



## COVERSHEET

<b>Minister</b>	Hon Stuart Nash Hon Kris Faafoi	<b>Portfolio</b>	Small Business Commerce and Consumer Affairs
<b>Title of Cabinet paper</b>	Fair Trading Amendment Bill: Approval for Introduction	<b>Date to be published</b>	17 December 2019

### List of documents that have been proactively released

<b>Date</b>	<b>Title</b>	<b>Author</b>
10 December 2019	Fair Trading Amendment Bill: Approval for Introduction	Office of the Minister for Small Business Office of the Minister of Commerce and Consumer Affairs
10 December 2019	Fair Trading Amendment Bill: Approval for Introduction LEG-19- MIN-0208	Cabinet Office

### Information redacted

**YES**

Any information redacted in this document is redacted in accordance with MBIE's policy on Proactive Release and is labelled with the reason for redaction. This may include information that would be redacted if this information was requested under Official Information Act 1982. Where this is the case, the reasons for withholding information are listed below. Where information has been withheld, no public interest has been identified that would outweigh the reasons for withholding it.

Some information has been withheld for the reasons of:

- Confidential advice to Government
- Free and frank opinions

In Confidence

Office of the Minister for Small Business

Office of the Minister of Commerce and Consumer Affairs

Chair, Cabinet Legislation Committee

## Fair Trading Amendment Bill: Approval for Introduction

### Proposal

1. This paper seeks approval for the introduction of the Fair Trading Amendment Bill (**the Bill**).

### Policy

2. Unfair commercial practices can undermine the Government's goal of a more productive, sustainable, and inclusive economy. Unfair practices can broadly be grouped into two categories:
  - 2.1. **Unfair contracts.** This may include contract terms which unduly shift risk from one party to another, make it difficult for a party to terminate a contract, allow one party to unilaterally vary the terms (including the price) of a contract, or are otherwise very one-sided.
  - 2.2. **Unfair conduct** outside of the terms of a contract itself. This may include the use of pressure tactics to induce a party to enter into a contract, deceptive conduct, or enforcing a contract in a harsh manner.
3. While there are already a number of legislative protections against unfair practices, consultation undertaken in 2018 indicated that gaps in the protections remain. As a result, on 29 July 2019, Cabinet agreed to amend the Fair Trading Act 1986 (**the Act**) to introduce new protections for businesses and consumers against such practices [CAB-19-MIN-0362; DEV-19-MIN-0189]. The attached Bill implements those decisions, as described below.

### *Unconscionable conduct*

4. The Bill introduces a new prohibition against unconscionable conduct in trade.<sup>1</sup>
5. The Bill does not define what is unconscionable, but includes a list of factors for a court to have regard to in determining whether conduct is unconscionable. The prohibition is intended to address similar conduct as in Australia, where the courts have found that conduct is unconscionable if it is 'against conscience by reference to the norms of society'. The Australian courts have stated that such norms can include acting honestly, fairly, and without deception or unfair pressure.

<sup>1</sup> In line with Cabinet's delegation to us to make additional policy decisions consistent with the policy intent of previous decisions, the concept of 'in trade' encompasses conduct in relation to land, in addition to conduct in relation to goods and services, as previously agreed by Cabinet.

6. The prohibition will apply to conduct towards all consumers and businesses, and includes:
  - 6.1. the circumstances surrounding the formation of a contract;
  - 6.2. the terms of a contract; and
  - 6.3. the way a contract is enforced.
7. It will also apply regardless of whether there is a system or pattern of conduct, whether a particular individual is identified as having been disadvantaged by the conduct, or whether a particular contract was ultimately entered into.
8. It will be an offence to engage in unconscionable conduct, subject to maximum penalties of \$600,000 for bodies corporate and \$200,000 for individuals, in line with current maximums in the Act. The Act's general regime in terms of civil proceedings and remedies (such as injunctions, refunds, damages, and having contract terms altered or declared void) will also apply.

#### *Unfair contract terms*

9. The Act currently provides protections against unfair contract terms (**UCTs**) in standard form consumer contracts. This Bill extends these protections to 'small trade contracts', which – broadly – are contracts between businesses that form part of trading relationships with an actual or expected total value of less than \$250,000 in any 12 month period. A trading relationship is defined as including any contracts that are on the same or substantially similar terms as each other, and which are between the same or related parties.
10. The Bill retains the current test that contract terms are unfair if:
  - 10.1. the term is in a standard form contract, which is a contract in which the terms have not been subject to effective negotiation between the parties;
  - 10.2. the term would cause a significant imbalance in the parties' rights and obligations arising under the contract;
  - 10.3. the term is not reasonably necessary in order to protect the legitimate interests of the party who would be advantaged by the term; and
  - 10.4. the term would cause detriment (whether financial or otherwise) to a party if it were applied, enforced, or relied on.
11. It also retains the same exclusions from the UCT regime, namely terms that:
  - 11.1. define the main subject matter of the contract;
  - 11.2. set the upfront price payable under the contract; or
  - 11.3. are required or expressly permitted by any enactment.
12. We expect that there will be comment from stakeholders at Select Committee on the rules for determining what constitutes a small trade contract, including the level of the \$250,000 cap.
13. This Bill retains the current UCT enforcement regime, under which it is not an offence to include a UCT, and the Act's civil remedies are not available, unless the Commerce Commission has sought (and received) a court declaration that the term

is unfair. However, the enforcement regime for UCTs is currently being considered as part of a broader review of the Act, and is likely to be strengthened in the future to ensure there are effective incentives to remove UCTs from contracts.

14. This Bill also retains the current exemptions for some terms in insurance contracts from the UCT regime. However, as part of the government's review of insurance contract law, Cabinet has recently agreed to amend these exemptions in future legislation [CAB-19-MIN-0620, DEV-19-MIN-0311 refer].
15. The Bill provides a regulation-making power to deem classes of contracts to be small trade contracts, or exempt contracts from being small trade contracts, for the purposes of the UCT provisions. The intent of this power is to ensure that the default rules for determining what is a small trade contract do not inadvertently place classes of contracts (such as, potentially, those relating to complex financial products) inside or outside of the regime in situations where this outcome would be contrary to the policy intent of the regime. This power is subject to requirements for consultation and other analysis.

#### *Strengthening consumers' ability to require uninvited sellers to leave or not enter premises*

16. The Bill also implements decisions made as part of the review of consumer credit law [CAB-18-MIN-0466, DEV-18-MIN0204 refer] to provide that a person seeking to engage in an uninvited direct sale must leave (or not enter) a consumer's premises as soon as possible if directed by a consumer. It also provides that such a direction may be made in written form (such as through the use of a 'Do Not Knock' sticker) and does not need to specifically identify the person being required to leave the premises.
17. These provisions will only apply to uninvited direct sales, and not personal visits or visits by organisations such as charities or political parties. The provisions are necessary to address a limitation in the Trespass Act 1980, under which signage that is not directed at a particular person is not considered to be a trespass notice. It also allows for enforcement by the Commerce Commission, alongside its enforcement of other laws relating to uninvited direct sales and mobile traders.
18. Contravention of this provision will be an offence, with penalties of up to \$10,000 for individuals, and up to \$30,000 for bodies corporate, in line with existing penalties for other breaches of the Act's uninvited direct sales provisions.<sup>2</sup> The Commerce Commission is only likely to take legal action in respect of systemic commercial offending by uninvited sellers, and we consider that penalties of the magnitude proposed are necessary to provide for effective deterrence against breaches of the law by such traders. In line with the Commission's existing enforcement approach, we expect that any legal action taken would generally be directed at the businesses responsible for the contravention, not particular individuals.

#### *Technical amendments*

19. In addition to the substantive changes outlined above, the Bill also makes technical changes in relation to the following areas:
  - 19.1. disclosure requirements relating to extended warranty agreements;

<sup>2</sup> Cabinet has not previously explicitly agreed that it would be an offence to contravene these new provisions. This offence is therefore proposed under Cabinet's delegation to us to make additional policy decisions consistent with the policy intent of previous decisions.

- 19.2. referring Fair Trading Act matters to the High Court;
- 19.3. prohibiting disclosure of information in the course of an investigation under the Act;
- 19.4. enforceable undertakings; and
- 19.5. management banning orders.

### **Impact analysis**

20. The impact analysis requirements apply to the main proposals in the Bill, and a Regulatory Impact Statement was submitted at the time that policy approval relating to the Bill was sought. The Ministry of Business, Innovation and Employment's (**MBIE**) Regulatory Impact Analysis Review Panel considered that the information and analysis summarised in the Regulatory Impact Statement met the criteria necessary for Ministers to make informed decisions on the proposals.
21. The impact analysis requirements do not apply to the technical amendments contained in the Bill as they have no or minor impacts on businesses, individuals or not for profit entities.

### **Compliance**

22. The Bill complies with:
  - 22.1. the principles of the Treaty of Waitangi;
  - 22.2. the rights and freedoms contained in the New Zealand Bill of Rights Act 1990 and the Human Rights Act 1993;
  - 22.3. the disclosure statement requirements (a copy of that statement is attached to the paper);
  - 22.4. the principles and guidelines set out in the Privacy Act 1993;
  - 22.5. the Legislation Guidelines (2018 edition), which are maintained by the Legislation Design and Advisory Committee.

### **Consultation**

23. The Treasury, the Ministry of Justice, the Ministry for Primary Industries, and Commerce Commission staff have been consulted on this Cabinet paper and the attached Bill. The Department of the Prime Minister and Cabinet has been informed. The Legislation Design and Advisory Committee also provided feedback on the Bill.
24. The Bill's provisions relating to unfair contract terms and unconscionable conduct were consulted on publicly through a discussion paper released in December 2018. The technical amendments have been subject to targeted consultation with relevant stakeholders.

*Ministry of Justice comment*

25.

Free and frank opinions

[Redacted content]

26.

Free and frank opinions

[Redacted content]

27.

Free and frank opinions

[Redacted content]

**Binding on the Crown**

28. The Fair Trading Act binds the Crown, to the extent that it engages in trade. This Bill does not amend this provision.

**Allocation of decision making powers**

29. This Bill does not alter the allocation of decision-making powers between the executive, the courts, and tribunals.

**Associated regulations**

30. As noted above, the Bill provides a regulation-making power to deem classes of contracts to be small trade contracts, or exempt contracts from being small trade contracts, for the purposes of the UCT provisions. However, no regulations are needed to bring the Bill into force.

## Commencement of legislation

31. The main proposals in the Bill will come into force 12 months after the date of Royal Assent. The technical amendments will come into force on the day after the date of Royal Assent.

## Parliamentary stages

32. We intend to introduce the Bill on 17 December 2019, and depending on the availability of House time, will move first reading in early 2020. The Bill should be passed, if possible, by the end of December 2020. The Bill has a Confidential advice to Government

33. We propose that the Bill be referred to the Economic Development, Science and Innovation Select Committee, for a period of six months.

## Proactive Release

34. We intend to proactively release this paper within 30 business days, subject to redactions in line with the Official Information Act 1982.

## Recommendations

The Minister for Small Business and Minister of Commerce and Consumer Affairs recommend that the Committee:

1. **note** that the Fair Trading Amendment Bill Confidential advice to Government
2. **note** that the Bill introduces a new prohibition against unconscionable conduct and extends existing protections against unfair contract terms to small trade contracts, as well as making other minor changes;
3. **note** that, in line with Cabinet's previous delegation to the Minister for Small Business and the Minister of Commerce and Consumer Affairs to make additional policy decisions consistent with the policy intent of previous decisions:
  - 3.1. the unconscionable conduct prohibition extends to conduct in relation to land, in addition to goods and services;
  - 3.2. contravention of the provisions relating to directions to leave or not enter premises will be subject to penalties of up to \$10,000 for individuals, and up to \$30,000 for bodies corporate;
4. **approve** the Bill for introduction, subject to the final approval of the government caucus and sufficient support in the House of Representatives;
5. **agree** that the Bill be introduced on 17 December 2019;

6. **agree** that the Government propose that the Bill be:
- 6.1. referred to the Economic Development, Science and Innovation Committee for consideration for a period of six months;
  - 6.2. enacted by the end of December 2020, if possible.

Authorised for lodgement

Hon Stuart Nash

**Minister for Small Business**

Hon Kris Faafoi

**Minister of Commerce and Consumer Affairs**

PROACTIVELY RELEASED