

UNFAIR ONLINE CONTRACT TERMS IN NEW ZEALAND: EVALUATING THE EFFECT OF REGULATORY CHANGE

Traditionally businesses operating in New Zealand were free to impose one sided contracts. To be sure, while the *Fair Trading Act 1986* and the *Consumer Guarantees Act 1993* placed some limits upon businesses' freedom of contract, such restrictions did not prevent what many considered unfair terms. In March 2015 New Zealand introduced its unfair contracts terms law (UCL), which was modelled on Australian law, to protect consumers against the use of unfair contract terms in standard form consumer contracts. To assess the impact of the regulatory change a study collected and analysed contracts of business operating online in New Zealand both before and after the UCL came into effect. The study's findings show that while the UCL has had some effect the changes are not sufficient to protect consumers and amendments are required to ensure that more unfair contract terms are removed from standard form consumer contracts.

KEYWORDS: Unfair contract terms, consumer law, online contracts, New Zealand, Australia

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I INTRODUCTION

'I am altering the deal. Pray I do not alter it any further.'¹

New Zealand's unfair contract terms law (UCL) that came into effect on 17 March 2015,² was modelled on Australia's unfair contract terms law.³ The UCL does not cover all contracts that a consumer⁴ enters into as only standard form consumer contracts⁵ are caught. Notwithstanding the

¹ Darth Vader to Lando Calrissian, *Star Wars: Episode V – The Empire Strikes Back* (1980).

² The UCL is contained in the *Fair Trading Act 1986* ('FTA') ss 26A, and 46H – 46M (the FTA was amended by the *Fair Trading Amendment Act 2013*). The UCL applies only to contracts that were entered on or after 17 March 2015, or for contracts entered into before this date if the contract was varied or renewed on or after 17 March 2015 (FTA s 26A).

³ See *Australian Consumer Law* ('ACL'), s 23 - 28. The ACL is contained in sch 2 of the *Competition and Consumer Act 2010* (Cth).

⁴ In New Zealand, consumers—in the sense of natural persons purchasing goods for their private and domestic use—are not per se protected by the FTA, instead the goods or services that the person is acquiring must be ones ordinarily acquired for personal and domestic use (FTA s 2), thus a Big Mac truck purchased by a truck enthusiast for her personal collection would not be caught by the UCL. On the other hand, businesses can gain the protection of the UCL, if they, for example, purchase mobile phones for their employees as mobile phones are goods ordinarily acquired for personal and domestic use. However, if the receiver acquired the goods or services, or held itself out as acquiring the goods or services, for the purpose of resupplying them in trade; or consuming them in the course of a process of production or manufacture; or in the case of goods, repairing or treating in trade other goods or fixtures on land, the receiver would not be protected under the UCL, FTA s 2. Curiously, however, unlike the *Consumer Guarantees Act 1993* ('CGA') (from where the definition of consumer has been taken and which allows businesses to contract out if the other party is in trade, CGA s 43), there is no ability to contract out of the UCL even if the other party is in trade, FTA s5C. That is, while some provisions of the FTA can be contracted out of (FTA s 5D), the UCL is not one of the provisions to which the contracting out exception applies.

⁵ There is no definition of 'standard form consumer contract' in the UCL, beyond a set of factors in s 46J(2) of the FTA that the court can use in determining whether a contract is a standard form consumer contract (see Alexandra Sims, 'Unfair Contract Terms: A New Dawn in Australian and New Zealand' (2013) 39 *Monash University Law Review* 739, 758–760). The factors in s 46J(2) include whether one of the parties had most or all of the bargaining power in relation to the transaction, whether one of the parties prepared the contract before

purpose of the UCL and other amendments to New Zealand consumer law⁶ was to ‘modernize... New Zealand consumer law, better reflecting the digital and commercial world we live in, and align... New Zealand and Australian consumer law’,⁷ significant differences remain.⁸ Only the Commerce Commission can seek a declaration that a term is unfair,⁹ unlike in Australia where both regulators and consumers can challenge unfair contract terms.¹⁰ In New Zealand fees and charges, so long as they are disclosed in the contract cannot be challenged.¹¹ In contrast, fees and charges can be challenged in Australia.¹²

The changes the UCL has made to consumer law cannot be underestimated: the UCL has been described as ‘[o]ne of the most substantial changes to consumer laws for 20 years’.¹³ Prior to the UCL it was standard practice for businesses and other organisations¹⁴ to use unilateral variation terms such as ‘we reserve the right to change these terms at any time’ and ‘we reserve the right at any time to modify this Agreement and to impose new or additional terms’. To compound the power imbalance, termination fees were often charged if a consumer wished to cancel because of a change to the contract, even if the charges to the consumer increased.¹⁵ The Commerce Commission acknowledged that it, ‘received many complaints over the years about potentially unfair terms in standard form contracts that gave companies significant rights at the expense of their customers’ and ‘that these

discussing the transaction with the other party, and whether one of the parties was required, in effect, to either accept or reject the terms of the offer.

⁶ Other amendments made by the *Fair Trading Amendment Act 2013* included preventing people from making unsubstantiated representations (*FTA* s12A) and requiring traders to disclose their status when offering goods or service for sale to consumers on the Internet (*FTA* s 28B).

⁷ The Commerce Commission’s description of the changes made by the *Fair Trading Amendment Act 2013* <<http://www.comcom.govt.nz/fair-trading/changes-to-the-fair-trading-act/>>.

⁸ Another difference between Australia and New Zealand in relation to unfair contract terms is that in New Zealand if a term has been declared unfair it is unenforceable and if the business or other organisation attempts to enforce it against a consumer an offence will also have been committed, *FTA* s 40(1)(a) or (b). In contrast, in Australia, the term is merely void, *ACL* s 23(1). In addition, unlike in New Zealand, the Australian law covers only consumer contracts to an individual who is acquiring the goods or services wholly or predominately for personal, domestic or household use or consumption. This limitation, however, will change when the *Treasury Legislation Amendment (Small Business and Unfair Contract Terms) Act 2015* (Cth) comes into force on 12 November 2016 and protection against unfair contract terms in Australia will extend to small businesses.

⁹ *FTA* s 46H(1).

¹⁰ *ACL* s 250.

¹¹ *FTA* s 46K(2). Unless the fees or charges are penalties, *FTA* s 46M(c) and see Commerce Commission, *Unfair Contract Terms Guidelines — February 2015* <<http://www.comcom.govt.nz/fair-trading/guidelines/unfair-contract-term-guidelines/>> [83]-[106].

¹² *ACL* s 26(2).

¹³ Troy Pilkington, ‘New Regime Targets Terms in Contracts’ Fine Print’, *Stuff* (online) 21 January 2015, <<http://www.stuff.co.nz/business/opinion-analysis/65245387/New-regime-targets-terms-in-contracts-fine-print>>. It could be argued, however, that even that commentator had not grasped the true import of the UCL. The equivalent legislation in the United Kingdom, the *Contract Terms Act 1977* (UK) c 50, which for business to consumer transactions has since been replaced by the *Consumer Rights Act 2015* (UK), has been described as ‘possibly the single most significant piece of legislation in the field of contract law’, Elizabeth Macdonald, ‘Scope and Fairness in Consumer Contracts Regulations: *Director General of Fair Trading v First National Bank*’ (2002) 65 *MLR* 763, 763 quoted in Kate Tokeley, ‘Introducing a Prohibition on Unfair Contract Terms into New Zealand Law: Justifications and Suggestions for Reform’ (2009) 23 *NZULR* 419, 421.

¹⁴ Notwithstanding the reach of the *FTA* is broader than businesses as it covers people and organisations in trade including tertiary education providers, the terms business and businesses will be used throughout the article.

¹⁵ For example, a telecommunications company raised the price of its broadband service from \$35 to \$40 six months into a two year contract. The company insisted that if the consumer wished to cancel the contract because of the increase the consumer would have to pay a significant termination fee, see Ministry of Consumer Affairs, *Briefing for Commerce Committee on Consumer Law Reform Bill: Including Unfair Contract Term Provisions in the Fair Trading Act*, 26 June 2012 <<http://www.parliament.nz/resource/0000216543>> [24].

terms might caught significant consumer harm'.¹⁶ Now many terms,¹⁷ including unilateral variation terms that do not allow termination without paying fees despite the business making substantive changes to the contract, would breach the UCL.¹⁸

The UCL goes further than most businesses realise. In the United Kingdom—from where Australia's unfair contract terms law and therefore New Zealand's UCL is derived—¹⁹ if a term is unfair in one scenario it could cover, the term can be declared unfair and unenforceable even if it was otherwise fair to impose it in the instant case. For example, in *Spreadex Ltd v Cochrane*²⁰ the Court refused to enforce the term, '[y]ou will be deemed to have authorised all trading under your account number', despite the defendant allowing someone else to trade on his account negligently, as the term purported to make the defendant liable for all trading, whether the defendant had authorised it or not. The Court observed the business may have protected itself by, for example, using a term making the consumer liable for third parties' unauthorised trades if they were facilitated by the consumer's negligence.²¹ The inability in *Spreadex Ltd v Cochrane* to enforce the term meant the business failed to recover £50,000 it had lost because of the defendant's negligent actions.

To be sure, it may be argued that businesses did not have complete freedom prior to the UCL. That the Disputes Tribunal and the courts could use unconscionability, the contra proferentem rule or the argument that terms had not been properly incorporated into a contract. In particular, in the Disputes Tribunal where it appears that an agreement between the parties, or any term of any such agreement, is harsh or unconscionable, the Disputes Tribunal has the power to make an order varying the agreement, or setting it aside (either wholly or in part).²² These possible protections, however, are limited. Unconscionability is difficult to establish. The weaker party must have a qualifying disability, for example, age, infirmity, difficulty understanding English and so on; the stronger party must have knowledge (actual or constructive) of the disability; and the stronger party must take advantage (passively or actively) of a benefit from the transaction.²³ Unconscionability's narrowness has led to calls for law reform to bring New Zealand into line with Australia's law on

¹⁶ Commerce Commission, *Telecommunications Contract Review: Unfair Contract Terms*, February 2016 <<http://www.comcom.govt.nz/the-commission/consumer-reports/uct-reviews/>> [8].

¹⁷ The non-exhaustive terms are set out in ss 46M(a)-(m) of the *FTA*.

¹⁸ See *FTA* ss 26A, 46I(1) and 46M(d). While the UCL does not state that a term that allows for the variation of the contract if the consumer can terminate the contract without paying for the privilege of doing so is fair, the UCL's construction means such a term will likely be unfair. That is, because a term is unfair if it would cause a significant imbalance in the parties' rights and obligations under the contract, is not reasonably necessary to protect the business' legitimate interests and would cause detriment to the consumer, s 46L(1)(a)-(c). Permitting a business to vary terms at will with no corresponding ability of the consumer to vary them causes a significant imbalance and would cause detriment to the consumer in the case of a price rise. However, businesses do have a legitimate interest in having some leeway under the contract, eg, if a supplier changes its prices, but the term can only be reasonably necessary and must be limited to such situations including permitting the consumer to terminate the contract without incurring charges for doing so.

¹⁹ Australia's unfair contract terms law was copied with a few modifications from Victoria's unfair contract terms law (*Fair Trading Act 1999* (Vic) pt 2B, as repealed by Fair Trading Amendment (*Australian Consumer Law*) Act 2010 (Vic) s 17), which in turn was modeled on the United Kingdom's unfair contract terms law (*Unfair Contract Terms Act 1977* (UK) c 50), which has now been replaced for business to consumer transactions by the *Consumer Rights Act 2015* (UK).

²⁰ [2012] EWHC 1290 (Comm).

²¹ *Ibid* [20].

²² *Disputes Tribunals Act 1988* s 19(e).

²³ *Nichols v Jessup (No 2)* [1986] 1 NZLR 237. See also Ministry of Consumer Affairs, Briefing for Commerce Committee on Consumer Law Reform Bill: Unconscionable Conduct and Oppression Document MED 013, 27 June 2012 [4].

unconscionability.²⁴ Finally, the Disputes Tribunal has not invoked its statutory powers of setting aside agreements or terms often.²⁵

The contra proferentem rule which allows a court to construe ambiguity in a contract against the party seeking to rely on it, can only be used if a term is ambiguous and then only for certain terms.²⁶ Many unfair contract terms suffer from no ambiguity: there is no doubt over, '[w]e reserve the right, at any time, to modify, amend or update these terms and conditions without notice.'²⁷ Finally, there is the argument that certain terms were not incorporated into the contract because the consumer did not have an opportunity to see those terms prior to the contract's formation.²⁸ Therefore, defects in procedure will make a term unenforceable rather than the nature of the term itself. Provided procedural requirements were met unfair terms were valid and enforceable.

In theory, New Zealand consumers have gained a great deal of protection under the UCL. Which is as it should be: a number of jurisdictions have regulated unfair contract terms for many years.²⁹ However, the protection offered by the UCL is illusory as the Disputes Tribunal has no jurisdiction to invoke the UCL.³⁰ In the courts the position is the same, with the exception that the Commerce

²⁴ Ministry of Consumer Affairs, Consumer Law Reform Additional Paper: Unconscionability, October 2010, <<http://www.parliament.nz/resource/0000157640>> and Ministry of Consumer Affairs, Briefing for Commerce Committee on Consumer Law Reform Bill: Unconscionable Conduct and Oppression Document MED 013, 27 June 2012 <http://www.parliament.nz/resource/en-NZ/50SCCO_ADV_00DBHOH_BILL10613_1_A252837/6593e90f533cb40c13757639345a5a0e0cc8c1ca>.

Australia's legislation on unconscionable conduct is contained in ss 20 – 22 of the *ACL*.

²⁵ 'Peter Spiller, a former Principal Referee of the Disputes Tribunal noted that in 5,000 cases, only two consumers succeeded in establishing unconscionable conduct (October 2008),' Ministry of Consumer Affairs, *Briefing for Commerce Committee on Consumer Law Reform Bill: Unconscionable Conduct and Oppression Document MED 013*, 27 June 2012 fn 2. See also Tokeley, above n 13, 423 and 424 who also notes the Disputes Tribunal has little if any power to protect consumers against unfair contract terms.

²⁶ *DHL International (NZ) Ltd v Richmond Ltd* [1993] 3 NZLR 10, 18 'if [a term] is to exclude liability for negligence [it] must be most clearly and unambiguously expressed' and *Darlington Futures Ltd v Delco Australia Pty Ltd* [1986] HCA 82; (1986) 161 CLR 500.

²⁷ *Sky Dive Abel Tasman Ltd*.

²⁸ See, eg, T O'Sullivan, 'Online Shopping Terms and Conditions in Practice: Validity of Incorporation and Unfairness' (2014) 20 *Canterbury Law Review* 1, where, in a review of a number of online contracts in New Zealand and Australia, there was considerable doubt as to whether some of the terms had been validly incorporated into some of the contracts through the use of clickwrap, browsewrap or a combination of the two. There is no case law in New Zealand on the enforceability of terms through using the clickwrap and browsewrap methods. In Australia there is limited authority. In *eBay International AG v Creative Festival Entertainment Pty Ltd* (2006) 170 FCR 450; [2006] FCA 1768 the Federal Court accepted in that case purchasers were bound through the use of the clickwrap method as they repeatedly clicked on boxes next to phrases such as "I have read and agreed to the following terms and conditions" and were provided with the terms and conditions. Browsewrap licences which do not require any positive assent to terms and conditions, even if those terms and conditions can be found on the website through a diligent search, are particularly problematic. In two relatively recent cases in the United States the courts have refused to incorporate terms that had attempted to be imposed through the use of the browsewrap method: *Nguyen v Barnes & Noble Inc* 2014 WL 405649 (9th Cir. Aug. 18, 2014 and *re Zappos.com Inc., Customer Data Security Breach Litigation* 893 F Supp 2d 1058 (D. Nev. 2012)

²⁹ In addition to Australia's unfair contract terms law there is also unfair contract terms legislation in the United Kingdom, Europe, Japan and South Africa. See, eg, the *Consumer Rights Act 2015* which replaced the *Unfair Contract Terms Act 1977* (UK) c 50 in relation to business to consumer contracts; *Unfair Terms in Consumer Contracts Regulations 1999* (UK) SI 1999/2083. See also *Council Directive 93/13/EEC of 5 April 1993 on Unfair Terms in Consumer Contracts* [1993] OJ L 95/29 (The 'Unfair Contract Terms Directive'); *Consumer Contract Act 2000* (Japan); and the *Consumer Protection Act 2008* (South Africa).

³⁰ *FTA* s 46I(1), 'The High Court or a District Court may, on application by the Commission, declare that a term in a standard form consumer contract is an unfair contract term.'

Commission can intervene and seek a declaration from the Court that the term was an unfair contract term.³¹

The article looks at whether the UCL has achieved the regulatory aim of removing unfair contract terms from standard form consumer contracts.³² To evaluate the impact of the regulatory change a study was conducted that involved two surveys of contracts from a broad range of industries selling online. The first survey (Phase 1) occurred before the UCL came into effect, the second (Phase 2) after the UCL came into effect. The contracts were analysed to determine what changes, if any, had been made to remove the unfair contract terms, the success of those changes and the frequency and nature of the unfair contract terms both before and after the introduction of the UCL. Finally, recommendations for amending the UCL are made.

A *The Standard Method of Evaluating Regulating Change*

Before a paper can be put before Cabinet in New Zealand recommending a law change a Preliminary Impact and Risk Statement (PIRA) must be completed if the change has potential regulatory implications.³³ Treasury reviews the PIRA and if it confirms there is likely to be a significant impact or risk a detailed Regulatory Impact Statement (RIS) must be written.³⁴ Because an unfair contract terms law had the potential to impose additional compliance costs on businesses and others through redrafting of contracts, an RIS was required.³⁵ The RIS itself requires independent evaluation through an Independent Quality Assurance (IQA) statement. Finally, the Treasury commissions an evaluation of a sample of RISs periodically to determine the quality of the RISs and IQAs so they can be improved.³⁶ Despite all the checks and balances for RISs, it is not standard practice to evaluate whether the regulatory change achieved the desired results.³⁷

³¹ *FTA* s 46H(1), ‘The Commission may apply to the High Court or a District Court (at the choice of the Commission) for a declaration under section 46I that a term in a standard form consumer contract is an unfair contract term’ and s 46I(1).

³² Iain Ramsay, ‘Consumer Redress and Access to Justice’ in Charles EF Rickett and Thomas GW Telfer (eds), *International Perspectives on Consumers’ Access to Justice* (Cambridge University Press, 2003) 26 “We still do not know much about the effectiveness of consumer laws...” Kate Tokeley, ‘Introduction’ in Kate Tokeley (ed) *Consumer Law in New Zealand* (LexisNexis, 2nd ed, 2014) 31 “it is crucial that a process is established for monitoring and reviewing the [consumer protection] regulation, in order to assess whether it has the desired effects and whether there have been any unexpected negative outcomes.”

³³ Treasury, *Regulatory Impact Analysis Handbook*, <<http://www.treasury.govt.nz/regulation/regulatoryproposal/ria/handbook/ria-handbk-pt1-jul13.pdf>> 1.2.

³⁴ *Ibid.*

³⁵ Regulatory Impact Statement Consumer Law Reform: December 2010 <<http://www.treasury.govt.nz/publications/informationreleases/ris/pdfs/ris-mca-clrd-mar11.pdf>>.

³⁶ For a recent review of a sample of RISs, see Vhari McWha, Jo Smith, Kieran Murray, ‘Regulatory Impact Analysis evaluation 2015’ 31 July 2015 <<http://www.treasury.govt.nz/regulation/informationreleases/pdfs/ria-review-2015.pdf>>.

³⁷ A rare exception was the Ministry of Business, Innovation and Employment’s (MBIE’s) review of the operation of the *Financial Advisers Act 2008* and the *Financial Service Providers (Registration and Dispute Resolution) Act 2008*, albeit the review was required by the *Financial Service Providers (Registration and Dispute Resolution) Act 2008* s 80, see MBIE, ‘Final report, Review of the operation of the Financial Advisers Act 2008 and the *Financial Service Providers (Registration and Dispute Resolution) Act 2008*’ July 2016 <<http://www.mbie.govt.nz/publications-research/publications/business-law/Final%20report%20on%20the%20review%20of%20the%20FA%20and%20FSP%20Acts.pdf>>.

After the data was collected for this study the Commerce Commission released a report on a review of the contracts of the major telecommunications companies in New Zealand ('the Review').³⁸ The findings of the Review and the study show that no business was successful in removing all of its unfair terms, albeit some contracts contained fewer unfair contract terms than others. The key difference in findings was that the percentage of businesses that had altered their contracts to accommodate the UCL was higher in the Review.

B Reasons for thinking UCL may not be effective in changing contracts significantly

The authors were concerned the UCL might not result in significant changes to standard form contracts for a number of reasons. First, the UCL imposes restraints on businesses' hereto freedom of contract by setting out a lengthy 'grey list' of terms which are examples of terms that may be unfair contract terms.³⁹ The first set are ones that allow or have the effect of permitting one party but not the other to: terminate the contract;⁴⁰ vary the terms of the contract;⁴¹ renew or not renew the contract;⁴² vary the upfront price⁴³ payable under the contract without the right of another party to terminate the contract;⁴⁴ unilaterally determine whether a contract has been breached or to interpret its meaning;⁴⁵ unilaterally vary the characteristics of the goods or services to be supplied, or the interest in land to be sold or granted, under the contract;⁴⁶ or assign the contract to the detriment of another party without that other party's consent.⁴⁷ Second are terms that limit or have the effect of limiting: the evidence one party can adduce in proceedings relating to the contract;⁴⁸ one party's right to sue another party;⁴⁹ or one party's vicarious liability for its agents.⁵⁰ Finally, terms that impose, or have the effect of imposing, the evidential burden on one party in proceedings relating to the contract,⁵¹ or penalise, or have the effect of penalising, one party (but not another party) for a breach or termination of the contract.⁵² In addition, the list is not exhaustive thus other terms not contained on that list may also be unfair.

The UCL's limitations on contractual freedom were unlikely to sit well with businesses' legal advisors who have grown up on a diet of almost unfettered freedom over contractual terms.⁵³ Indeed, some of the largest businesses in the world continue to use unfair contract terms. The terms and conditions for New Zealand's Apple, Inc iTunes Store provides that:

³⁸ Commerce Commission, *Unfair contract terms – Telecommunications contract review*, above n 16. In addition, after this article was submitted for publication the Commerce Commission released a second Review, this time for energy retail providers: Commerce Commission, *Energy Retail Contracts Review, Unfair Contract Terms*, August 2016 <<http://www.comcom.govt.nz/the-commission/consumer-reports/uct-reviews/>>.

³⁹ *FTA* s 46M(a)-(m).

⁴⁰ *FTA* s 46M(b).

⁴¹ *FTA* s 46M(d).

⁴² *FTA* s 46M(e).

⁴³ Upfront price is defined in *FTA* s 46K(2) as meaning 'the consideration (including any consideration that is contingent upon the occurrence or non-occurrence of a particular event) payable under the contract, but only to the extent that the consideration is set out in a term that is transparent.'

⁴⁴ *FTA* s 46M(f).

⁴⁵ *FTA* s 46M(h).

⁴⁶ *FTA* s 46M(g).

⁴⁷ *FTA* s 46M(j).

⁴⁸ *FTA* s 46M(l).

⁴⁹ *FTA* s 46M(k).

⁵⁰ *FTA* s 46M(i).

⁵¹ *FTA* s 46M(m).

⁵² *FTA* s 46M(c).

⁵³ While some may point out that the *CGA*, *FTA* and other statutes have limited businesses' freedom of contract in recent years, nevertheless businesses were still able to impose numerous one sided and unfair terms on consumers. For a discussion about the limits that consumer law has placed on freedom of contract, see Sims, 'Unfair Contract Terms: A New Dawn in Australia and New Zealand', above n 5, 748-752.

All transactions on the App and Book Services are governed by the laws of New South Wales, without giving effect to its conflict of law provisions, provided however that you may have rights under New Zealand law, including under the Consumer Guarantees Act 1993. Your use of the App and Book Services may also be subject to other laws. You expressly agree that exclusive jurisdiction for any claim or dispute with Apple or relating in any way to your use of the App And Book Services resides in the courts of Australia.

Apple's term breaches the UCL as it has the effect of limiting one party's right to sue another party: the hurdle of requiring the consumer to instruct a lawyer to prepare and argue the case applying the laws of a different jurisdiction make it less likely for the consumer to pursue a claim against Apple.⁵⁴ Indeed, it appears common for large US based technology businesses to attempt to include unfair jurisdiction terms in their contracts.⁵⁵

The Commerce Commission's Review also bore out the suspicion that it was difficult for businesses to make a paradigm shift in their views of what terms they were permitted to use. For example, the reasons provided by the telecommunication companies for why wide variation terms remained in their contracts included 'that the term was necessary to take account of advances in technology, changes to the law and regulatory requirements.'⁵⁶

Second, in contrast to Australia, as noted already, only the Commerce Commission has standing to seek a declaration from the District Court or High Court that a term is an unfair contract term.⁵⁷ While consumers have the right to ask the Commission to apply for a declaration,⁵⁸ there is no corresponding duty on the Commission to seek a declaration. Consumers' inability to challenge terms directly means that consumers will have unfair terms enforced against them as the Commerce Commission does not have the resources to seek a declaration for each unfair term that consumers bring to its attention. Granted, the Commerce Commission can prosecute businesses that use unfair contract terms which serves as a warning to other businesses not to engage in the same behaviour. However, one or two high profile cases may not change behaviour. Indeed, the preferred regulatory position for the Commerce Commission is to work with businesses and pursue expensive and time consuming enforcement action as a last resort.⁵⁹ Yet the Commerce Commission does not have the

⁵⁴ FTA s 46M(k). In *Director of Consumer Affairs Victoria v Backloads.com Pty Ltd* [2009] VCAT 754 a term in a truck removal contract that the agreement was to be governed by and interpreted and enforced in accordance with the laws applicable in the Australian Capital Territory had the effect of limiting or deterring consumers outside that jurisdiction from enforcing the contract, see the Tribunal's orders in relation to term 2(e).

⁵⁵ See, eg, M Loos and J Luzak, 'Wanted: a Bigger Stick. On Unfair Terms in Consumer Contracts with Online Service Providers' (2016) 39 *Journal of Consumer Policy* 63, 83 where Facebook, Dropbox and Twitter all had terms that attempted to award exclusive jurisdiction to US federal courts or state courts in California. Google's equivalent term attempted to provide that disputes were to be adjudicated by Californian courts but provided that 'if the courts in your country will not permit you to consent to the jurisdiction and venue of the courts in Santa Clara County, California, U.S.A., then your local jurisdiction and venue will apply to such disputes related to these terms.'

⁵⁶ Commerce Commission, *Unfair contract terms – Telecommunications contract review*, above n 16, [69].

⁵⁷ FTA s 46H(1).

⁵⁸ FTA s 46H(2).

⁵⁹ See, eg, Commerce Commission, 'Enforcement Response Guidelines' < <http://www.comcom.govt.nz/the-commission/commission-policies/enforcement-response-guidelines/> > [10]. Also see Ian Ayres and John Braithwaite, *Responsive Regulation: Transcending the Deregulation Debate* (Oxford University Press, 1992) 35 (the enforcement pyramid). However, Ayres and Braithwaite's enforcement pyramid has been challenged in recent years. See, in particular, Grant Hooper, 'When to Punish, When to Persuade and When to Reward: Strengthening Responsive Regulation with the Regulatory Diamond' (2015) 41 *Monash University Law Review* 136, 138 where Hooper argues that a regulatory diamond should be used where the regulator does not simply seek compliance with strict legal rules (compliance regulation), but also with urging and encourage regulates to go beyond the bare legal minimums (aspirational regulation) and thus realise the 'continuous improvement' meta-goal of regulation'.

resources to work with all or even a majority of businesses to ensure the removal of unfair contract terms.

In contrast, consumers in Australia can challenge terms directly, not only in the courts, but also in the Australian equivalents of the Disputes Tribunal.⁶⁰ The Ministry of Consumer Affairs, mindful of the options available for Australian consumers, argued for the right of consumers to challenge terms in the Disputes Tribunal.⁶¹ Moreover, the ability for Australian consumer to challenge terms means that many business are all too aware of consumers' rights.⁶²

Finally, the Australian Competition and Consumer Commission (ACCC) in March 2013, two years after the introduction of the unfair contracts terms law in Australia,⁶³ released a review of contracts of selected industries.⁶⁴ The ACCC found large numbers of contracts continued to contain unfair contract terms.⁶⁵ If unfair contract terms remained a problem in Australia, it was likely that the same pattern would be repeated in New Zealand.

C *The Study's Methodology*

The study was divided into two phases. In Phase 1 (December 2014 to January 2015), 114 standard form consumer contracts⁶⁶ from businesses selling online⁶⁷ in New Zealand were analysed to determine the number and nature of unfair contract terms in those contracts. The contracts were from a range of industries used by consumers: hotels and other providers of accommodation, airlines, banks, hair dressers and beauty therapy providers (beauty services), car parking buildings, car rentals, car services, cleaning services, couriers, digital music, electricity and gas, ticket sellers and cinemas (entertainment), fast food, groceries and meal services, gyms, online auctioneers, outdoor adventures, pet care, retail including clothing, sporting equipment, appliances, electronics and jewellery, sporting events, telecommunications, online streaming and satellite providers (television), tourism services, transport services, and travel agents.⁶⁸

⁶⁰ See, eg, in Victoria, the relevant tribunal is the Victorian Civil and Administrative Tribunal (VCAT).

⁶¹ Ministry of Consumer Affairs, 'Review of the Redress and Enforcement Provisions, International Comparison Discussion Paper', May 2006) 27 <<http://www.consumerprotection.govt.nz/assets/PDFs/CP-Review-of-the-Redress-and-Enforcement-Provisions-of-Consumer-Protection-Law-International-Comparison-Discussion-Paper.pdf>>.

⁶² The author has been told anecdotally that a number of businesses in Australia have decided not to attempt to enforce terms that consumers claimed were unfair as the consumers threatened to challenge the terms in tribunals if attempts were made to enforce those terms.

⁶³ Australia's unfair contract terms law came into effect on 1 July 2010.

⁶⁴ Australian Competition and Consumer Commission (ACCC), *Unfair Contract Terms: Industry Review Outcomes* (March 2013) <[http://www.accc.gov.au/system/files/Unfair Contract Terms - Industry Report.pdf](http://www.accc.gov.au/system/files/Unfair%20Contract%20Terms%20-%20Industry%20Report.pdf)> where the ACCC looked into selected industries (airline, telecommunications, fitness and vehicle rental industries, as well as some contracts commonly used by online traders) and found a large number of unfair terms.

⁶⁵ While the ACCC's Review did not provide actual numbers of unfair contract terms in the contracts it reviewed, the fact that it had to work extensively with businesses to make their contracts fair meant that there remained a large number of unfair contract terms in the contracts it reviewed.

⁶⁶ See above n 4 for the definition of standard form consumer contracts. As all the contracts were contained on websites where no negotiation was possible they were treated as standard form consumer contracts.

⁶⁷ While most businesses were online businesses in the sense that goods and services could be purchased directly online, for some the consumer was required to visit the business in person or phone the business before purchasing the goods or services. Thus the survey was not limited solely to online businesses.

⁶⁸ The industries were therefore similar to those identified by the Commerce Commission as being industries where standard form consumer contracts were common. The Commerce Commission's list was: car parking; childcare centres; daily deal or coupon specials; events and entertainment; finance; gym membership; hire purchase; motor vehicle sales; online and mobile apps and software; pay TV; professional services; rental of

Where possible the contracts from a range of small, medium and large sized businesses within each industry were used.⁶⁹ On occasion more than one contract from some businesses were looked at.⁷⁰ In contrast, the Commerce Commission's Review ranged between one and six contracts for each of the telecommunication companies.⁷¹ Another difference was that the Commerce Commission contacted each telecommunication company in the Review and they were able to provide additional information to justify (or attempt to justify) why terms were reasonably necessary to protect legitimate business interests.⁷² Of the contracts reviewed in the study, 18.4 per cent were from businesses that provided goods, 64.0 per cent from businesses that provided services, the remaining 17.6 per cent provided both goods and services.⁷³

Because the contracts in Phase 1 were collected at least two months before the UCL's commencement date some contracts may have been amended in anticipation of the UCL prior to when they were collected; however, it is likely that only a few, if any, would have been amended.⁷⁴ Phase 2 of the study took place in December 2015 and January 2016—at least nine months after the UCL was introduced UCL. The contracts of the same businesses were collected and analysed to see whether changes had been made to remove unfair contract terms and, if changes had occurred, their effectiveness.

Assessing unfair contract terms is not a straightforward task. The grey list does not ban the use of certain terms,⁷⁵ rather it provides a list of terms that *may* be unfair. That is, a term will be unfair only if it would cause a significant imbalance in the parties rights and obligations; it is not reasonably necessary to protect the legitimate business interests of the party advantaged by the term and would cause detriment (whether financial or otherwise) to a party if it were applied, enforced or relied on.⁷⁶ Thus businesses have a legitimate interest to be able to vary some terms, for example, increase prices if the goods and services tax (GST) increased, but the term must not go further than reasonably necessary. Therefore, a unilateral variation term may be counterbalanced by a separate term so that the initial term is no longer unfair.⁷⁷ For example, a term that allows a business to change any term

appliances or goods; residential construction; residential tenancy and real estate; retirement villages; self-storage facilities; telecommunications; travel and tourism (such as airfares, rental cars and tours) and utilities, such as electricity or gas services, see Commerce Commission, *Unfair Contract Terms Guidelines — February 2015* (n 11) [14].

⁶⁹ The criteria used to assess small, medium and large was the size of the business relative to others in the same industry. The businesses and their contracts were chosen at random.

⁷⁰ For example, with Vodafone New Zealand Ltd a consumer who was signing up for residential broadband would be required to agree to both the 'Residential broadband, TV and fixed line terms and conditions' and 'Consumer terms and conditions'. In this situation both contracts were analysed.

⁷¹ From the seven telecommunication companies in the Review, the Commerce Commission reviewed 19 separate standard form contracts. (Commerce Commission, *Unfair contract terms – Telecommunications contract review*, above n 16.)

⁷² Ibid [89]. Under s 46L of the *FTA* a term will be unfair if the court is satisfied inter alia that it "is **not reasonably necessary** in order to protect the **legitimate interests** of the party who would be advantaged by the term' [emphasis added].

⁷³ Eg, it is common for telecommunication companies to sell both services (broadband, mobile data, calls and so on) and goods (smart phones and other goods). And retailers that provide services where a mobile technician will go to consumer's home and set up and explain how the purchased products work (eg, Noel Leeming Group Ltd with its 'Tech Solutions').

⁷⁴ Eg, the author was told that a lot of work was done on Les Mills New Zealand Ltd's contract to meet the UCL requirements, however, the changes do not appear to have come into effect at the time the work was done to the contract, rather the changes were delayed until the UCL came into effect.

⁷⁵ A list which bans certain terms automatically would be a black list. Recently in the United Kingdom a black list was created by the *Consumer Rights Act 2015* (UK), see ss 65, 66 and 63(6) and (7).

⁷⁶ *FTA* s 46L.

⁷⁷ See, eg, J Paterson, 'The Australian Unfair Contract Terms Law: The Rise of Substantive Unfairness as a Ground for Review of Standard Form Consumer Contracts' (2009) 33 *Melbourne University Law Review* 934, 944.

while prima facie unfair because it allows one party (the business) to vary its terms can be counterbalanced⁷⁸ by a term that allows the consumer to terminate the contract without paying any charges or fees for doing so.

Adding to the complexity was that one term may breach multiple terms in the grey list. ‘Under no circumstances shall the liability of the Company exceed the price of the Goods’,⁷⁹ would be unfair under s 46M(i) as it has the effect of limiting the business’ liability for its agents and under s 46M(k) by limiting the right of one party to sue another party. While it can be argued that the one term created two unfair contract terms, for the calculation of the number of unfair contract terms in Figure 1 and Figure 2 below, the term was counted as only one unfair contract term. However, in Figure 6 which sets out the percentage of total contracts containing each grey list term, that unfair contract term would be recorded as unfair under both ss 46M(i) and 46M(k).

II FINDINGS AND DISCUSSION

In Phase 1, four contracts contained no unfair contract terms,⁸⁰ however, those contracts were short and limited to describing delivery details or were simply cancellation policies. Given the lack of a law against unfair contract terms at the time the contracts were collected it was not surprising that almost all contracts contained unfair contract terms and that the number of unfair contract terms in the contracts in Phase 1 was high, as Figure 1 below shows. The mean of unfair contract terms was 10.74, the median 9, and the mode 3.⁸¹

Figure 1 *Number of unfair contract terms per contract in Phase 1*

⁷⁸ Commerce Commission, *Unfair contract terms – Telecommunications contract review*, above n 16, [27].

⁷⁹ Electronic Boutique Pty Ltd (trading as ‘EB Games’). For a longer exclusion clause Orcon Ltd’s terms included the following:

‘9.2. Orcon excludes all liability we may have to you or anyone claiming through you whether in contract, tort, equity or otherwise relating to any indirect or consequential loss, damage or expense of any kind whatsoever arising under or in respect of this Agreement including, without limitation, any economic loss, loss of use, loss of profits, loss of income, or increased or alternative costs, however caused. This exclusion applies to any claim you may have for any damages whatsoever and applies for the benefit of the following people:

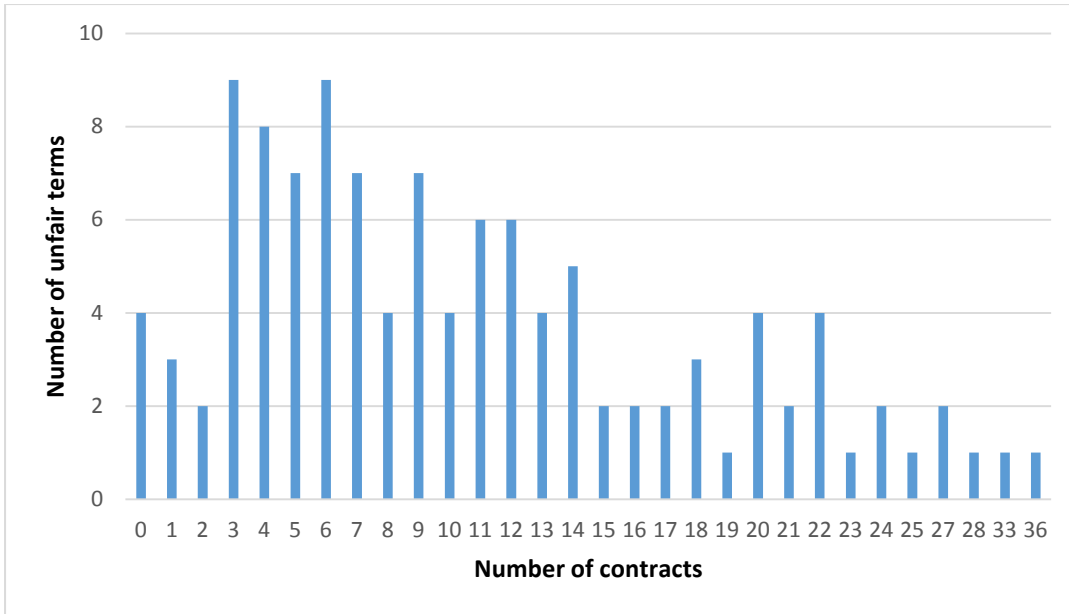
- Orcon and any of its related companies;
- Orcon employees, contractors, officers and agents
- Any network operator or other person whose services we use to provide services to you (or any of their employees, contractors, officers and agents).

9.3. If, despite the exclusion set out above, Orcon is held to be liable to you, then our liability is limited to a maximum of \$5000 for any event (or series of related events) and to a maximum of \$10,000 in any 12 month period.

9.4. For the avoidance of doubt, Orcon shall not be liable to you for any indirect or consequential loss, damage or expense of any kind whatsoever arising under or in respect of this Agreement. This includes, without limitation, any economic loss, loss of use, loss of profits, loss of income, or increased or alternative costs, however caused.’

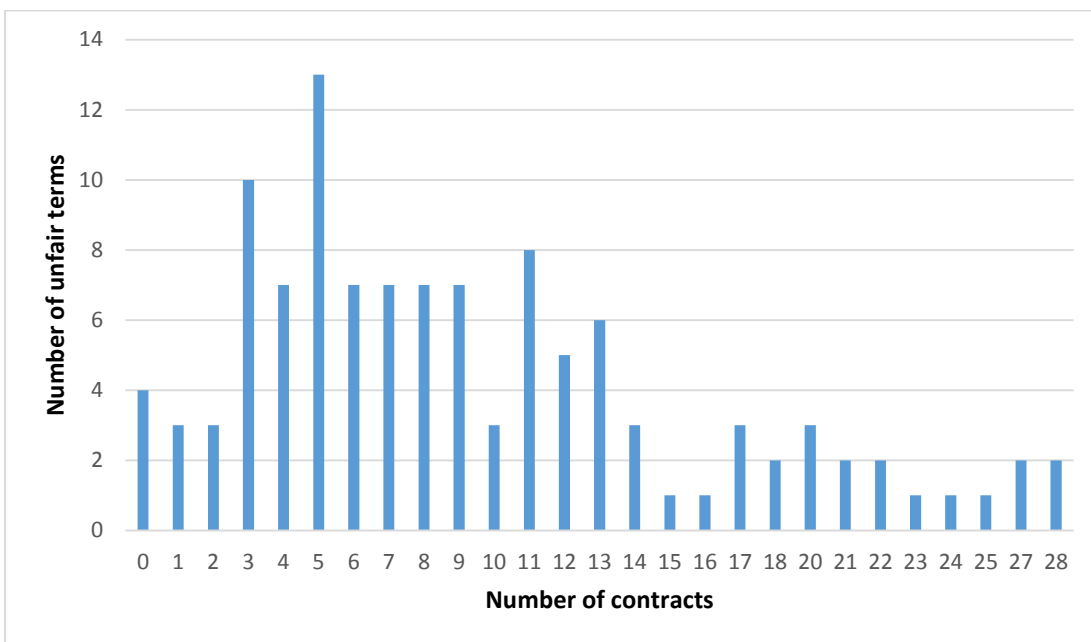
⁸⁰ Actions Paintball Ltd, Fresh2U Ltd, Pegasus Ltd and Unity Books (Wellington) Ltd.

⁸¹ The standard error was 0.71532685, standard deviation 7.637600749, sample variance 58.33294519 and the confidence level at 95.0 per cent was 1.417191505.



The number of unfair contractual terms decreased in Phase 2, although none of the contracts that contained unfair contract terms in Phase 1 had removed all of their unfair contract terms. The mean in Phase 2 was 9.52, the median 8 and the mode 5.⁸²

Figure 2 *Number of unfair contract terms per contract in Phase 2*



⁸² The standard error was 0.63524913, standard deviation 6.782604671, sample variance 46.00372613 and the confidence at 95.0 per cent was 1.2585431.

One third, 33.3 per cent of the contracts analysed, were changed significantly in Phase 2. Significant was defined as an apparent attempt to ameliorate or remove a grey list unfair term or other unfair term, for example, the addition of a counterbalancing term allowing the consumer to terminate the contract without paying early termination fees if changes were made to the terms of the agreement;⁸³ or the addition of phrases such as ‘to the extent permitted by law’ to terms that are otherwise unfair.⁸⁴ However, in the latter, the mere addition of ‘to the extent permitted by law’ was not treated as sufficient to transform a term from unfair to fair.⁸⁵

Just over one third, 39.5 per cent, had changes made; however, the changes were made to other aspects of the contract and in an attempt to remove unfair contract terms.⁸⁶ The remaining, 27.2 per cent remained unchanged. The study, therefore, found that fewer than half the contracts had been changed to comply with the UCL.

The number of unfair terms across the 114 contracts in Phase 1 was 1,225 which decreased by 11.3 per cent to 1,086 in Phase 2. Table 1 shows the descriptive statistics for the number of successfully changed unfair terms in phase 2 contracts. The number of terms that had been changed successfully ranged from 0 to 25, with a mean of 3.7 terms ($SD = 5.09$).

Table 1 *Descriptive statistics - number of successfully changed terms*⁸⁷

Mean ⁸⁸	3.684210526
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⁸³ Businesses that added counter-balancing terms that allowed the consumer to terminate the contract without charge if the business altered the terms of the agreement included City Fitness Holdings Ltd, ASB Bank Ltd, Kiwibank Ltd, Primowireless Ltd, Lightbox New Zealand Ltd, MyRepublic Ltd, Slingshot Communications Ltd, Spotify Australia Pty Ltd and Vodafone New Zealand Ltd

⁸⁴ One business, Spotify Australia Pty Ltd, added the phrase ‘to the extent permitted by law’ to otherwise unfair terms without mentioning what that ‘law’ was; two businesses, Pulse Energy Ltd and Jucy Rentals NZ Ltd, added phrases to the effect of ‘to the extent permitted by law’ but also indicated that the CGA was the applicable legislation.

⁸⁵ See eg, M Loos and J Luzak, above n 55, 68 who note that using phrases such as ‘in accordance with applicable national law’ is not sufficient under *The Unfair Contract Terms Directive* (see above n 29) to make that term fair. While the issue is beyond the scope of this article, it appears common for businesses to state, eg, that they are not liable for any loss or damage arising, but then in that term or in a term elsewhere saying that consumer protection laws are not excluded. Given the Commerce Commission’s lack of prosecutions in this area, it would appear that the Commerce Commission does not view such constructions as problematic. However, there is a strong argument that denying liability in one term, despite oblique wording in that term or another about consumers’ rights, is misleading and deceptive and thus a breach of s 9 of the FTA. To help remedy this situation mandatory wording should be required for consumer contracts that explains consumers’ rights clearly. For example, the CGA should be amended to follow Australia where the following term is required in consumer contracts: ‘Our goods come with guarantees that cannot be excluded under the Australian Consumer Law. You are entitled to a replacement or refund for a major failure and compensation for any other reasonably foreseeable loss or damage. You are also entitled to have the goods repaired or replaced if the goods fail to be of acceptable quality and the failure does not amount to a major failure’, Competition and Consumer Regulations 2010, reg 90 (Cth).

⁸⁶ For example, the promotion being run by the business in Phase 1 differed to the promotion being run in Phase 2 (Servilles Ltd) or there was an addition to the orders and delivery term stating that the business was unable deliver large items on weekends (Rebel Sports Ltd). Other unrelated changes included where the consumer was required to agree to an additional set of terms, for example, the addition of a third party payment provider contract due to the business changing the way they accepted payment.

⁸⁷ The sample for this analysis included the 38 businesses that changed at least one unfair contract term in an apparent attempt to ameliorate or remove unfair contract terms. As some businesses had more than one contract, the word “contract” in the definitions below refers to all contracts for a single business. The results provide information about the variability and central tendencies of the data in the sample (in this case the number of successfully changed unfair terms in a contract).

⁸⁸ The average number of unfair contract terms changed successfully per contract.

Standard Error ⁸⁹	0.826400499
Median ⁹⁰	1.5
Mode ⁹¹	1
Standard Deviation ⁹²	5.094274811
Sample Variance ⁹³	25.95163585
Kurtosis ⁹⁴	7.345196915
Skewness ⁹⁵	2.415746234
Range ⁹⁶	25
Minimum ⁹⁷	0
Maximum ⁹⁸	25
Sum ⁹⁹	140
Count ¹⁰⁰	38
Confidence Level ¹⁰¹ (95.0 per cent)	1.674446463

The study's findings that the majority of contracts had not been changed to meet the UCL is in contrast to the Commerce Commission's Review, where six of the seven telecommunication companies had made changes.¹⁰² However, the Review did not cover all the telecommunication businesses operating in New Zealand.¹⁰³ Given the size of the larger telecommunications companies

⁸⁹ The standard error provides an indication of close the sample mean is to the true population mean. In this case, the 38 contracts are only a sample of the total population of contracts with successfully changed unfair terms and the standard error of 0.8264 means we are 95% certain that the true population mean is between 2.8578 (3.6842 – 0.8264) and 4.5106 (3.6842 + 0.8264) successfully changed unfair terms.

⁹⁰ The number in the middle when the data are arranged from lowest to highest. The mean is a measure of central tendency. In Table 1 it can be seen that the median was 1.5 successfully changed unfair terms, indicating that the number of successfully changed unfair terms was lower for most contracts.

⁹¹ The most frequently repeated number in the data.

⁹² The squared root of the variance, indicating how close the data is to the mean. If a normal distribution is assumed, 68% of the values are within 1 standard deviation from the mean, 95% within 2 standard deviations and 99% within 3 standard deviations.

⁹³ The mean of the squared distance from the mean of data. The higher the sample variance, the further the data is dispersed from the mean.

⁹⁴ Kurtosis provides an indication of how peaked (or how high around the mean) the data is if it is shown in a graph. A positive kurtosis indicates there is too little data in the tails (more centred around the mean/more peaked) while a negative value indicates there is too much data in the tails (more dispersed from the mean/less peaked).

⁹⁵ A measure of how the data is distributed along the curve. A perfectly normal distribution curve has skewness of 0 (symmetric distribution around the mean). Therefore if skewness is positive it indicates that there is more data on the left side of the curve. If skewness is negative it indicates that the mass of the data is concentrated on the right of the curve.

⁹⁶ The difference between maximum and minimum number of successfully changed terms in a contract. Range is a measure of dispersion in the sample.

⁹⁷ The lowest number of successfully changed terms in a single contract.

⁹⁸ The highest number of successfully changed terms in a single contract.

⁹⁹ Sum of all successfully changed unfair terms across the 38 contracts in the sample.

¹⁰⁰ The total number of contracts in the sample.

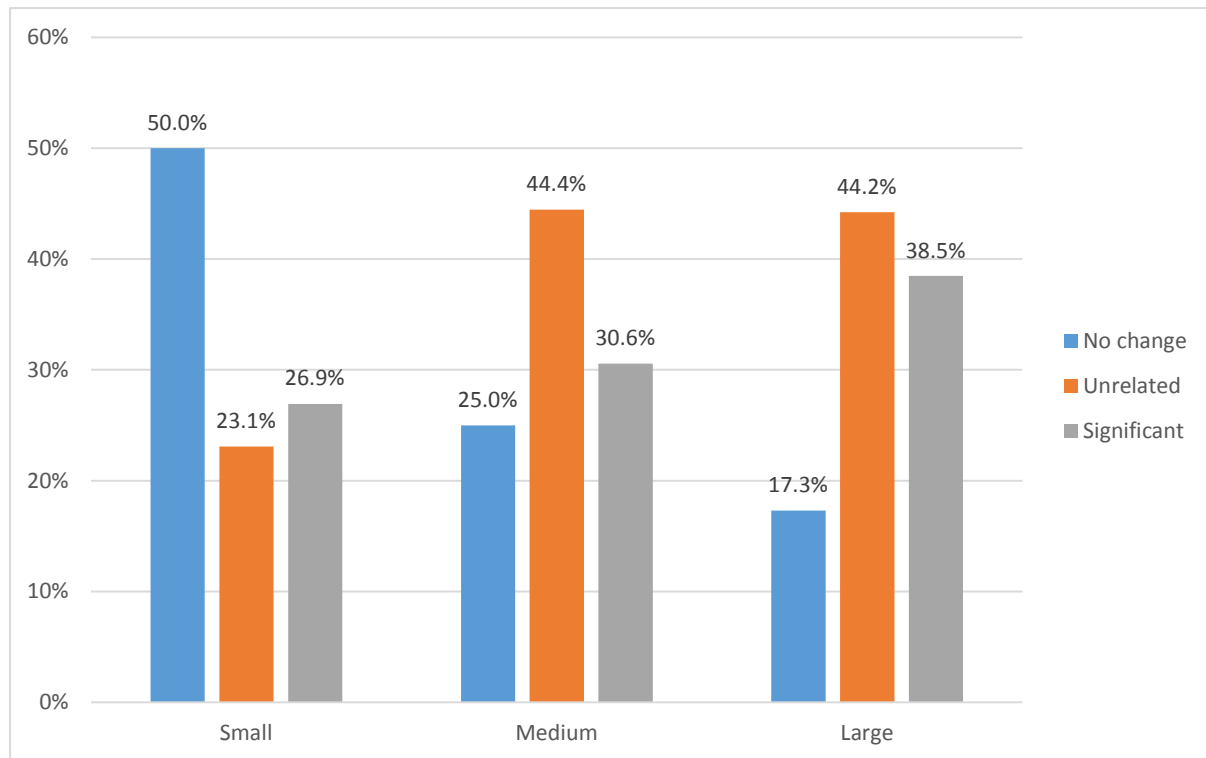
¹⁰¹ The confidence level in this analysis is 95%, meaning that if the mean of different samples within the population were calculated multiple times, the mean would fall within the range 2.0098 (3.6842 – 1.6744) and 5.3586 (3.6842+ 1.6744) 95% of the time.

¹⁰² The companies were, Spark New Zealand Ltd, Vodafone New Zealand Ltd, CallPlus Services Ltd, Orcon Ltd, Flip Services Ltd, Two Degrees Mobile Ltd, and My Republic Ltd.

¹⁰³ The Telecommunications Dispute Resolutions Service (TDR) as at 22 February 2016 had 17 scheme members, all of which supply consumers with telecommunication services and there are a number of small businesses that are not members of the scheme.

and the concerns surrounding telecommunication contracts,¹⁰⁴ the telecommunication industry would have been expected to have made concerted efforts to comply with the UCL. Thus the Reviews' findings on the rate of change cannot be extrapolated to all industries. On the other hand, the study showed that large businesses were more likely to have made significant changes to their contracts than their small and medium counterparts. The trend of large companies being more likely to make changes was mirrored in the Review: the telecommunications company that had not amended its contract was the smallest of the companies reviewed.

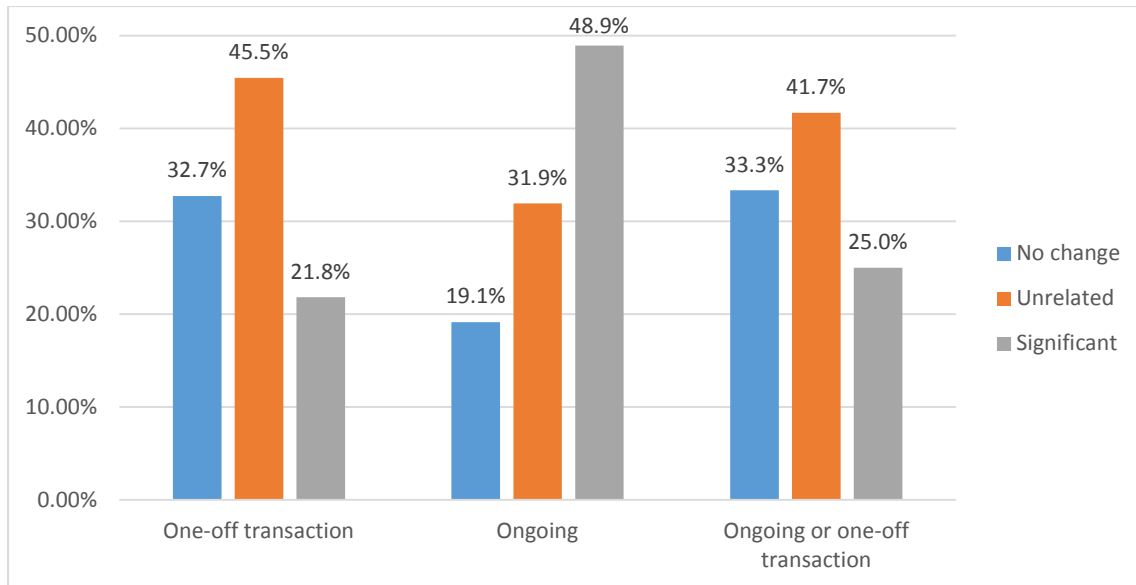
Figure 3 *Type of change made by size of business*



In addition, there were differences in the rate of change depending on whether the contract was for a one-off transaction, for example, the sale of a good, or for ongoing transactions, such as a mobile plan. Figure 4 shows that businesses with ongoing contracts made the highest percentage of significant changes (48.9 per cent), while businesses with contracts for one-off transactions made the lowest percentage of significant changes (21.8 per cent). Falling between the two were businesses that offered a mix of ongoing or one-off transactions.¹⁰⁵

¹⁰⁴ See, eg, in the Review, the Commerce Commission stated that '[o]verseas regulators told us that the telecommunications sector was one in which potentially unfair terms were common in their countries', Commerce Commission, *Unfair contract terms – Telecommunications contract review*, above n 16, [10].

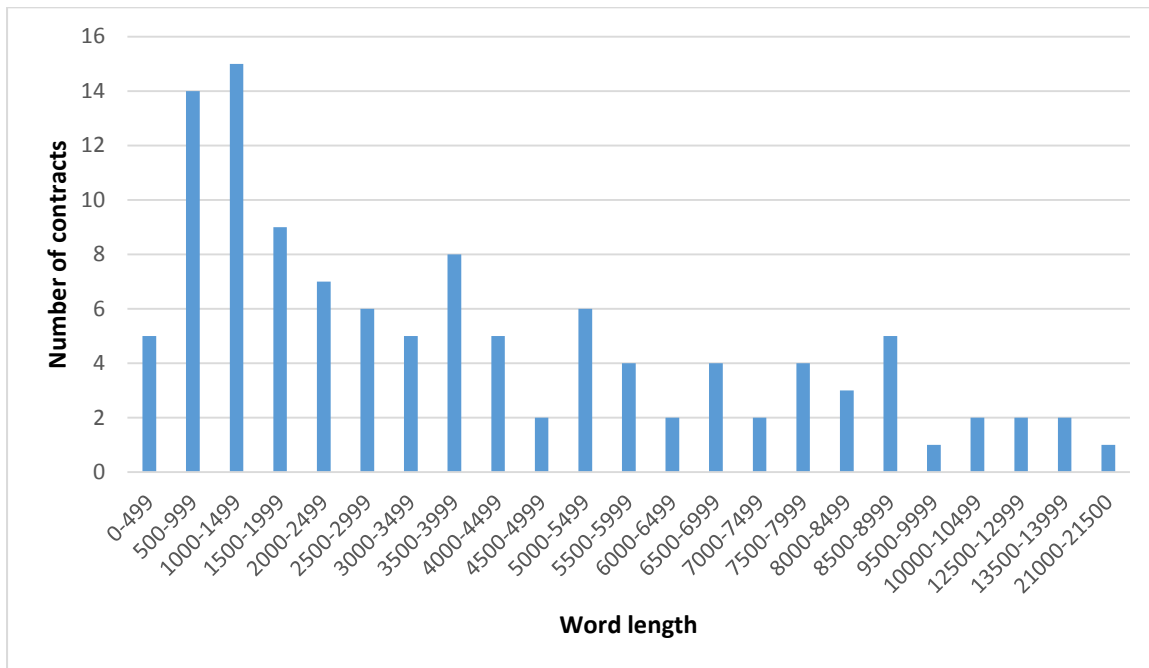
¹⁰⁵ For example, Green Acres Franchise Group Ltd, offered one-off transactions where the consumer paid for a single clean (or other service); its ongoing transactions were where the consumer entered into a contract for their house to be cleaned on a weekly basis.

Figure 4 *Changes made by type of contract*

The average length of a contract increased from an average of 4,169 words in Phase 1 to 5,322 in Phase 2, a 27.7 per cent increase. The increase is to be expected because, for example, when unilateral variation terms are used the situations where changes can occur and the consequences of such changes need to be explained.¹⁰⁶ Interestingly the longest contracts, airlines, banks and power and gas with an average length of 8,846, 8,282 and 11,842 respectively did not all increase at the same rate. The increases being 15.8 per cent, 37.9 per cent and 7.9 per cent. Car parking buildings saw the largest increase in significantly changed terms at 107.0 per cent.¹⁰⁷ Only hotels and other providers of accommodation at 8.4 per cent fewer decreased.

¹⁰⁶ See below n 112 and accompanying text (Slingshot term) where one term increased from 60 words to 126 words.

¹⁰⁷ In addition, hair dressers and beauty therapy providers saw a 1099 per cent increase, however, this was due to one of the businesses, Ruby Waxx, introducing a third party payment provider contract which substantially increased the word length.

Figure 5 *Word length of contracts in Phase 2.*

The number of contracts containing each grey list term in both Phase 1 and Phase 2 was compared. Figure 6 shows a slightly higher percentage of Phase 1 contracts contained each grey list term than Phase 2 contracts, with the exception of s 46M(m)¹⁰⁸ which was included in 6.1 per cent in both phases. Figure 6 also shows that s 46M(a),¹⁰⁹ s 46M(i)¹¹⁰ and s 46M(k)¹¹¹ were the most included grey list terms in both Phase 1 and Phase 2 contracts, while s 46M(l)¹¹² and s 46M(m)¹¹³ were the least included.

¹⁰⁸ '[I]mpose, or have the effect of imposing, the evidential burden on one party in proceedings relating to the contract'.

¹⁰⁹ '[P]ermit, or have the effect of permitting, one party (but not another party) to avoid or limit performance of the contract'.

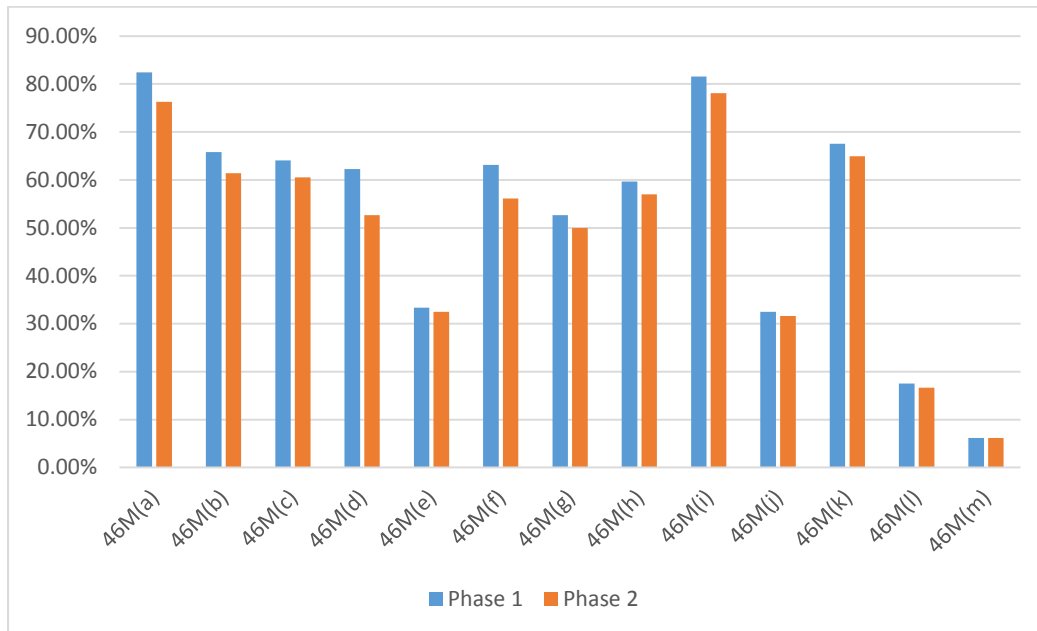
¹¹⁰ '[L]imit, or have the effect of limiting, one party's vicarious liability for its agents'.

¹¹¹ '[L]imit, or have the effect of limiting, one party's right to sue another party'.

¹¹² '[L]imit, or have the effect of limiting, the evidence one party can adduce in proceedings relating to the contract'.

¹¹³ '[I]mpose, or have the effect of imposing, the evidential burden on one party in proceedings relating to the contract'.

Figure 6 *Percentage of total contracts containing each grey list term in Phase 1 and Phase 2 contracts*



III THE GREY LIST

This part looks at the grey list terms, the frequency of the ones remaining in the contracts as well the attempts to amend terms to make them fair. The figures for each term are the number of businesses that altered term(s) that fell under each of the grey list terms.

A 46M(a) Avoid or limit performance

Terms that were unfair under s 46M(a) were included in 88 contracts across every industry. The nature of the unfair terms varied widely and were often unfair under other grey list provisions. A term in the contract which allowed the business to vary terms unilaterally—without allowing the consumer to terminate the contract without paying fees or charges—breached s 46M(d) as it would ‘permit, or have the effect of permitting, one party (but not the other one) to vary the terms of the contract’. Such a term would also be unfair under s 46M(a) because the ability of the business to change terms unilaterally could also allow them to avoid or limit their performance of the contract. In addition, terms that purported to allow a business to vary the characteristics of the goods or services to be supplied would also breach s 46M(g) and could have the effect of limiting performance under s 46M(a).

Businesses altered or attempted unsuccessfully to alter terms that were unfair under s 46M(a) in 11 ways; the most common was to give consumers the right to terminate if they disagreed with the change, or if the changes had a detrimental effect (12 contracts). The remaining 10 ways were: providing specific examples of situations where performance may be limited (five); variations would apply only to subsequent purchases (three); ability to make ‘reasonable changes’ that do not disadvantage the consumer materially (three); added or increased notice period for notifying consumer of changes (two); inserting phrase such as ‘to the fullest extent permitted by law’ into an otherwise unfair term and the *CGA* mentioned in that term (two); business will remedy limited

performance (two); business does not have control over certain aspect of services provided (one); does not warrant that products will be provided as described (one); giving consumer opportunity to provide feedback on proposed changes (one); and permitting the business to suspend or restrict services if it considered it ‘reasonably necessary’ and would do its best to contact consumer before doing so (one).

B *46M(b) Termination*

Seventy contracts contained terms unfair under s 46M(b). With the exception of car services, such terms were used by all the industries. There were eight ways in which businesses attempted to alter terms unfair under s 46M(b); the most common was to identify situations in which the business could terminate the contract clearly (12). Other ways were: increase the cancellation period or to make the cancellation period or reasons equal for the business and consumer (five); add a cancellation policy and/or an explanation of the cancellation period (three); remove the ability for the business to terminate at its sole discretion (two); permit the consumer to terminate if certain terms were changed (two); remove unfair cancellation terms (one);¹¹⁴ provide the business would give notice if it intended to terminate (one); and to allow the consumer to cancel at any time after the minimum term without paying a fee for cancellation (one).

C *46M(c) Penalty for cancellation or breach*

Terms unfair under s 46M(c) were in 67 contracts across all industries except car services and sporting events. Car rentals had a high number of unfair terms mostly due to high fees for relocation if the consumer returned a car to a different location than arranged.¹¹⁵ While the high fee would be necessary in some situations, for example, if the consumer returned the car to the North Island rather than the South Island, charging a high fee is arguably unfair if the consumer returns the car to a nearby location. While fees and charges cannot be challenged normally as they are part of the upfront price,¹¹⁶ if the fees or charges are not a reasonable estimate of the businesses fees or charges, that fee or charge will be a penalty.¹¹⁷

The most common of the eight ways in which businesses altered or attempted to alter terms unfair under s 46M(c) was by identifying terms which, if breached by the consumer, permitted the business to terminate the contract (eight). Previously blanket terms had been used which had permitted the business to terminate for any breach of the contract—meaning the business could terminate for a technical breach, such as the consumer not updating contact details immediately when they moved house. The next most common change was to list the cancellation fees when such fees were not clear before (seven).

The remaining ways were: removal of terms which allowed the business to terminate for a consumer's breach (three); removal of charges, for example, for interest on overdue amounts and the return of payments made (three); business able to suspend where it ‘reasonably’ (as opposed to in its ‘sole discretion’) considered a breach had occurred and it was necessary to suspend (two); defined nature of breach for when charges will be made, that is, something that the business considers material and will expose it to more than trivial losses (two); cancellation terms made equal for business and consumer (one); and the business would try to give notice of intention to suspend for breach by consumer (one).

¹¹⁴ See, eg, CityFitness Group Ltd removed wording that the consumer could terminate for medical reasons only if their minimum term was 12 months.

¹¹⁵ For example, Go Rental Ltd included the following term, “The Owner reserves the right to charge a relocation fee of up to \$1000 to the Hirer if the vehicle has been returned to a different location than what was agreed.”

¹¹⁶ FTA ss 46K(1)(b) and 46K(2).

¹¹⁷ See, eg, Commerce Commission, *Unfair Contract Terms Guidelines — February 2015*, (n 11) [83]-[106].

D 46M(d) Unilateral variation of terms

Terms unfair under s 46M(d) were in 61 contracts across all industries except car services, online auctioneers and tourism. Terms that permitted unilateral variation were also often unfair under s 46M(a) because the ability of businesses to change terms unilaterally could also allow them to avoid or limit their performance of the contract.

The most common (also for 46M(a)) way changes were made to attempt to remove terms that permitted unilateral variation of terms was to allow the consumer to terminate the contract if the consumer disagreed with the changes made, or if changes made would have a detrimental effect (nine contracts). Five businesses made changes that extended or introduced the notice period given to consumers regarding any changes made to the contract; however, extending or introducing the notice period was not sufficient in itself to make a term fair because if the consumer could not terminate the contract they were still bound by the changes.

Of the remaining ways: changes would only apply to purchases after the change was made (goods) or after the minimum term (services) (three); business permitted to make neutral changes or to remove invalid or unenforceable terms (two); business may make variations ‘acting reasonably’ (one); and consumers may be given the opportunity to provide feedback on proposed changes (one).

The high rate of unilateral variation terms remaining in the contracts was concerning because it was one of the easiest terms to make fair, that is, businesses can retain unilateral variation terms so long as they allow the consumer to terminate the contract without incurring charges for doing so. However, only 8.8 per cent (10 businesses) permitted such ability to terminate. 56.1 per cent permitted unilateral variation of terms without allowing the consumer to terminate, while the remaining 35.1 per cent did not mention unilateral variation of terms. The pattern of the majority of businesses not permitting the consumer to terminate without incurring charges was repeated in the Commerce Commission’s Review. Four out of the seven telecommunication companies had contracts that retained terms that allowed the companies to vary their terms without an adequate ability of consumer to terminate the contract without paying fees to do so.¹¹⁸

E 46M(e) Renewing/not renewing contract

Terms unfair under s 46M(e) were included in seven contracts across five industries (digital music, gyms, telecommunications, television and transport services). The only way in which changes were attempted was to explain more clearly how the contract would renew after the minimum term. However, of course, that by itself did not make the renewal term fair. To make such a term fair it is arguable that there should be a mechanism that alerts the consumer the contract is being renewed and allow the consumer to decide whether to allow the renewal to take place or to terminate the contract without paying a fee after an automatic renewal.¹¹⁹

F 46M(f) Variation of upfront price

Terms unfair under s 46M(f) were in 65 contracts across all industries except beauty services, car parking buildings, outdoor adventures and sporting events. The most common way of the six ways businesses attempted to alter unfair terms was to give the consumer the opportunity to terminate the

¹¹⁸ Commerce Commission, *Unfair contract terms – Telecommunications contract review*, above n 16, [42].

¹¹⁹ See, eg, Australian Capital Territory Office of Regulatory Services; ACCC; Australian Securities and Investments Commission; Consumer Affairs and Fair Trading Tasmania; Consumer Affairs Victoria; New South Wales Fair Trading; Northern Territory Consumer Affairs; Office of Consumer and Business Affairs South Australia; Queensland Office of Fair Trading; Western Australia Department of Commerce; *Consumer Protection, A Guide to the Unfair Contract Terms Law* (2010) 16.

contract if prices changed (six contracts), or to extend or introduce a period of notice to the consumer about price changes (five). While allowing the consumer to terminate if prices were changed was successful in removing the unfair contract term, if the change was simply to the notice period provided to the consumer the term remained unfair.

Of the remaining ways: stating that prices will not be changed for fixed term contracts or where specific terms said that no changes would be made (five); explaining how price would increase in line with CPI or regulatory events, such as a GST increase or a third party supplier increase (four); providing a list of fees and charges that consumer may have to pay (three); or business to alert consumer if the action the consumer wants to take would incur an extra charge before following through with the consumer's instructions (one).

G 46M(g) Unilateral variation of goods/services

Unfair terms under s 46M(g) were in 58 contracts across all industries except beauty services and online auctioneers. There were four ways in which businesses attempted to remove unfair terms: by adding that the business could make reasonable product variations that would not materially disadvantage the consumer (three); allowing consumers the right to terminate the contract if they disagreed with the product variations (three) and providing the business could not alter the services once the booking was confirmed (three). Finally one contract permitted the business to alter functions or features only 'to the extent permissible by law'.

H 46M(h) Unilaterally determine breach/meaning

Terms unfair under s 46M(h) were used in 54 contracts across all industries with the exception of car services, electricity and gas and travel agents. Apparent attempts to remove or ameliorate unfair terms were made by inserting additional explanations of meanings and how the business would determine whether breaches had occurred (three) and by the removal of phrases such as 'in our sole discretion' (two).

I 46M(i) Limitation of vicarious liability

Unfair terms under s 46M(i) were in 89 contracts across all of the industries. Nine ways were used to attempt to remove unfair terms. One way was to add phrases that limited liability 'to the extent permitted by law' with no explanation of the limitations were (two contracts). Such additions were ineffective for the large part because businesses inserted that phrasing into exclusion of liability terms which also excluded statutory guarantees and warranties. In addition, the phrase was misleading under section 9 of the *FTA* because consumers may not know that businesses cannot contract out of certain guarantees and thus believe they cannot sue for breaches of their consumer rights. Terms that excluded non-excludable consumer rights were also commonly unfair under 46M(k).

The remaining ways were to: add phrases to terms that limited liability such as 'to the extent permitted by law' and mentioned, but did not explain, the relevant legislation (nine); the addition of terms in which the businesses accepted liability for fraud, negligence, tortious actions, breach of contract and so on (five); deleting terms that denied the business owed any liability to the consumer (four); removing businesses' liability caps to consumers and/or including terms that capped consumer liability equally to the business (four); removal of terms which stated that consumers would indemnify the business for all costs or damages associated with their use of the services (two); alteration of indemnity terms to make consumers liable only when they caused damage or loss due to factors within their control (two); and adding phrases that limited liability 'to the extent permitted by law' and mentioned and explained the relevant legislation (one).

J 46M(j) Assignment

36 contracts in 14 out of 25 industries contained terms unfair under s 46M(j).¹²⁰ The most common of the seven ways involved allowing the consumer to assign the contract with the business' consent (two) and two more went a step further by saying they would not unreasonably withhold their consent. Both ways, of course, failed to make the term fair as the consumer could still be prevented from assigning the contract. Other ways were: the addition of a term that allowed the consumer to terminate if the businesses' assignment had a material detrimental effect (one); adding the phrase 'except to the extent required by law' to a term that stated that the booking could not be assigned (one); stating that while the business was permitted to assign, the assignee would have the same rights and obligations under same contract (one); business permitted to assign, provided it acted reasonably (one); and allowing the goods to be transferred by the consumer (one).¹²¹

K 46M(k) Limit right to sue

Terms unfair under s 46M(k) were in 74 contracts across all industries except banks, beauty services and car services. The most common of the four ways to attempt to remove unfair contract terms was to explain how disputes were to be resolved (two contracts). While this was not a successful change as consumers' rights remained limited, the terms did give an indication to consumers about how they could resolve any disputes and provided an option for the consumer to escalate the problem within the business before outlining how disputes could be resolved through the courts if the dispute had not been resolved. The other ways were to: remove limitations on amounts that would be refunded (one); the removal of an unfair indemnity term (one); and the statement that the failure of the business to enforce rights would not prevent the consumer from taking further action (one).

A worrying trend occurred, which was mirrored in the Commerce Commission's Review: businesses attempting to limit their liability to the consumer for consequential loss. In the Review all seven companies had terms that attempted to limit such liability.¹²² The Review found one of the companies sought to limit its liability for any loss to the lesser of \$1000 or the total amount paid to it for services in the six months prior to the date of the consumer's claim.¹²³ The one positive note is that terms that limit consequential loss also breach the *CGA* and the *FTA*¹²⁴ thus if the matter did come before the Disputes Tribunal or the courts the term would be unenforceable.¹²⁵

L 46M(l) Limit evidence in proceedings

Terms unfair under s 46M(l) were included in 17 contracts in 14 out of the 25 industries.¹²⁶ The most common type was to state the consumer could not rely upon any representations made by the business or its employees or agents that were not contained in the contract. For example, '[t]his Agreement

¹²⁰ Those industries were: banks, car parking buildings, car rentals, couriers, digital music, electricity and gas, entertainment, gyms, pet care, retail, telecommunications, television, tourism and transport services.

¹²¹ The goods in question were gift vouchers.

¹²² Commerce Commission, *Unfair contract terms – Telecommunications contract review*, above n 16, [42].

¹²³ *Ibid* [51].

¹²⁴ Section 43 of the *CGA* provides that there can be no contracting out of the *CGA*, unless the other party is also in trade and the agreement is in writing, the parties agree to contract out of the provisions of the *CGA* and it is fair and reasonable that the parties are bound by the provision in the agreement, *CGA* s 43(2). Moreover, if a supplier (a business) does attempt to contract out, for example, by stating that it is not liable for any damages arising for the use of its services, that supplier commits an offence against section 13(i) of the *FTA*.

¹²⁵ Commerce Commission, *Unfair contract terms – Telecommunications contract review*, above n 16, [60], 'there can be no limitation for losses caused by breaches of the Fair Trading Act and Consumer Guarantees Act'.

¹²⁶ Those industries were: accommodation, beauty services, car parking buildings, car rentals, couriers, digital music, electricity and gas, gyms, online auctioneers, pet care, retail, television and tourism services.

constitutes the complete & exclusive agreement between you & Pandora with respect to the subject matter hereof, and supersedes all prior or contemporaneous oral or written communications ... or agreements not specifically incorporated herein'.¹²⁷ As with s 46M(k), clauses that attempted to deny representations made outside of the contract were unenforceable and would be a breach of s 9 of the FTA. The only way of attempting to make such terms fair was to state that other information provided during sign up was part of the contract (one contract).

M 46M(m) *Impose evidential burden*

Terms unfair under s 46M(m) were included in seven contracts in seven of the industries, airlines, banks, car rentals, couriers, entertainment, retail and tourism services. For example, '[n]o responsibility can be accepted by AUTO VALET for omissions or discrepancies detected after the Customer leaves the company grooming shed / after 24 hours for client not present'. No business attempted to remove or ameliorate terms unfair under s 46M(m).

N *Other unfair contract terms*

The grey list under s 46M is not exhaustive and other terms may also be unfair.¹²⁸ In the study, 23 contracts in all industries except airlines and banks contained terms that were unfair, but did not correspond to a grey list term. For example, '[y]ou agree to unreservedly allow us 24/7 access to our equipment.'¹²⁹ Such a term is unfair as it would allow, for example, an employee or agent of the business to enter a home at 3am in the morning to fix or retrieve the businesses equipment.

IV CONCLUSION AND RECOMMENDATIONS

The study's finding that fewer than half of the contracts had been amended to attempt to meet the UCL's requirements is concerning. Moreover, even for those contracts where changes were made substantial unfair terms remained. The UCL was well publicised before,¹³⁰ during¹³¹ and after it came into effect.¹³² Businesses' lack of knowledge of the UCL cannot, therefore, be a contributing factor. Moreover, businesses were given more than 15 months to amend their contracts.¹³³ The inability of even one business in the study or Review to remove all of its unfair terms shows that the behaviour of businesses to continue using unfair contract terms is entrenched. For example, Slingshot, a

¹²⁷ Pandora Media Ltd.

¹²⁸ FTA s 46M 'the following *are examples* of the kinds of terms that, if in a consumer contract, may be unfair contract terms' [emphasis added]. Examples of terms that have been found to be unfair, but do not come within any of the grey terms include the term in *Spreadex Ltd v Cochrane*, above n 20, where the business attempted to make the consumer liable for all activity on his account, even if the activity was beyond the consumers control, for example, if the account had been hacked into. Also a term that permitted telecommunication company to continue charging if service suspended for any reason, *Director of Consumer Affairs v AAPT Ltd* [2006] VCAT 1493 [52].

¹²⁹ Primo Wireless.

¹³⁰ Morgan Tait, 'Law reforms give buyers more power, protection' *New Zealand Herald* (online), 14 June 2014 <http://www.nzherald.co.nz/nz/news/article.cfm?c_id=1&objectid=11273683>; 'New Protection from Unfair Contract Terms' Citizens Advice Bureau, 10 March 2015, <<http://www.cab.org.nz/aboutus/news/news/Pages/unfair-contract-terms.aspx>>; Pilkington (n 13); and Hannah Norton, 'No Grace Period for Unfair Contract Terms Law' *NZ Lawyer* (online), 2 March 2015, <<http://www.nzlawyermagazine.co.nz/news/no-grace-period-for-unfair-contract-terms-law-197527.aspx>>.

¹³¹ 'Consumer NZ campaign targets unfair contract terms as law change kicks in' *National Business Review* (online) 16 March 2015, <<http://www.nbr.co.nz/article/consumer-nz-campaign-targets-unfair-contract-terms-law-change-kicks-170154>>.

¹³² 'Many gyms using 'unfair and illegal' contract terms' *NZME*, (online), 5 February 2016, <<http://www.newstalkzb.co.nz/news/national/many-gyms-using-unfair-and-illegal-contract-terms/>>.

¹³³ While the *Fair Trading Amendment Act 2013* came into force on 18 December 2013, s 2(3) of FTA provided that ss 14 and 36 of the Amendment Act, which contained the UCL, came force 15 months later.

telecommunication company, did try to amend its unfair term that allowed it to vary its charges. The term:

You must pay our charges for the services we provide to you, regardless of whether you or someone else uses those services. We may vary our charges from time to time. If we increase any charge we will give you at least 14 days' notice. You can always check the latest charges in the My Account section of the website.

Was changed to:

You must pay our charges for the services we provide to you, regardless of whether you or someone else uses those services. We may vary our charges from time to time. If we increase any charge we will give you at least 14 days' notice. You can always check the latest charges at help.slingshot.co.nz. If you do not agree to the changes, you may terminate the service which is the subject of the changes. If you have a minimum term contract with us, the charges for the Services covered by that contract will not increase until the end of that contract, unless an increase is as a result of a change in the price from a supplier for an input required for your Slingshot Broadband Service [emphasis added].

The first sentence remains unfair as it purports to make the consumer liable for others' unauthorised use of the services, for example, if the consumer's account was hacked.¹³⁴ In addition, the underlined part of the term is unfair for consumers on minimum term contracts because Slingshot should bear the risk of the cost of supplying the service increasing, not the consumer.

Adding another tool to the Commerce Commission's tool box in the form of the UCL, while welcome, is not a silver bullet. Many businesses continue to use terms that breach the *FTA* and the *CGA*. For example, it was common, and as the study shows, still common, for businesses to attempt to limit their liability for consequential loss unlawfully, for example, '[u]nder no circumstances shall the liability of the Company exceed the price of the Goods'.¹³⁵ That such terms are still used demonstrates that the Commerce Commission is struggling to ensure businesses comply with existing law despite its work with businesses and prosecuting businesses for breaching consumer laws such as attempting to contract out of the *CGA*.¹³⁶

While some positive changes have been made as both the study and the Review show unfair terms have decreased, the reduction is slight. As the study shows, the passing of a law does not mean that law is adhered to by most or even a majority of actors subject to it:¹³⁷ there is little point having a law on the books if it is not followed.¹³⁸ Indeed, it is detrimental to consumers for a law to be flouted routinely because it allows Government and other officials to say that consumers are protected against unfair contract terms, when in fact unfair contract terms are rife. As the Commerce Commission's observed, the standard form consumer contracts that it reviewed and which still contained unfair contract terms 'affect[ed] millions of telecommunication contracts' and therefore millions of consumers.¹³⁹

¹³⁴ See *ibid* [76].

¹³⁵ *CGA* s 43 and see above n 124.

¹³⁶ See eg *Commerce Commission v Sutherland* (District Court, Christchurch, 6/12/ 2013, CRI-2013-009-10152, Judge P R Kellar (contract wrongly stated that no refunds would be provided if a train trip was cancelled).

¹³⁷ The factors of why people follow the law (or follow some laws and not others) is complex, see generally Tom R Tyler, 'Compliance with Intellectual Property Laws: A Psychological Perspective (1996) *New York University Journal of International Law and Politics* 219 and Tom R Tyler, *Why People Obey the Law* (Princeton University Press, 2006).

¹³⁸ See Jessica Litman, *Digital Copyright* (Prometheus Books 2001) 195 'Laws that people don't obey and that governments don't enforce are not much use to the interests that persuaded [the legislature] to enact them.'

¹³⁹ Commerce Commission, *Unfair contract terms – Telecommunications contract review*, above n 16, [38].

What would be the most effective regulatory response for standard form consumer contracts to meet the requirements of the UCL? The Commerce Commission's work with the seven telecommunication companies was successful as all agreed to remove unfair terms or they were able to provide sufficient information to the Commission to justify why certain terms were not unfair as they were necessary to protect legitimate business interests.¹⁴⁰ In addition, the Commission is reviewing electricity retail, credit and gym contracts.¹⁴¹ The Achilles' heel, of course, is that the Commerce Commission does not have the resources to work with all or even most businesses to ensure contracts adhere to the UCL and other consumer law. Indeed, despite the name of the Review, 'Telecommunications Contracts Review' the contracts of fewer than half of the companies in that sector were reviewed.

The high level of non-compliance of businesses means consumers will continue to have terms enforced against them that are unfair because even if the consumer does go so far as to challenge what appears to be an unfair term, the Disputes Tribunals and the courts would be required to enforce the term against the consumer, unless those fora can invoke other parts of consumer law or the limited protections that existed prior to the UCL,¹⁴² or, if the case is before the court, the Commerce Commission can be persuaded to intervene and seek a declaration. The reason given in the Regulatory Impact Statement for not permitting consumers to challenge unfair contract terms directly was because of uncertainty and increased costs for businesses.¹⁴³ While the work that the Commerce Commission is doing with businesses and the guidelines it has issued¹⁴⁴ provides a good starting point, the study and the Review shows more needs to be done to protect consumers.

A number of changes are recommended. First, the UCL requires amendment to align it with Australia and allow consumers to challenge unfair contract terms in both the Disputes Tribunals and the courts. Indeed, much of the success of the *FTA* is because enforcing the *FTA* is not the Commerce Commission's sole domain:¹⁴⁵

The Commerce Commission has the job of policing the Fair Trading Act, but its resources are limited. Accordingly it cannot hope to prosecute more than a fraction of alleged infringements. By empowering private individuals and [businesses] to take enforcement action, the Act vastly extends its 'reach'.

Allowing 'consumers' to challenge unfair contract terms would mean more terms would be challenged because in some situations businesses who acquire goods or services would be regarded as 'consumers' for the purposes of the UCL. That is, if businesses are supplying goods or services that are of a kind ordinarily acquired for personal, domestic, or household use or consumption, the businesses cannot contract out of the UCL even when the other party is in trade unless the business was acquiring them for the purpose of resupplying them in trade; or consuming them in the course of a process of production or manufacture; or in the case of goods, repairing or treating in trade other goods or fixtures on land.¹⁴⁶

Second, because of the legitimate concern that the same term will be litigated by consumers in a multitude of different Disputes Tribunals' hearings, a process needs to be created in addition to the

¹⁴⁰ Ibid [89]. The agreement of the telecommunication companies to change all of their unfair terms is in contrast to the ACCC's review where 79 per cent of the 'problematic' terms identified by the ACCC were altered or deleted by the relevant businesses, ACCC, (n 63) 1.

¹⁴¹ Commerce Commission, *Unfair contract terms – Telecommunications contract review*, above n 16, [13].

¹⁴² See, above n 21–28 and accompanying text.

¹⁴³ Regulatory Impact Statement Consumer Law Reform: December 2010, Ministry of Consumer Affairs, <<http://www.treasury.govt.nz/publications/informationreleases/ris/pdfs/ris-mca-clrd-mar11.pdf>> 10.

¹⁴⁴ Commerce Commission, *Unfair Contract Terms Guidelines – February 2015*, (n 11).

¹⁴⁵ C Harrison, 'Private Action under the *Fair Trading Act*', 57-63 in E Le Lievre (ed) *A Decade of Fair Trading in New Zealand: The Fair Trading Act 1987-1997*, (1997) Commerce Commission, Wellington, quoted by G Hannis, 'Truth-In-Advertising Law: New Zealand's Experience' (2001) 8 *Agenda* 19, 20.

¹⁴⁶ *FTA* s 5C, and see above (n 4).

creation of a readily accessible and up-to-date list of terms adjudicated upon.¹⁴⁷ If a term is found to be fair in one hearing, that term cannot be challenged in a subsequent Disputes Tribunal hearing. Instead, if a consumer wishes to challenge that term, the District Court or the High Court would be required to hear the case. In addition, an exception should be made to the rule that Disputes Tribunals' decisions cannot be appealed to the District Court unless it is on narrow grounds.¹⁴⁸

Third, an additional way of adjudicating unfair contract terms should also be used. There are a multitude of different dispute resolution schemes dealing with particular industries.¹⁴⁹ For example, there are schemes that deal with electricity and gas,¹⁵⁰ retirement villages¹⁵¹ and telecommunications.¹⁵² The schemes offer great advantages to consumers as consumers are not required to pay normally for the scheme to investigate and settle their dispute, in contrast to the cost to the consumer in taking a dispute to the Disputes Tribunal.¹⁵³ When a consumer raises a complaint against the scheme member, often the scheme is required to look at its member's terms. Currently, unless the schemes can obtain the agreement of the scheme members to set aside unfair contract terms, the schemes must uphold the term or terms and simply pass their concerns to the Commerce Commission. Therefore, when consumers complain to dispute resolution schemes those schemes should be given the power to adjudicate whether terms are fair.¹⁵⁴ As with the proposed Disputes Tribunal arrangement, a register of challenged terms would be kept, and, if a scheme makes a determination that a term is fair, the scheme would refuse to adjudicate upon the fairness of that term again. If, however, the scheme found the term was unfair, not only would the scheme be entitled to refuse to enforce the term, a procedure would need to be put in place to require the term to be changed if the scheme member did not change the term voluntarily.¹⁵⁵ Moreover, if the consumer, the businesses or a later consumer affected by the same term wished to challenge the scheme's determination, that matter could be heard by the District or High Court. Thus the courts would have the ability to oversee the schemes' determinations.

If the changes suggested to the UCL and other changes are made as outlined above, consumers in New Zealand will stand to be gain better protection against unfair contract terms.

¹⁴⁷ The term, of course, may be balanced by another term, therefore, if the balancing term is altered the term initially found to be fair may now be unfair. Therefore, for terms that are fair because of a balancing term, the balancing term would also need to be recorded.

¹⁴⁸ Those grounds are that the proceedings were conducted by the Referee; or an inquiry was carried out by an Investigator, in a manner that was unfair to the appellant and prejudicially affected the result of the proceedings, *Disputes Tribunals Act 1988*, s 50(1).

¹⁴⁹ See, generally, Alexandra Sims, 'Industry-Specific Regulation' in Kate Tokeley (ed), *Consumer Law in New Zealand* (2nd edn, LexisNexis, 2014).

¹⁵⁰ Electricity and Gas Complaints Commissioner Scheme, <<http://www.egcomplaints.org.nz>>.

¹⁵¹ Retirement Commissioner, <<http://www.cffc.org.nz>>.

¹⁵² Telecommunication Disputes Resolution Scheme (TDR), <<http://www.tdr.org.nz>>.

¹⁵³ Currently the cost of taking dispute to the Disputes Tribunal depends on the value being claimed, see *Disputes Tribunals Rules 1989*, s 5(a). Between \$0 and \$2000 (\$45); between \$2000 and \$4999 (\$90) and above \$5000 (\$180). For other shortcomings with taking a dispute to the Disputes Tribunal, see Alexandra Sims, "Reforming the *Consumer Guarantees Act 1993* and its Enforcement: Time for Action" (2010) 16 *NZBLQ* 145, 154–161.

¹⁵⁴ See Sims, 'Industry-Specific Regulation', above n 149, 285.

¹⁵⁵ For example, the Commerce Commission could be required to seek a declaration from the District or High Court if a scheme member does not amend the term to make it fair.