm with market power rather than a person that simply acquires or supplies goods or services to the firm.

New Zealand’s Fair Trading Act 1986 applies to most business transactions and this Act also supports competitive markets through ensuring honest trading. Section 9 of this Act prohibits any person in trade from engaging in conduct that is misleading or deceptive or is likely to mislead or deceive. The Act also prohibits certain unfair trading practices, such as the use of physical force or coercion in connection with the supply or possible supply of goods or services or the payment of goods or services. Some forms of abuse of a superior bargaining position may fall within the prohibitions under this Act, but that is not its primary focus.

b. Other laws and regulations that apply to the prohibition of “abuse of superior bargaining position”?

Effectively no. There are examples of laws which prohibit certain classes of conduct or mandate minimum contractual terms or prohibit unfair contractual terms where such conduct or contractual terms (or lack of such contractual terms) could arise from an abuse of a superior bargaining position, but that is not the primary focus of these laws. Examples

include:

- (a) Sale of Goods Act 1908, which codifies some common law principles relating to the sale of goods in trade, including implied conditions as to quality or fitness of the goods sold and the reasonableness of the price if not otherwise specified.
- (b) Employment Relations Act 2000, which specifically enshrines the principle that parties to an employment relationship are to deal with each other in good faith, and provides for such things as collective bargaining, freedom of association and cost effective dispute resolution (including remedies for unfair bargaining²).
- (c) Credit Contracts and Consumer Finance Act 2003, which provides for the courts to reopen a credit contract where its terms are oppressive, the creditor is acting in an oppressive manner, or the debtor has been induced to enter the contract by oppressive means. Section 118 of this Act defines ‘oppressive’ to mean:
 - ..oppressive, harsh, unjustly burdensome, unconscionable, or in breach of reasonable standards of commercial practice.
- (d) Construction Contracts Act 2002, which prohibits some contractual provisions that were resulting in unfair outcomes (e.g. prohibiting pay-if-paid and pay-when-paid clauses) and facilitates timely resolution of disputes.
- (e) Sharemilking Agreements Act 1937, which specifies some minimum contractual terms to protect sharemilkers in contractual relations with farmers in relation to distribution of profits or returns derived from dairy farming operations.

If “no” for both a. and b., please proceed to question C.

(For those jurisdictions where such acts mentioned above are regulated, please respond to the following questions.)

- (2) How are such acts regulated, including whether these rules are handled by the competition agency and/or handled under the rubric of competition policy?**
- (3) Why are such acts regulated?**

² Section 68 of the Employment Relations Act 2000 defines ‘unfair bargaining’ to include circumstances where a person is induced to enter into an agreement by oppressive means, undue influence, or duress, or the stronger person should reasonably have known the weaker person has diminished capacity, inadequate information or was reliant upon the stronger person for advice.

- (4) Please provide the text (in English if available) of your jurisdiction’s rules (including rules other than competition laws) on “abuse of superior bargaining position.”
- (5) If there are different regimes to address this situation (competition law and other laws) how are competences defined/interventions coordinated?

B.2.

(1) Which of the following criteria do you use to assess superior bargaining position? Please mention for each criteria whether it is relevant under the competition law and/or different laws governing “abuse of superior bargaining position.”

- a. Degree of trade dependence on the firm by the other (e.g., percentage of the firm’s total sales attributable to the allegedly abusive party) yes/no
- b. Probability of finding an alternative trade partner yes/no
- c. Supply and demand forces of the product or service yes/no
- d. Difference in scale of business between the parties yes/no
- e. Harm to consumer welfare yes/no
- f. Other – please explain

(2) Please specify examples of conduct that constitutes “abuse of superior bargaining position” (i.e., request for provision of supplier’s labor without compensation, coercive collection of contributions, etc.).

(3) Must effects on competition, including harm to consumer welfare, be demonstrated in order to prove “abuse of superior bargaining position”?
yes/no

If yes, how are competitive effects demonstrated?

(4) What sanctions are imposed on firms if they commit “abuse of superior bargaining position” in your jurisdiction? Please describe the type and nature of the sanction imposed.

B.3. When assessing cases of abusive conduct, does your agency also take into account positive aspects of (countervailing) buyer (or seller) power which may lead to the conclusion that a superior bargaining position does not exist?
yes/no

If yes, please explain how.

B.4.

- (1) To the extent possible, please provide the number of “abuse of superior bargaining position” cases your agency decided or reviewed (beyond a preliminary investigation) during the past 10 years.**
- (2) Please provide a short English summary of the leading “abuse of superior bargaining position” decisions/cases in your jurisdiction and, if possible, a link to the English translation/press release.**

B.5. Does your jurisdiction allow private cases challenging “abuse of superior bargaining position”?

yes/no

If so:

- a. Please explain whether elements of the private action differ from those required for a similar claim brought by a competition or other regulatory agency.**
- b. Please provide a description of representative examples of private claims, as available.**

B.6. What is the relationship between “abuse of superior bargaining position” and “abuse of dominance/monopolization” in your jurisdiction?

C. If your answer to question B.1.a. and b. is “no” (meaning that your jurisdiction does not prohibit acts that would fall within the “abuse of superior bargaining position” concept in your jurisdiction), please explain why.

New Zealand has not prohibited an abuse of a superior bargaining position in statute for business to business relations, as the current common law of equity has been operating effectively. The common law allows the courts to determine the difficult issue of what is oppressive or unconscionable conduct on a case by case basis. In some limited cases, specific forms of conduct or unfair contractual terms that may arise from an abuse of a superior bargaining position have been prohibited, such as for credit contracts and contracts for sale of goods. However, the emphasis is on private enforcement of both the common law and the limited specific prohibitions. Private enforcement (by the parties or their representatives) recognizes that in most circumstances the harm caused is a private one and the parties (by virtue of being in trade) are willing and able to seek redress on their own behalf. Private enforcement is facilitated through establishing cost effective dispute resolution processes, in particular, granting jurisdiction for the Disputes Tribunal to hear

proceedings for small claims relating to oppressive contracts (generally where the amount sought is less than NZ \$7,500).

D. Please add any comments you may have on the subject.

Inequality in bargaining positions is not uncommon in many commercial transactions. Often this arises from information asymmetries, where one party to the transaction has more or better information than the other party. In New Zealand, many sectors where transactions are characterized by information asymmetries have engaged in self-regulation or voluntary practices to address these problems. An example is the Franchise Association of New Zealand Inc where members comply with a code of practice and code of ethics, including an agreed dispute resolution process.