



# Amendments to the Fair Trading Act 1986

Targeted consultation paper  
July 2025



**MINISTRY OF BUSINESS,  
INNOVATION & EMPLOYMENT**  
HĪKINA WHAKATUTUKI

**Te Kāwanatanga o Aotearoa**  
New Zealand Government

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# How to have your say

## Submissions process

The Ministry of Business, Innovation and Employment (**MBIE**) seeks written submissions on the issues raised in this document by 5pm on 8 August 2025.

Your submission may respond to any or all of these issues. Where possible, please include evidence to support your views, for example references to independent research, facts and figures, or relevant examples. Please include your contact details in the cover letter or e-mail accompanying your submission.

A summary of questions can be found in annex three.

You can make your submission by:

- sending your submission to [consumer@mbie.govt.nz](mailto:consumer@mbie.govt.nz).
- mailing your submission to:

Consumer Policy Team  
Building, Resources and Markets  
Ministry of Business, Innovation and Employment  
PO Box 1473  
  
Wellington 6140  
New Zealand

Please direct any questions that you have in relation to the submissions process to [consumer@mbie.govt.nz](mailto:consumer@mbie.govt.nz).

## Use of information

The information provided in submissions will be used to inform MBIE's policy development process, and will inform advice to Ministers on the Fair Trading Act 1986. We may contact submitters directly if we require clarification of any matters in submissions.

## **Release of information**

MBIE does not intend to publish submissions.

Submissions remain subject to request under the Official Information Act 1982. Please clearly set out in the cover letter or e-mail accompanying your submission if you have any objection to its release, and in particular, which parts you consider should be withheld, along with the reasons for withholding the information. MBIE will take such objections into account and will consult with submitters when responding to requests under the Official Information Act 1982.

## **Personal information**

The Privacy Act 2020 establishes certain principles with respect to the collection, use and disclosure of information about individuals. Any personal information you supply to MBIE in the course of making a submission will only be used for the purpose of assisting in the development of policy advice in relation to this review.

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# Executive summary

The Ministry of Business, Innovation and Employment (**MBIE**) is seeking feedback on a targeted package of reforms to the Fair Trading Act 1986 (**the Act**). These proposals aim to strengthen consumer protection, improve regulatory responsiveness and ensure the Act remains current and fit for purpose in a changing commercial environment.

The proposed amendments respond to feedback from regulators, businesses, and consumer advocates, and focus on practical improvements rather than wholesale reform. They are designed to support better enforcement, reduce compliance costs and enhance consumer confidence. Key proposals include:

## **Penalties Reform**

Modernising and strengthening the penalties regime to make it more effective and efficient by:

- Introducing pecuniary penalties subject to civil proceedings for certain breaches and aligning with other commercial law in New Zealand.
- Increasing maximum monetary penalties to ensure they are proportionate to the harm caused and provide an effective deterrence or punishment.
- Expanding the range of infringement offences and increasing infringement fees to support more effective and efficient enforcement.
- Prohibiting insurance and indemnification for penalties to preserve the integrity of the penalties regime.
- Making harassment and coercion in trade subject to civil pecuniary penalties or to a strict liability offence.

## **Product Safety Standards**

- Enabling automatic updates to standards referenced in regulations to reduce delays and ensure alignment with current safety expectations.
- Delegating authority to adopt international standards to MBIE's Chief Executive, to improve agility and responsiveness.

## **Unfair Contract Terms**

- Allowing individuals and small businesses to challenge unfair contract terms directly, to improve access to justice and reduce reliance on the Commerce Commission.
- Removing the requirement for a second breach before penalties apply, to strengthen deterrence and encourage proactive compliance.

MBIE is seeking input from stakeholders with relevant expertise or experience. Feedback will help refine the proposals and inform advice to Ministers ahead of Cabinet decisions later this year.

# Chapter 1: Proposed changes to the penalties regime

1. The Act is an important piece of legislation in consumer law. The purpose of the Act is to contribute to a trading environment in which the interests of consumers are protected, businesses compete effectively, and consumers and businesses participate confidently. To this end, the Act:
  - a. prohibits certain unfair conduct and practices in relation to trade;
  - b. promotes fair conduct and practices in relation to trade
  - c. provides for the disclosure of consumer information relating to the supply of good and services
  - d. promotes safety in respect of goods and services.

## Problem definition

2. We consider that the current penalties regime settings in the Act are not as effective and efficient as they could be, and do not always provide businesses and other persons with the right incentives to comply with the Act. We have therefore identified several areas of the penalties regime (in Part 5 of the Act) where we propose improvements could be made. The intention underlying the proposed changes discussed in this chapter is to modernise and strengthen the penalties regime.
3. For instance:
  - a. All breaches of the Act carrying monetary penalties are currently determined under the criminal law. We consider that for some breaches of the Act, the civil law, compared to the criminal law, may be more effective and efficient.
  - b. The Act does not prohibit defendants from relying on insurance and indemnification to meet the costs of defending prosecution proceedings, and the imposition of any penalty. We are concerned that this may negatively influence the behaviour of persons subject to the Act by diluting the deterrent effect of penalties and therefore potentially undermining the regulatory objectives of the Act.
  - c. Section 23 of the Act prohibits a person from using physical force, harassment, or coercion in connection with the supply or possible supply of services, or the payment for goods or services. Likewise, s14(2) of the Act prohibits any person from using physical force, harassment, or coercion in connection with the sale or grant or possible sale or grant of an interest in land, or the payment for an interest in land. However, breaches of these sections are not subject to monetary penalties, which reduces the incentives for complying with the Act.

### Questions for consultation

1. Do you have any comments on the problem definition and what Chapter 1 is aiming to achieve?

## Seven options for amending the penalties regime in the Fair Trading Act

4. A menu of seven potential options for amending the penalties regime in the Act is as follows:

**Option A:** Replace the majority of criminal offences with civil pecuniary penalties.

**Option B:** Tiered increases in maximum monetary penalties.

**Option C:** Expand the range of infringement offences.

**Option D:** Increase infringement fees in the Act.

**Option E:** Increase the period under which infringement notices are enforceable.

**Option F:** Prohibit indemnification and insurance.

**Option G:** Harassment and coercion.

### Option A: Replace the majority of criminal offences with civil pecuniary penalties

#### Enforcement action under the Act is based on the criminal law only

5. All breaches of the Act carrying monetary penalties are currently determined under criminal law. Liability for breaches of the Act is, depending on the specific offence, in the form of:
  - a. a criminal fine following criminal proceedings taken by the Commerce Commission (**the Commission**) in the District Court; or
  - b. an infringement fee following the Commission issuing an infringement notice for an infringement offence (aimed at low-level offences – see Option C below).
6. Annex One provides an inventory of the criminal offences and infringement offences included in Part 5 of the Act and shows the corresponding current possible maximum monetary penalty for each offence.
7. Annex Two also sets out the criminal offences and infringement offences in the Act, but with a focus on describing the prohibited conduct that constitutes an offence, and

whether the particular criminal offence is a mens rea offence<sup>1</sup> or a strict liability offence<sup>2</sup>.

### **Proposed changes under this option**

8. Under Option A:
  - a. All strict liability offences against s40 of the Act (see Annex Two) would be replaced with civil pecuniary penalties.
  - b. Criminal offences against s40 which include a mens rea element (i.e. are not strict liability offences) would be retained. These comprise:
    - i. prohibited conduct under s17 (relates to offering gifts and prizes with the intention of not providing them or of not providing them as offered); and
    - ii. s21(b) (relates to demanding or accepting payment or other consideration for goods or services but with intention to supply goods or services materially different from the goods or services for which the payment or other consideration is demanded or accepted).
  - c. The remaining strict liability offences in the Act would not be replaced with civil pecuniary penalties. These offences are against:
    - i. s19 (relates to bait advertising);
    - ii. s21(a) and s21(c) (relate to demanding or accepting payment without intending to supply as ordered);
    - iii. s46E (relates to breaches of management banning orders);
    - iv. s47F (relates to resisting, obstructing or delaying specified persons from carrying out certain powers given to them under the Act, such as powers given to product safety officers and to persons acting under a search warrant); and
    - v. s47J (relates to failing to supply information or documents or give evidence to the Commission pursuant to s47G of the Act).

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<sup>1</sup> This term refers to the mental element that must be proved in prosecuting a criminal offence. It concerns the question of whether there was an element of intent or knowledge on the part of the person in committing the offence, thus implying moral culpability.

<sup>2</sup> A strict liability offence is one where there is no need for the enforcement agency to prove any element of knowledge on the part of the defendant (mens rea), but there is a defence if the defendant proves total absence of fault on the lesser standard of the balance of probabilities. This may be compared to an absolute liability offence, where legal responsibility is imposed in the absence of any fault or moral blameworthiness (i.e. absence of fault is not a defence) and, hence, the prosecution only needs to prove the physical elements of the offence.

9. The rationale for keeping some criminal offences (the mens rea and strict liability offences) is:
  - a. These offences are serious breaches (in the case of obstruction, it can prevent other proceedings or offences from being brought against a business).
  - b. These offences would often be brought against the specific individuals who obstruct investigations or breach banning orders. A criminal conviction is likely to be a significant deterrent on top of any fine.
  - c. Equivalent breaches are strict liability offences under the Commerce Act 1986.
10. While the strict liability offences against s40 would be replaced with civil pecuniary penalties, the Commission would still have the option of taking criminal proceedings in some instances under the Crimes Act 1961 for prohibited conduct considered to be particularly egregious. For example, s240 of the Crimes Act relates to using deception for gain or to cause loss (including by knowingly or recklessly making false representations).
11. The Commission has used s240 in the past to prosecute persons making false or misleading representations or engaging in misleading or deceptive conduct in connection with the supply in trade of goods or services. Under s240 of the Crimes Act, a person found guilty faces imprisonment for a term of up to seven years. This compares with the Act where imprisonment is not an available option for a s40 offence. However, succeeding in a prosecution under the Crimes Act is complex because of the need to prove knowledge or recklessness or an intention to deceive, resulting gains or losses, and other required elements.

#### **What are civil pecuniary penalties?**

12. Civil pecuniary penalties may be considered as non-criminal monetary penalties that are imposed by a court after a trial conducted under the rules of civil procedure and evidence, in which:
  - a. liability is established on the civil standard of proof (i.e. 'on the balance of probabilities')
  - b. the monetary penalty can be very substantial
  - c. neither imprisonment nor criminal conviction can result, and
  - d. the penalty is paid to the Crown, rather than any victim, i.e. civil pecuniary penalties are not intended or designed to compensate.
13. We consider that including civil pecuniary penalties in the Act can be justified for the following reasons:
  - a. The Act deals with commercial conduct, with enforcement often directed at corporate actors rather than individuals, which suggests that monetary penalties

alone, without a criminal conviction, would be sufficient to deter breaches of the Act.

- b. Much of the Act is principles-based, and, as shown in Annex Two, the vast majority of breaches of the Act are strict liability offences<sup>3</sup>. The implication of this is that breaches of the Act by individuals and corporates may not always have been committed intentionally or knowingly and, hence, a criminal conviction would be unwarranted in that situation.
- c. Often, civil pecuniary penalties are targeted at breaches by corporate bodies, which can be difficult to prove to the criminal standard.
- d. Many defendants are large, well-equipped corporate actors able to mount robust defences. This mitigates the need for them to have access to the higher procedural protections available in criminal proceedings.<sup>4</sup>
- e. Civil pecuniary penalties would enable the Commission to more effectively and efficiently obtain compliance with the Act, including by avoiding the need to establish criminal guilt.
- f. When civil pecuniary penalties are set at very high maximum penalties, they can be especially effective where the prohibited conduct is carried out to achieve a financial gain; the pecuniary penalty can operate as a powerful deterrent and act as a punishment where a breach occurs.

14. At the same time, however, we recognise that the seriousness of some breaches may warrant retaining criminal liability (including conviction) for those breaches, and the more stringent procedural safeguards in criminal proceedings (for example, the ‘beyond reasonable doubt’ standard of proof, rather than the ‘on balance of probabilities’ standard of proof in civil proceedings) may be more appropriate for some breaches.

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<sup>3</sup> Only breaches of s17 (relating to offering gifts, prizes or other free items with the intention of not providing them or of not providing them as offered), s19 (relating to bait advertising, which includes advertising for supply at a specified price goods or services which a person does not intend to offer for supply) and s21 (relating to demanding or accepting payment without intending to supply as ordered) are offences that include mens rea elements. This compares with the 40 other possible breaches under the Act which are all strict liability offences (seven of these are also infringement offences).

<sup>4</sup> The following aspects of civil proceedings conflict with the rights afforded to defendants in criminal proceedings: the requirement for particularised statements of defence to be filed before trial; the availability of discovery orders and interrogatories against defendants; the requirement for pre-trial service of briefs of evidence; the ability to require a defendant to give evidence; the inability to rely on the privilege against self-incrimination in civil proceedings by virtue of s63 of the Evidence Act 2006; and the use of reverse onuses of proof, presumptions and deeming provisions in many statutes that impose civil pecuniary penalties.

### Questions for consultation

2. Do you agree with the proposal as set out in Option A, which would replace the majority of criminal offences in the Fair Trading Act with pecuniary penalties subject to civil proceedings? Why or why not?

## Option B: Increase maximum monetary penalties

### Historical changes to maximum monetary penalties in the Act

15. Between 2010 and 2015, New Zealand's consumer law was comprehensively reviewed and updated (**consumer law reforms**).
16. The consumer law reforms sought to update the consumer law so that it is principles-based, enables consumers to transact with confidence, protects consumers and businesses from inappropriate market conduct, is easily accessible to those who are affected by it, and, where appropriate, aligns with the Australian consumer law. The consumer law reforms resulted in substantive changes to several statutes, including the Act.<sup>5</sup>
17. The consumer law reforms resulted in substantial increases in the maximum fines for most breaches of prohibited conduct in the Act:
  - a. For breaches relating to Part 1 (except s9, s14(2), s23 or s24), Part 3 or Part 4, the maximum fine increased from \$60,000 to \$200,000 in the case of an individual and from \$200,000 to \$600,000 in the case of a body corporate.
  - b. For breaches of s24 (related to promoting or operating a pyramid scheme), the maximum fine increased from \$200,000 to \$600,000. In addition to any fine imposed, the court could, following an application by the Commission, make an order requiring the person to pay an amount not exceeding the value of any commercial gain resulting from the breach if the court is satisfied that the breach occurred in the course of producing a commercial gain.
18. In the case of breaches relating to Part 2 of the Act (provisions for consumer information standards), the consumer law reforms reduced the maximum fines to \$10,000 for an individual and \$30,000 for a body corporate. The same maximum fines were introduced for the then new Part 4A of the Act (provisions for layby sale agreements, uninvited direct sale agreements, extended warranty agreements, and auctions).

### Current monetary penalties are too low for effective deterrence

19. However, as indicated earlier in this chapter, we are concerned that the maximum penalties provided for in the Act are currently too low to deter or adequately punish

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<sup>5</sup> Information about the consumer law reforms is available at <https://www.mbie.govt.nz/business-and-employment/consumer-protection/review-of-consumer-law/review-of-consumer-law-2010-2015>.

breaches of the Act, and that any fines imposed by the courts are treated as an acceptable cost to be absorbed into the general costs of doing business. Few prosecutions under the Act have resulted in fines being imposed that are close to the maximum possible fines. This reflects the principles set out in the Sentencing Act 2002, which means that only the most serious offending should be subject to the maximum penalties set out in a statute.

### Proposal to increase maximum monetary penalties in the Act

20. Under Option B, it is proposed to increase the maximum monetary penalties for breaches of many (but not all) provisions of the Act. The option would establish three main tiers of penalties (as distinct from two main tiers at present), as set out in Table 1 below. The table also identifies the provisions of the Act that each penalty tier would apply to.

**Table 1: Proposed maximum monetary penalties for the Fair Trading Act**

Tier	Maximum monetary penalties	Sections of the Act
1	a. In the case of an individual, <b>\$500,000</b> ; or in any other case b. the greater of <b>\$10 million</b> ; or either (i) if it can be readily ascertained and the court is satisfied that the breach occurred in the course of producing a commercial gain, <b>three times the value of any commercial gain</b> resulting from the contravention; or (ii) if the commercial gain cannot readily be ascertained, <b>10% of the turnover</b> of the person and all its interconnected bodies corporate (if any) in each accounting period in which the contravention occurred.	<b>10, 11, 12, 12A, 13, 14</b> (false, misleading, deceptive, and unsubstantiated conduct and representations), <b>16</b> (conduct in relation to trade marks), <b>22</b> (misleading representations about business activities), <b>23</b> (harassment and coercion – <b>see Option C below</b> ), <b>24</b> (pyramid selling) <sup>6</sup> , <b>26A</b> (unfair contract terms), <b>30</b> (compliance with product safety standards), <b>31</b> (unsafe goods), <b>32</b> (compulsory product recalls), <b>36</b> (compliance with service safety standards).
2	a. In the case of an individual, <b>\$200,000</b> ; or in any other case b. <b>\$600,000</b> .	<b>17</b> (offering gifts and prizes), <b>19</b> (bait advertising), <b>20</b> (referral selling), <b>21</b> (demanding or accepting payment without intending to supply), <b>21C</b> (asserting right to payment in respect of unsolicited goods or services).
3	a. In the case of an individual, <b>\$60,000</b> ; or in any other case b. <b>\$200,000</b> .	<b>28</b> (compliance with consumer information standards) <sup>7</sup> , <b>28A</b> (regulations relating to disclosure

<sup>6</sup> Section 40A, which provides for additional penalties for breaches of section 24 up to the level of the commercial gain associated with the contravention, would be repealed, as (for bodies corporate) it would be exceeded by the penalties proposed above.

<sup>7</sup> This would restore penalties to where they sat prior to the consumer law reforms.

Tier	Maximum monetary penalties	Sections of the Act
		by fund-raisers), <b>28B</b> (disclosure of trader status on internet), <b>31A</b> (voluntary product recalls), <b>33D</b> (suspension of supply notices), <b>36C, 36D, 36F, 36G, 36H</b> (layby sales), <b>36L, 36N, 36P</b> (uninvited direct sales), <b>36U, 36V</b> (extended warranties), <b>36ZB, 36ZD, 36ZF</b> (auctions), <b>46E</b> (breach of management banning order), <b>47F</b> (offence to restrict, obstruct or delay), <b>47J</b> (not supplying information, documents or evidence).

21. We note that:

- a. **Tier 1** penalties would align with the maximum pecuniary penalties for breaching Part 2 of the Commerce Act 1986,<sup>8</sup> which is also enforced by the Commission
- b. **Tier 2** penalties reflect the current maximum penalties in the Act for breaches of Parts 1, 3, and 4 of the Act; and
- c. **Tier 3** penalties reflect the former maximum penalties that existed for most breaches of the Act prior to the consumer law reforms, noted above.

22. The intention underlying Option B is to increase maximum penalties to a level that would provide greater incentives to comply with the Act, while still recognising that some breaches of the Act (for example, misleading and deceptive conduct and breaches of product safety standards) generally have the potential to be more serious and harmful than other breaches (for example, non-compliance with consumer information standards).

23. Option B interacts with Option A:

- a. Option A would be a precondition to full implementation of Option B. If strict liability offences (with the associated criminal stigma) are retained, it is unlikely to be appropriate to increase maximum penalties to the extent proposed above for Tier 1 (although a smaller increase might still be appropriate).
- b. If neither Option A nor Option B were implemented, it could still be appropriate to increase maximum penalties for Tier 3 offences as shown in Table 1 above.

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<sup>8</sup> In relation to specific breaches of any prohibited conduct in Part 2 of the Commerce Act 1986 (relating to restrictive trade practices), for example: s27 (contracts, arrangements or understandings substantially lessening competition); s30 (contracts, arrangements, understandings, or covenants containing cartel provisions); s36 (misuse of market power).

## Comparison with other commercial law in New Zealand and Australia

24. As noted above, the proposed Tier 1 monetary penalties if adopted would make the maximum monetary penalties in the Act equivalent to the maximum monetary pecuniary penalties provided for in the Commerce Act 1986.
25. Another useful comparator in New Zealand are the civil pecuniary penalties under s490(1) of the Financial Markets Conduct Act 2013, where the maximum amount of a pecuniary penalty for a breach, or involvement in a breach, of a civil liability provision (for example, a Part 2 fair dealing provision) is the greatest of:
- a. the consideration for the transaction that constituted the breach (if any); and
  - b. if it can be readily ascertained, three times the amount of the gain made, or the loss avoided, by the person who breached the civil liability provision; and
  - c. \$1 million in the case of a breach, or involvement in a breach, by an individual or \$5 million in any other case.
26. By way of comparison with an international jurisdiction, the 'Australian Consumer Law' in the Competition and Consumer Act 2010 contains civil pecuniary penalties provisions prohibiting conduct similar to the unfair conduct provisions in the Act.
27. The maximum pecuniary penalties for breaches of the provisions in the Australian Consumer Law are substantially higher than what we are proposing for the Act for Tier 1 in Table 1 above, as follows:
- a. In the case of an individual, \$2,500,000
  - b. In the case of a corporation, the greater of \$50 million; or either
    - i. if the Court can determine the value of the 'reasonably attributable' benefit obtained, three times that value; or
    - ii. if the Court cannot determine the value of the 'reasonably attributable' benefit, 30% of the corporation's adjusted turnover during the breach turnover period for the contravention.

## Option C: Expand the range of infringement offences

### What are infringement offences?

28. The consumer law reforms established a new infringement offences scheme for specific clear-cut, low-level offences under the Act. Infringement offences give the Commission the ability to issue an infringement notice that imposes an infringement fee for the prohibited conduct if:
- a. the Commission believes on reasonable grounds that a person is committing, or has committed, an infringement offence; and

- b. no information for that offence has been laid against, and no infringement notice has been issued to, the person in relation to the conduct alleged to be an infringement offence.

29. The Commission may, however, revoke an infringement notice before the infringement fee is paid, or before an order for payment of an infringement fee is made or deemed to be made by a court under s21 of the Summary Proceedings Act 1957.

30. If an infringement notice is issued, a criminal record must not be created in respect of the infringement offence. Section 375 of the Criminal Procedure Act 2011 prevents a conviction being entered in the event of prosecution for an offence that is specified in law as an infringement offence. Section 375 applies to every infringement offence whether or not there is an express reference to a conviction in the infringement offence provision or in any provision specifying the penalty for the infringement offence.

### **Proposal to increase the number of infringement offences in the Act**

31. The Legislation Design and Advisory Committee (**LDAC**) guidelines on making legislation<sup>9</sup> and the Ministry of Justice guidelines on new infringement schemes<sup>10</sup> state that infringement schemes are generally not appropriate for offences that require proof of intent, cases that involve complex factual situations, or conduct that may warrant more serious consequences.

32. Taking into consideration the above authoritative guidance, there may be room to expand the infringement offences scheme to cover more minor breaches, especially where the costs of court action typically would be costly and exceed the benefits.

33. Current infringement offences in the Act (against s40(1B) of the Act) relate to prohibited conduct are shown in Table 2 below (see Annex Two for more details on the offences).

**Table 2: Current infringement offences in the Act**

<b>Section</b>	<b>Infringement offences</b>
28	Failing to comply with a consumer information standard.
28B	Failing to disclose a person’s trader status on the Internet.
33D	Failing to comply with a suspension of supply notice issued by a product safety officer.
36C, 36D	Failing to comply with disclosure requirements related to layby sales.
36L	Non-compliance with disclosure requirements relating to uninvited direct sales.

<sup>9</sup> Legislation Design and Advisory Committee “Legislation Guidelines, 2021 Edition” (last updated September 2021) (**LDAC Legislation Guidelines**) at Chapter 25, <https://www.ldac.org.nz/guidelines>.

<sup>10</sup> Ministry of Justice “Policy framework for new infringement schemes” (undated) (**Ministry of Justice Guidelines**), <https://www.justice.govt.nz/assets/Documents/Publications/Policy-Framework-for-New-Infringement-Schemes.pdf>.

Section	Infringement offences
36U	Non-compliance with disclosure requirements relating to extended warranty agreements.

34. Under Option C, the infringement offences scheme in the Act could be expanded to include the strict liability offences shown in Table 3 below, on the premise that the facts of the offending are likely to be relatively straightforward and that including them in the Act would comply with the LDAC Legislation Guidelines and the Ministry of Justice Guidelines (see Annex Two for more details on the offences listed in Table 3):

**Table 3: Potential new infringement offences for the Act**

Section	Current strict liability offence
13	Prohibition on false or misleading representations (an offence against s40(1) of the Act).
21C	Prohibition on asserting right to payment in respect of unsolicited goods or unsolicited services (an offence against s40(1) of the Act).
31	Failing to comply with an unsafe goods notice (an offence against s40(1) of the Act).
31A	Failing to notify MBIE about a voluntary product recall (an offence against s40(1) of the Act).
32	Failing to comply with a compulsory product recall notice (an offence against s40(1) of the Act).
36F	Failing to comply with supplier's obligations in respect of cancellation of a layby sales agreement by a consumer (an offence against s40(1B) of the Act).
36G	Prohibited cancellation of a layby sales agreement by a supplier (an offence against s40(1B) of the Act).
36N	Prohibited enforcement of an uninvited direct sales agreement by a supplier (an offence against s40(1B) of the Act).
36P	Failing to meet supplier's obligations on cancellation of an uninvited direct sale agreement by a consumer (an offence against s40(1B) of the Act).
36V	Supplier's obligations in respect of cancellation of an extended warranty by a consumer (an offence against s40(1B) of the Act).
36ZB	Failing to make proper disclosure of the terms of an auction to participants (an offence against s40(1B) of the Act).
36ZD	Failing to meet auctioneers' obligations in respect of vendor bids (an offence against s40(1B) of the Act).
36ZF	Failing to meet auctioneers' obligations in respect of payment of balance of proceeds and providing account of sales to vendors (an offence against s40(1B) of the Act).

35. A quid pro quo associated with Option C is that under the Criminal Procedure Act 2011, a person issued with an infringement notice or otherwise found guilty of an infringement

offence does not receive a criminal conviction. This would have limited impact if most criminal offences were substituted for pecuniary penalties.

## **Option D: Increase infringement fees in the Act**

36. Currently, infringement fees for an infringement offence under the Act cannot exceed \$2,000 and are required to be prescribed by regulations made under s40H of the Act.<sup>11</sup> The Fair Trading (Infringement Offences) Regulations 2014 prescribes the current infringement fees:
- a. for an infringement offence against s40(1) of the Act, \$1,500; and
  - b. for an infringement offence against s40(1B) of the Act, \$1,000.
37. The LDAC Legislation Guidelines and the Ministry of Justice Guidelines state that, in general, infringement fees should not exceed \$1,000. However, these guidelines also state that in some situations a higher infringement fee may be justified to deter the prohibited conduct. This could be the case for some infringement offences under the Act.
38. Under Option D, which would complement Option A, it is proposed that the maximum allowable infringement fee in the Act would increase from \$2,000 to \$20,000 (which would be the same as in the Financial Markets Conduct Act 2013<sup>12</sup>). Schedule 22 of the Financial Markets Conduct Regulations 2014 lists 34 infringement offences with prescribed infringement fees of \$5,000, \$7,500, \$12,500 or \$20,000, depending on the specific infringement offence.
39. The proposal is not to immediately raise infringement fees to \$20,000, but to allow flexibility for future adjustments. For now, one option could be for fees to stay at current levels (i.e. depending on the specific infringement offence, \$1,500 or \$1,000), while fees for any other case could increase to \$5,000.

## **Option E: Increase period under which infringement notices are enforceable**

40. There are some procedural barriers to enforcing infringement notices that may need to be addressed. Under the Summary Proceedings Act 1957, the Commission effectively only has four months after the date of a potential breach to issue an infringement notice under the Act.<sup>13</sup> The Commission has advised that there have been several instances in

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<sup>11</sup> Section 40B of the Act.

<sup>12</sup> Under s548(1)(m) of the Act.

<sup>13</sup> This is because, after issuing an infringement notice, the Commission is bound to wait 28 days for a notice to be paid or challenged. If this notice is not paid within 28 days, the Commission must issue a

which it has not been able to issue an infringement notice because of this restrictive timeframe. This may result in the Commission, as an alternative response, taking less appropriate forms of enforcement action (which may be either too strict or too lenient relative to the breach).

41. Under Option E, which would complement Option D and Option E, the default rule in the Summary Proceedings Act 1957 would be overridden, to give the Commission 10 months (rather than the current four months) to issue an infringement notice following an alleged breach.<sup>14</sup> It is expected that this would address the concerns raised by the Commission regarding the timeframes for enforcement.

### Questions for consultation

3. Which options above relating to infringement offences (Options C, D and E) do you support (if any)? Why or why not?
4. What additional strict liability offences in the Fair Trading Act (if any) should be included to expand the range of the infringement offences scheme? Why or why not?

## Option F: Prohibit insurance and indemnification

42. Under Option F, insurance and indemnification relating to penalties imposed for breaches of the Act would be prohibited.

43. The following insurance and indemnity framework is proposed:

- a. Entering into an insurance policy that indemnifies against penalties for breaches of the Act would be prohibited, and any such policy would have no effect.
- b. Businesses would not be permitted to indemnify their directors, employees or agents against their liability to pay a penalty, and no person could be indemnified.
- c. Breaching the above prohibited conduct would be subject to a penalty.
- d. Insurance or indemnification against the cost of defending against proceedings would be prohibited in situations where a penalty was imposed, but not in situations where a penalty was not imposed.

44. The rationale for prohibiting indemnification of individuals (rather than the businesses they are associated with) is that, in general, individuals are likely to be subject to direct

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reminder notice, triggering an additional 28 days within which the recipient can pay. An unpaid notice is only enforceable if it is provided to the Ministry of Justice within six months of the alleged offending.

<sup>14</sup> This would be achieved by stating that, despite section 21(5) of the Summary Proceedings Act 1957, a reminder notice provided to the Ministry of Justice would be enforceable if it is provided up to 12 months after the date of the alleged offending.

enforcement action only in cases involving relatively serious breaches of the Act, where insurance or indemnification against penalties is unlikely to be appropriate.

45. Furthermore, it is considered that even if a breach of the Act does not involve knowledge or intent, then the potential for indemnity reduces the incentive for individuals and businesses to have good systems and procedures in place to minimise the risk of inadvertent breaches.

#### **Questions for consultation**

5. Do you agree that insurance and indemnification against breaches of the Fair Trading Act should be prohibited? Why or why not?
6. If indemnification is prohibited, should this prohibition extend to all provisions of the Act, or only certain ones? Please indicate which provisions you consider should be covered and outline why?

### **Option G: Harassment and coercion**

46. The Act prohibits a person from using physical force, harassment or coercion in connection with the:<sup>15</sup>
- a. supply or possible supply of goods or services or the payment for goods or services (s23 of the Act)
  - b. sale or grant of an interest or possible sale or grant of an interest in land, or the payment for an interest in land (s14(2)) of the Act.
47. However, the Act does not impose any liability on persons breaching the prohibitions.
48. Option G would make harassment and coercion in trade subject to a civil pecuniary penalty or a strict liability offence. We consider that the Tier 1 maximum penalties under Option B above may be appropriate.
49. Option G could also involve amending the Act to include definitions of harassment and coercion, to clarify the nature of the prohibited conduct.
50. For instance, harassment could be defined along the lines of s3 and s4 of the Harassment Act 1997, where the courts have stated that a pattern of behaviour must be “sufficiently repetitive so as to establish the requisite behavioural trend to constitute harassment”.<sup>16</sup>

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<sup>15</sup> The provisions in the Act relating to harassment and coercion occurring in commercial situations differs significantly from the largely safety-oriented provisions relating to harassment and coercion included in the Harassment Act 1997 and the Crimes Act 1961.

<sup>16</sup> See *W v W* [2004] NZFLR 1048.

51. Coercion could be defined as:

- a. the use or threatened use of physical force<sup>17</sup>, violence or restraint
- b. the use of undue influence or pressure
- c. inflicting or threatening to inflict damage, harm or loss, including in relation to a current or future commercial relationship.

52. Harassment and coercion could be prohibited outright, as at present. Alternatively, they could be prohibited only if certain conditions are met. This would seek to differentiate conduct that is harmful, or otherwise strains the concept of freedom of contract, from conduct that might be unwelcome, but does not have significant adverse effects. In addition, the aim would be not to interfere in reasonable, robust commercial negotiations between businesses.

53. For instance, harassment and coercion in connection with the supply or potential supply of, or payment for, goods or services could be prohibited if:

- a. the conduct substantially impairs, or is likely to substantially impair, another person's freedom of choice or conduct in relation to the supply or potential supply of goods or services<sup>18</sup>
- b. in relation to the performance of an existing obligation (for example, debt collection), it goes beyond what is reasonably necessary to promote the performance of that obligation, and/or
- c. in the case where one of the persons is a consumer, it would cause substantial detriment, whether financial, emotional, or otherwise.

54. Two alternative approaches could be to:

- a. retain the existing prohibitions, without defining harassment and coercion, and make breaches of the prohibited conduct subject to civil pecuniary penalties, or
- b. prohibit undue harassment and coercion (as in Australia), without defining harassment and coercion, and make breaches of the prohibited conduct subject to civil pecuniary penalties.

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<sup>17</sup> Alternatively, physical force could be subsumed within the concept of coercion, rather than stand alone, as at present.

<sup>18</sup> This proposal is based on the European Union's prohibition against aggressive commercial practices. The prohibition only seeks to prohibit conduct that causes, or is likely to cause, another party to make a commercial decision that they would not otherwise have made. See Office of Fair Trading 'Consumer Protection from Unfair Trading: Guidance on the UK Regulations implementing the Unfair Commercial Practices Directive' (2008), [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/284442/oft1008.pdf.2015](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/284442/oft1008.pdf.2015).

### Questions for consultation

7. Should harassment and coercion be defined in the Fair Trading Act? If so, how?
8. Should harassment and coercion that is prohibited conduct be subject to a civil pecuniary penalty or strict liability offence, with Tier 1 penalties (see Option B, Table 1)? If so, should the penalties relate to harassment and coercion outright, *undue* harassment and coercion (as in Australia), or only harassment and coercion that meets certain other conditions?

# Chapter 2: Product Safety Standards: allowing automatic updates

## Description of the regulatory settings

55. Product safety standards are a key tool for protecting consumers from injury. They set minimum requirements for the design, construction and performance of goods to ensure they are safe for use. Under the Act, product safety regulations are made by the Governor General (on the recommendation of the Minister) and enforced by the Commerce Commission. These regulations apply to specified classes of products and often incorporate official standards by reference. These may include New Zealand Standards, joint Australia/New Zealand Standards, or international standards from recognised bodies such as the International Organization for Standardization (**ISO**).
56. When a standard is incorporated into regulation, it is typically referenced by a specific version. That version remains fixed unless the regulation is formally amended, which requires Executive Council approval, even for minor or technical updates.
57. MBIE is seeking feedback on two proposals to improve the flexibility and responsiveness of the product safety standards process.
58. These proposals are not alternatives to be weighed against each other, but complementary options that address different aspects of the regulatory process. The first proposal focuses on how standards are referenced in regulation, while the second considers who should have authority to adopt updated standards. Feedback is sought on each proposal individually.

## Allow automatic updates to product safety standards

### What is the issue?

59. In December 2024, Australia amended the Australian Consumer Law to modernise how product safety standards are incorporated into regulation. The changes allow:
- a. Australian or international standards to be incorporated by reference into product safety regulations (replacing a more limited declaration process).
  - b. Referenced standards to be incorporated '*as in force or existing from time to time*', enabling automatic updates when the standard is revised.
60. Referencing a fixed version of a standard provides clarity at the time the regulation is made but creates persistent challenges over time. Even when a standard is updated to

reflect new technologies, materials, or testing methods, the regulation continues to refer to the older version until it is formally amended.

61. The process of updating regulations can be slow and resource-intensive and is seldom a priority for government. This has led to outdated standards remaining in force for many years. For example, the Product Safety Standards (Pedal Bicycles) Regulations 2000 still refer to AS/NZS 1927:1998, despite a newer version being released in 2010.
62. This regulatory lag can create confusion for businesses, particularly those operating across borders. Firms may be unsure whether to comply with the outdated version referenced in regulation or the newer version used internationally. This uncertainty can lead to additional compliance costs, such as duplicative testing or documentation, and may require product modifications to meet differing standards.

### **Proposal and rationale**

63. MBIE is proposing to amend the Act to allow product safety regulations to reference any future version of the same standard that is published by the standards body. This would enable automatic updates when a standard is revised, without requiring a full Cabinet process for each change. The aim is to reduce delays in updating references to standards, improve clarity for businesses, and help ensure that New Zealand's product safety regime remains aligned with international best practice.
64. New Zealand already allows product safety regulations to incorporate both domestic and international standards. However, current practice is to reference a specific version of the standard, which does not update automatically. Under the proposed change, Cabinet would continue to approve the initial regulation and retain oversight of broader policy decisions, while technical updates to standards could occur automatically.
65. This would enable regulations to automatically reflect the most recent version of a standard, without requiring a full Cabinet process for each update. It would improve responsiveness, reduce regulatory lag, and help ensure that New Zealand's product safety framework remains aligned with international best practice.

### **Benefits**

66. This proposal would make it easier to keep product safety regulations up to date by automatically reflecting the latest version of a referenced standard. It would reduce compliance costs for businesses, particularly those trading internationally, by removing the need to test products against outdated requirements. It would also support greater alignment with international best practice and provide consumers with increased confidence that regulated products meet current safety expectations.

### **Risks and mitigations**

67. There are some risks and costs from automatic updates. Automatic updates may create uncertainty for businesses if they are not aware that a standard has changed. Some standards are only available for purchase, which could impose additional (relatively low) costs. There is also a risk that automatic updates could introduce significant changes

without sufficient government oversight, particularly if the updated standard is materially different from the previous version.

68. These risks could be managed by ensuring that updated standards are clearly communicated to affected businesses and made accessible where possible and providing for clear transitional arrangements between versions. Standards working group processes, including public consultation, would still take place to ensure transparency and stakeholder input prior to finalisation of standards. Notices would be published when a standard is updated, along with guidance on any material changes. Regulations would allow businesses would be permitted to comply with prior versions of standards for a time, or indefinitely.

69. MBIE welcomes feedback on whether this approach would improve the effectiveness of the product safety regime and how any risks or implementation challenges could be managed.

#### **Questions for consultation**

9. Do you support allowing automatic updates to product safety standards under the Act? Why or why not?
10. What impacts would this change have on your organisation or sector?
11. Are there any risks or safeguards that should be considered?

## **Delegate adoption of international product safety standards**

### **What is the issue?**

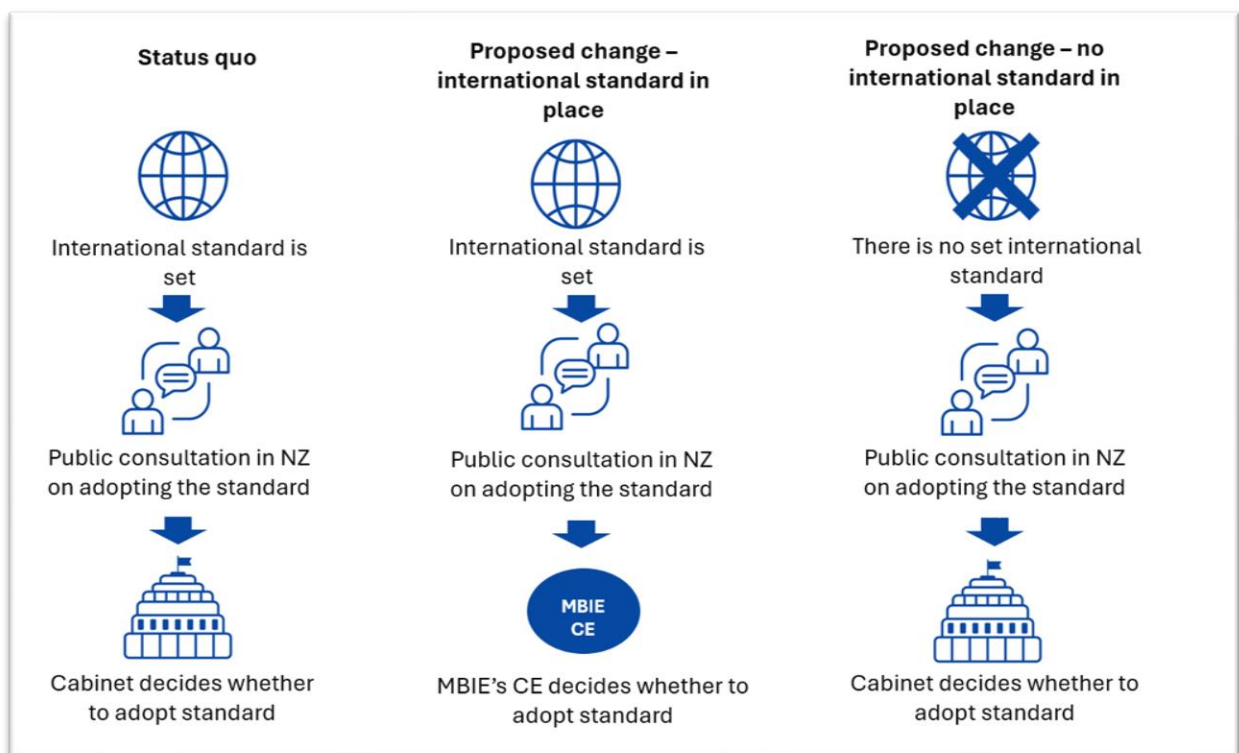
70. All mandatory product safety standards must be approved by Cabinet, even when the standard has already been developed and reviewed by recognised international bodies such as ISO and in widespread use overseas.
71. This reliance on Cabinet for decisions limits New Zealand's ability to incorporate international standards into domestic regulation and respond quickly to changes in international best practice. This can reduce consumer confidence and create challenges for businesses operating across borders.

### **Proposal and rationale**

72. Product safety standards are developed through collaborative international processes involving technical experts, industry stakeholders, and consumer representatives. These standards undergo rigorous review and public consultation before being adopted globally.
73. In New Zealand, the process for adopting or updating a product safety standard in regulation involves several formal steps. It begins with public consultation to gather feedback from stakeholders. After consultation, the proposed standard must be approved by Cabinet before it can be incorporated into regulation. This requirement

applies even when the standard has already been developed and reviewed by recognised international bodies. Once a standard has been approved, it must still be drafted into regulations, which are approved by Cabinet again before final sign-off by the Governor-General (an Order in Council). While Cabinet’s involvement provides democratic oversight, it also means that adopting standards can take time and require significant resources to progress.

74. Under this option, public consultation would still take place to ensure transparency and stakeholder input. Once consultation is complete, the Chief Executive of MBIE would make a decision on whether the international product safety standard should be adopted. If the decision is to adopt the standard, it would then be formalised by public notice. This process would apply specifically to standards that have already been developed and reviewed by recognised international organisations. Comparison of status quo and proposed change for adopting Product Safety Standards in New Zealand:



75. The proposal also accounts for situations where no international standard exists. In such cases, the process would remain unchanged: a public consultation would be held to determine whether a domestic standard should be developed and what it should contain, followed by a decision from Cabinet.

### Benefits

76. Delegating authority to adopt international product safety standards would enable more timely incorporation of standards into regulation, where standards have already undergone robust development and public consultation. It would allow technical decisions to be made by the Chief Executive of MBIE, who is better placed to assess highly specialised standards matters than Ministers and avoid the need for Cabinet processes. This approach could improve regulatory agility, support alignment with

international best practice, and streamline compliance for businesses operating across borders.

### **Risks and mitigations**

77. Delegating authority may raise concerns about transparency and consistency. Businesses and consumers may be unclear about who is responsible for updates or how decisions are made. There is also a risk that standards could be adopted without sufficient stakeholder engagement.
78. These risks could be mitigated by establishing clear criteria for which standards are eligible for adoption, requiring public consultation on of adoption standards, and publishing the rationale for each decision. Any notice adopting international standards would be subject to review by the Regulation Review Committee and disallowable by Parliament. Cabinet and Parliament would retain oversight of broader policy settings, ensuring that the overall direction of the regime remains subject to democratic control.

### **Questions for consultation**

12. Should MBIE's Chief Executive be able to adopt international standards by notice?
13. What types of standards should be eligible for adoption under this process?
14. What safeguards or oversight mechanisms should be in place to ensure standards are adopted appropriately?

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

## Description of the regulatory settings

79. Many standard form contracts, such as those used for phone plans, gym memberships, and online services, are offered on a ‘take it or leave it’ basis, with little or no opportunity for customers to negotiate the terms. These contracts can contain clauses that unfairly shift risk or limit rights, leaving consumers exposed to significant detriment.
80. To address this, the Act was amended in 2015 to ban unfair terms in standard form consumer contracts. Under section 46L(1) of the Act, a term is considered unfair if it:
- a. creates a significant imbalance in rights and obligations between the parties
  - b. isn’t needed to protect the business’s interests, and
  - c. would cause harm if enforced.
81. In 2021, these protections were extended to cover small trade contracts.
82. The Commerce Commission is currently the only body that can apply to the court to have a term declared unfair, except in the case of grocery supply contracts. Even after a term is declared unfair, penalties only apply if a business continues to use it and the Commerce Commission takes further court action. These limitations have led to concerns about the effectiveness of the regime in practice. Many potentially unfair terms remain in use without ever being tested, and consumers and small businesses have limited ability to challenge them directly.
83. MBIE is seeking feedback on two proposals to improve the effectiveness of the unfair contract terms regime. These proposals are complementary and address different limitations in the current framework. The first proposal focuses on who can take action when a term may be unfair, while the second considers when penalties should apply. Feedback is sought on each proposal individually.

## Allow private parties to challenge unfair contract terms

### What is the issue?

84. Under the current regime, only the Commerce Commission can apply to the court to have a term declared unfair. Consumers and small businesses cannot take direct action, even if they are directly affected and have suffered financial loss.
85. The Commerce Commission does not have the resources to investigate every potentially unfair term. As a result, many terms remain untested and continue to be used, weakening the deterrent effect of the regime.

86. In Australia and the United Kingdom, private parties can challenge unfair terms directly, providing a more accessible and responsive enforcement system.

### **Proposal and rationale**

87. MBIE is considering whether individuals and small businesses should be able to challenge unfair contract terms directly through the courts or the Disputes Tribunal. This would mirror the existing approach for grocery supply contracts under section 46H of the Act.

88. Under this proposal, customers could apply for a declaration that a term is unfair. If successful, the term would be void and unenforceable. While penalties would not apply in these cases, the declaration could support claims for compensation or other remedies. If a business continued to use a term after it had been declared unfair, the Commerce Commission could then apply penalties under the existing enforcement framework.

#### **Scenario 1: Sarah's gym membership**

Sarah signs up for a 12-month gym membership. The contract includes a term stating that the gym may increase the monthly membership fee at any time during the 12-month period, without notice and without giving Sarah the option to cancel.

Six months into her membership, Sarah receives an email informing her that the monthly fee will increase by 40%, starting the following week. She is frustrated to learn that she cannot cancel the contract without paying a substantial early termination fee, even though the price has changed significantly.

Under the current law, Sarah cannot take direct action to challenge the term. She could complain to the Commerce Commission, but the Commission may not have capacity to investigate or take the case to court. Unless the Commission acts, the term remains enforceable.

Under the proposed change, Sarah could apply to the Disputes Tribunal for a declaration that the price variation clause is unfair. If the Tribunal agrees, the term would be void and unenforceable. Sarah could also seek compensation if she had already paid the increased fee.

If the gym continued to use the same term in future contracts, the Commerce Commission could then take enforcement action and seek penalties. This is because the term would have already been declared unfair. Currently, penalties only apply if a business continues to use a term after it has been declared unfair by the court, and only the Commission can obtain that declaration.

to use a term after it has been declared unfair by the court, and only the Commission can obtain that declaration.

### **Benefits**

89. Allowing customers to challenge unfair contract terms directly would improve access to justice and reduce reliance on the Commerce Commission. It would empower affected

parties to seek remedies where they are directly impacted and increase incentives for businesses to proactively review and improve their standard form contracts.

## **Risks and mitigations**

90. While businesses should already be reviewing contract terms to ensure they are not unfair, the higher likelihood of enforcement and uncertainty about outcomes may result in them conducting further review, resulting in one-off compliance costs. These costs are expected to be modest and proportionate to the benefits. The programme could be supported by clear guidance and would continue to exclude core terms such as price and subject matter.

### **Questions for consultation**

15. Do you support allowing private parties to challenge unfair contract terms? Why or why not?
16. What types of parties should be able to take action (e.g. individuals, businesses party to a small trade contract)?
17. What impacts would this change have on your organisation or sector?

## **Remove the requirement for a second breach before penalties apply**

### **What is the issue?**

91. In 2023, Australia amended its unfair contract terms regime under the Australian Consumer Law to make unfair terms in standard form contracts illegal and subject to substantial civil penalties, even on a first breach.
92. In New Zealand, although the Act prohibits the use of unfair contract terms, penalties only apply if a business continues to use a term after it has been declared unfair by a court. This means that businesses can include and enforce potentially unfair terms without facing any legal consequences, unless the Commerce Commission has already taken the matter to court.
93. This two-step enforcement model weakens the deterrent effect of the law. Businesses have limited incentive to proactively review and amend their contracts, especially if they believe the risk of enforcement is low. It also places a significant burden on the Commerce Commission, which must first obtain a court declaration before it can seek penalties. This adds time and cost to the enforcement process and limits the number of cases the Commission can pursue.
94. Most other provisions of the Act allow penalties to be imposed on the first breach. The unfair contract terms framework stands out as an exception, and this has led to concerns about its effectiveness in practice.

## Proposal and rationale

95. MBIE is considering removing the requirement for a court declaration before penalties can apply to unfair contract terms. Under this proposal, it would be an offence to include an unfair term in a standard form consumer contract, regardless of whether that term has previously been declared unfair by a court.

96. This change would bring the unfair contract terms provisions into line with other parts of the Act, where penalties can be imposed on the first breach. It would also make enforcement more responsive and cost-effective by allowing the Commerce Commission to seek penalties without first needing to obtain a declaration. Removing the two-step process would strengthen the deterrent effect of the law by increasing the legal risk for businesses that continue to use terms that are likely to be unfair and encourage businesses to take greater care to avoid unfair terms when drafting and reviewing their contracts. Penalties could apply only where a business knew or was negligent in using a term that was unfair.

### Scenario 2: Jim's car rental experience

Jim books a car through an online rental service. The standard form contract includes a term stating that if the car is returned even slightly late, the customer must pay for a full extra day. James returns the car 15 minutes late and is charged for an entire additional day.

Under current law, this term might be considered unfair, but unless the Commerce Commission has already taken the business to court and obtained a declaration about that specific term, there is no penalty for including or enforcing it. Jim can complain, but the business faces no legal consequences unless the Commission acts.

Under the proposed change, it would be quicker and less expensive to take action. If the court found the term was unfair, the business would be required to refund Jim the extra charge, remove the term from its contract, and could be penalised for including the term in the first place.

## Benefits

97. Removing the two-step enforcement process would strengthen the deterrent effect of the law and bring the unfair contract terms regime into line with other provisions of the Act. It would allow the Commerce Commission to take enforcement action more efficiently and encourage businesses to take greater care when drafting and reviewing their contracts.

## Risks and mitigations

98. While the Act includes a statutory test and a 'grey list' of potentially unfair terms, case law remains limited. While businesses should already be reviewing contract terms to ensure they are not unfair, greater consequences for using unfair terms, may result in further review of contract terms and increase compliance costs for businesses. These risks could be mitigated by:

- a. Providing clear guidance and examples of potentially unfair terms

- b. Retaining the existing 'grey list' in section 46M of the Act
- c. Limiting penalties to only where a business knew or was negligent in using a term that was unfair.

**Questions for consultation**

- 18. Do you support introducing penalties for including unfair terms, even if they haven't been declared unfair by a court in a previous case?
- 19. If so, what types of penalties (e.g. pecuniary penalties, offences) would be appropriate?
- 20. Should penalties be restricted to where a business knew or was negligent in using a term that was unfair?

# Annex One: Current penalties regime for criminal and infringement offences under Part 5 of the Fair Trading Act 1986

Offence type	Offences section	Breaches under the Act	Maximum monetary penalties
Criminal	40(1)	Breaches of a provision of: Part 1 of the Act (relating to unfair conduct), except for s9, s14(2), s23 or s24; <sup>19, 20</sup> a. Part 3 of the Act (relating to product safety); or b. Part 4 of the Act (relating to safety of services).	<b>\$200,000</b> fine in the case of an individual and <b>\$600,000</b> in the case of a body corporate. However, see s40(2) below in this table for condition on imposing the maximum fine. Note that an offence against s40(1) in relation to a breach of s33D is an "infringement offence" (see infringement offences below in this table).
	40(1A), 40(A)	Breaches of s24 (relating to the prohibition of promoting or operating a pyramid selling scheme).	<b>\$600,000</b> fine. However, see s40(2) below in this table for condition on imposing the maximum fine. Under s40A, the court may, on the application of the Commission, in addition to any fine imposed under s40(1A), order the person to <b>pay an amount not exceeding the value of any commercial gain resulting from the breach if the court is satisfied that the breach occurred in the course of producing a commercial gain.</b> The standard of proof in proceedings for a court order under s40A for an additional penalty for a breach of s24 involving commercial gain is the standard of proof that applies in civil proceedings.
	40(1B)	Breaches of a provision of: a. Part 2 (relating to consumer information); or b. Part 4A (relating to consumer transactions and auctions).	<b>\$10,000</b> fine in the case of an individual and <b>\$30,000</b> in the case of a body corporate. However, see s40(2) below in this table for condition on imposing the maximum fine. Note that certain offences against s40(1B) are "infringement offences" (see infringement offences below in this table).
	40(2)		With respect to the penalties in s40 of the Act above, where a person is convicted, whether in the same or separate proceedings, of two or more offences in respect of breaches of the same provisions of the Act and those breaches are of the same or a substantially similar nature and occurred at or about the same time, the aggregate amount of any fines imposed on that person for those convictions <b>cannot exceed the amount of the maximum fine that may be imposed for a conviction for a single offence.</b>
	46E	Breach by a person of a management banning order made against him or her.	<b>\$60,000</b> fine.
	47F	Resisting, obstructing or delaying: a. any product safety officer exercising a power under s33C (relating to safety of products) or s33D (relating to suspension of supply notices); b. any authorised person acting pursuant to a search warrant issued under s47; or c. any authorised employee exercising a power to enter a "place" under s47L.	<b>\$10,000</b> fine in the case of an individual and <b>\$30,000</b> in the case of a body corporate.
	47J	Refusing or failing to comply with a notice under s47G (relating to requirement that a person supply information or documents or give evidence to the Commission); or in purported compliance with the	<b>\$10,000</b> fine in the case of an individual and <b>\$30,000</b> in the case of a body corporate.

<sup>19</sup> **Section 9** relates to misleading and deceptive conduct generally, which is prohibited. **Section 14(2)** relates to the prohibition of the use of physical force, harassment, or coercion in connection with the sale or grant or possible sale or grant of an interest in land, or the payment for an interest in land. **Section 23** relates to the prohibition of the use of physical force, harassment, or coercion in connection with the supply or possible supply of goods or services or the payment for goods or services. A breach of s14(2) or s23 (both relating to use of physical force, harassment or coercion) **is not an offence under s40(1) of the Act, and therefore there are no penalties for breaches of these sections.** **Section 24** relates to the prohibition of promoting or operating a pyramid selling scheme (see s40(1A) below in this table).

<sup>20</sup> Note that **s26** in Part 1 of the Act prohibits goods being imported into New Zealand that bear a "false trade description" (i.e. any representation which if made in connection with the supply or possible supply of goods or with the promotion by any means of the supply or use of goods would constitute a breach of s13(a), s13(d) or s13(j) of the Act. Such goods are prohibited to be imported under s96 of the Customs and Excise Act 2018. It is a criminal offence under s388(1) of the Customs and Excise Act to import such goods. Under s388(2) of the Customs and Excise Act, a person convicted of an offence is liable to a maximum fine of \$5,000 in the case of an individual and \$25,000 in the case of a body corporate. See also **s33** of the Act where there is an equivalent effect in relation to the importation of goods which, if supplied, would constitute a breach of Part 3 (relating to product safety) of the Act.

Offence type	Offences section	Breaches under the Act	Maximum monetary penalties
		notice, supply information, or supply a document, knowing it to be false or misleading.	
<b>Infringement</b>	40B-40H	<p>Under s40B, an "infringement offence" means an offence against:</p> <ol style="list-style-type: none"> <li>a. s40(1) – failing to comply with a suspension of supply notice issued under s33D;</li> <li>b. s40(1B) – a breach of s28 (relating to consumer information standards);</li> <li>c. s40(1B) – failing to comply with s28B(2) or s28(B)(3) (relating to disclosure of trader status on Internet); or</li> <li>d. s40(1B) – the breach of any of the following provisions of Part 4A of the Act: <ul style="list-style-type: none"> <li>• s36C (relating to layby disclosure requirements)</li> <li>• s36D (relating to further layby disclosure requirements)</li> <li>• s36L (relating to uninvited direct sale disclosure requirements)</li> <li>• s36U (relating to extended warranty disclosure requirements).</li> </ul> </li> </ol>	<p>The amount of an "infringement fee" <b>cannot exceed \$2,000</b> and is prescribed by regulations made under s40H (see s40B).</p> <p>In accordance with the Fair Trading (Infringement Offences) Regulations 2014, the infringement fee for an infringement offence against:</p> <ol style="list-style-type: none"> <li>a. s40(1) is <b>\$1,500</b></li> <li>b. s40(1B) is <b>\$1,000</b>.</li> </ol>

# Annex Two: Prohibited conduct under the Fair Trading Act 1986

Conduct section <sup>21</sup>	Offence section	Offence type	Description
10	40(1) <sup>22</sup>	Strict liability	<b>Misleading conduct in relation to goods.</b> No person shall, in trade, engage in conduct that is misleading or deceptive or is likely to mislead or deceive.
11		Strict liability	<b>Misleading conduct in relation to services.</b> No person shall, in trade, engage in conduct that is liable to mislead the public as to the nature, characteristics, suitability for a purpose, or quantity of services.
12		Strict liability	<b>Misleading conduct in relation to employment.</b> No person shall, in relation to employment that is, or is to be, or may be offered by that person or any other person, engage in conduct that is misleading or deceptive, or is likely to mislead or deceive, as to the availability, nature, terms or conditions, or any other matter relating to that employment.
12A		Strict liability	<b>Unsubstantiated representations.</b> A person must not, in trade, make an unsubstantiated representation.
13		Strict liability	<b>False or misleading representations.</b> No person shall, in trade, in connection with the supply or possible supply of goods or services or with the promotion by any means of the supply or use of goods or services make false or misleading representations as specified in section 13.
14(1)		Strict liability	<b>False representations and other misleading conduct in relation to land.</b> No person shall, in trade, in connection with the sale or grant or possible sale or grant of an interest in land or with the promotion by any means of the sale or grant of an interest in land make false or misleading representations as specified in section 14(1).
16		Strict liability	<b>Certain conduct in relation to trade marks prohibited.</b> No person shall, in trade, engage in conduct specified in section 16(1) in relation to trade marks.
17		Mens rea	<b>Offering gifts and prizes.</b> No person shall – in connection with (a) the supply or possible supply of goods or services or with the promotion by any means of the supply or use of goods or services, or (b) the sale or grant or the possible sale or grant of an interest in land or with the promotion by any means of the sale or grant of an interest in land – offer gifts, prizes, or other free items with the intention of not providing them or of not providing them as offered.
19		Strict liability	<b>Bait advertising.</b> No person shall, in trade, advertise for supply at a specified price goods or services which that person (a) does not intend to offer for supply, or (b) does not have reasonable grounds for believing can be supplied by that person at that price for a period that is, and in quantities that are, reasonable having regard to the nature of the market in which the person carries on business and the nature of the advertisement.
20		Strict liability	<b>Referral selling.</b> Except where the acquisition of goods is for resupply, no person shall induce another person to acquire goods or services by representing that the person acquiring the goods or services will, after the contract for the acquisition of the goods or services is made, receive a rebate, commission, or other benefit in return for giving that person the names of prospective customers or otherwise assisting that person to supply goods or services to other users or consumers, if receipt of the rebate, commission, or other benefit is contingent on an event occurring after that contract is made.
21		Strict liability (s21(a) and s21(c)) Mens rea (s21(b))	<b>Demanding or accepting payment without intending to supply as ordered.</b> No person shall demand or accept payment or other consideration for goods or services, if at the time of the demand or acceptance that person (a) does not intend to supply the goods or services, (b) intends to supply goods or services materially different from the goods or services in respect of which the payment or other consideration is demanded or accepted, or (c) does not have reasonable grounds to believe that that person will be able to supply the goods or services within any specified period; or if no period is specified, within a reasonable time.
21C		Strict liability	<b>Prohibition on asserting right to payment in respect of unsolicited goods or unsolicited services.</b> A person must not, in trade, (a) assert, or appear to assert, that the person has a right to payment from another person for unsolicited goods or unsolicited services, or (b) send or deliver to another person an invoice or other document that states the amount of a payment for, or sets out the charge for supplying, unsolicited goods or unsolicited services, unless that invoice or document complies with section 21C(2).
22(1)		Strict liability	<b>Misleading representations about certain business activities.</b> No person shall make a representation that is false or misleading in a material particular concerning the profitability or risk or any other material aspect of any business activity that that person represents as one that can be, or can be to a substantial extent, carried on at or from a person's place of residence.
22(2)		Strict liability	<b>Misleading representations about certain business activities.</b> No person who invites, whether by advertisement or otherwise, persons to engage or participate, or to offer or apply to engage or participate, in a business activity requiring: (a) the performance by the persons concerned of work, or

<sup>21</sup> **Note:** The table excludes prohibited conduct under s14(2) and s23 of the Act. Section 14(2) relates to the prohibition of the use of physical force, harassment, or coercion in connection with the sale or grant or possible sale or grant of an interest in land, or the payment for an interest in land. Section 23 relates to the prohibition of the use of physical force, harassment, or coercion in connection with the supply or possible supply of goods or services or the payment for goods or services. A breach of s14(2) or s23 is not an offence under s40(1) of the Act, and therefore currently there are no penalties for breaches of these sections.

<sup>22</sup> Maximum penalty is a **\$200,000** fine in the case of an individual and **\$600,000** in the case of a body corporate.

Conduct section <sup>21</sup>	Offence section	Offence type	Description
			(b) the investment of money by the persons concerned and the performance by them of work associated with the investment, shall make, with respect to the profitability or risk or any other material aspect of the business activity, a representation that is false or misleading in a material particular.
26A		Strict liability	<b>Unfair contract terms in standard form consumer contracts.</b> If a court has declared, under section 46I, that a term in a standard form consumer contract is an unfair contract term, a person must not (a) include the unfair contract term in a standard form contract (unless the term is included in a way that complies with the terms (if any) of the decision of the court), or (b) apply, enforce, or rely on the unfair contract term in a standard form contract.
30		Strict liability	<b>Compliance with product safety standards.</b> Where a product safety standard is applicable in respect of goods, a person must not supply, or offer to supply, or advertise to supply those goods unless product safety standard is complied with.
31		Strict liability	<b>Unsafe goods.</b> No person shall supply, or offer to supply, or advertise to supply, goods in respect of which (a) there is in force a notice declaring the goods to be unsafe goods, or (b) there is in force a notice under section 31(3).
31A		Strict liability	<b>Voluntary product recall.</b> If a supplier voluntarily recalls goods, they must, within two working days after recalling the goods, notify MBIE's chief executive of the recall as prescribed.
32		Strict liability	<b>Compulsory product recall.</b> A supplier must comply with a notice issued under section 32.
33D		Strict liability (also an infringement offence)	<b>Suspension of supply notices.</b> A person to whom a suspension of supply notice applies must not supply the goods identified in the notice at any time before the notice expires.
36		Strict liability	<b>Compliance with services safety standards.</b> Where a services safety standard is applicable in respect of services, a person must not supply, or offer to supply, or advertise to supply the services unless the services safety standard is complied with.
24	40(1A) <sup>23</sup>	Strict liability	<b>Pyramid selling schemes.</b> No person shall promote or operate a pyramid selling scheme.
28	40(1B) <sup>24</sup>	Strict liability (also an infringement offence)	<b>Compliance with consumer information standards.</b> Where a consumer information standard is applicable in respect of goods or services, a person must not supply, or offer to supply, or advertise to supply those goods or services unless the consumer information standard is complied with.
28B		Strict liability (also an infringement offence)	<b>Disclosure of trader status on Internet.</b> Applies when goods or services are offered for sale to consumers on the Internet, and the offer is able to be accepted via the Internet.
36C		Strict liability (also an infringement offence)	<b>Disclosure requirements relating to layby sale agreement.</b> A supplier must comply with disclosure requirements in section 36C.
36D		Strict liability (also an infringement offence)	<b>Further disclosure in relation to layby sale agreement if requested by consumer.</b> If requested by the consumer in relation to a layby sale agreement, a supplier must provide the consumer with a written statement that clearly sets out the information specified in section 36D(1).
36F		Strict liability	<b>Cancellation of layby sale agreement by consumer.</b> A supplier must not require the consumer to pay a charge for the cancellation of a layby sale agreement (a "cancellation charge") unless certain circumstances exist. A supplier must not impose a cancellation charge that is more than the supplier's "reasonable costs arising directly from the agreement".
36G		Strict liability	<b>Cancellation of layby sale agreement by supplier.</b> A layby sale agreement may only be cancelled by the supplier in certain circumstances.
36H		Strict liability	<b>Effect of cancellation of layby sale agreement.</b> Obligations that must be met by supplier if layby sale agreement is cancelled.
36L		Strict liability (also an infringement offence)	<b>Disclosure requirements relating to uninvited direct sale agreements.</b> A supplier must comply with the disclosure requirements in section 36L.
36N		Strict liability	<b>Enforcement of uninvited direct sales agreement by supplier.</b> Certain uninvited direct sales agreements by suppliers are not enforceable.
36P		Strict liability	<b>Supplier's obligations on cancellation of uninvited direct sale agreement.</b> Obligations that supplier must meet on cancellation of an uninvited direct sale agreement in accordance with section 36M.

<sup>23</sup> Maximum penalty is a **\$600,000** fine. In addition, under section 40A, the court may, on the application of the Commission, in addition to any fine imposed under section 40(1A), order the person to pay an amount not exceeding the value of any commercial gain resulting from the breach if the court is satisfied that the breach occurred in the course of producing a commercial gain. The standard of proof in proceedings under section 40A is the standard of proof that applies in civil proceedings.

<sup>24</sup> Maximum penalty is a **\$10,000** fine in the case of an individual and **\$30,000** in the case of a body corporate.

Conduct section <sup>21</sup>	Offence section	Offence type	Description
36U		Strict liability (also an <b>infringement offence</b> )	<b>Disclosure requirements relating to extended warranty agreements.</b> A warrantor must comply with the disclosure requirements in section 36U.
36V		Strict liability	<b>Cancellation of extended warranty agreement.</b> A supplier must immediately repay all additional consideration, in full and without deductions, to the consumer upon cancellation of an extended warranty agreement.
36ZB		Strict liability	<b>Notice to participants in relation to auctions.</b> Before and during any auction, notice of the terms of the auction must be readily available to view by all participants and potential participants in the auction. The notice must include prescribed information.
36ZD		Strict liability	<b>Vendor bids.</b> An auctioneer must not accept a vendor bid unless conditions specified in section 36ZD are met.
36ZF		Strict liability	<b>Account and payment of proceeds.</b> Requirements of auctioneer for paying balance of proceeds and providing an account of the sale to the vendor.
46C		Strict liability	<b>Management banning orders.</b> The District Court may make a management banning order against an individual if the conditions in section 46C are met. It is an offence to breach a management banning order.
33C, 33D, 47, 47L	47F <sup>25</sup>	Strict liability	<b>Offence to resist, obstruct or delay.</b> Resisting, obstructing or delaying: (a) any product safety officer exercising a power under section 33C (relating to safety of products) or 33D (relating to suspension of supply notices); (b) any authorised person acting pursuant to a search warrant issued under section 47; (c) any authorised employee exercising a power to enter a "place" under section 47L.
47G	47J <sup>26</sup>	Strict liability	<b>Offence to contravene section 47G.</b> Refusing or failing to comply with a notice under section 47G (relating to requirement that a person supply information or documents or give evidence to the Commission); or in purported compliance with the notice, supply information, or supply a document, knowing it to be false or misleading.

<sup>25</sup> Maximum penalty is a **\$10,000** fine in the case of an individual and **\$30,000** in the case of a body corporate.

<sup>26</sup> Maximum penalty is a **\$10,000** fine in the case of an individual and **\$30,000** in the case of a body corporate.

# Annex Three: Summary of questions for in targeted consultation paper ‘Amendments to the Fair Trading Act 1986’

July 2025

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## Chapter 1 questions: Proposed changes to the penalties regime

1. Do you have any comments on the problem definition and what Chapter 1 is aiming to achieve?

### Option A and B

2. Do you agree with the proposal as set out in Option A, which would replace the majority of criminal offences in the Fair Trading Act with pecuniary penalties subject to civil proceedings? Why or why not?

### Options C, D and E

3. Which options above relating to infringement offences (Options C, D and E) do you support (if any)? Why or why not?
4. What additional strict liability offences in the Fair Trading Act (if any) should be included to expand the range of the infringement offences scheme? Why or why not?

### Option F

5. Do you agree that insurance and indemnification against breaches of the Fair Trading Act should be prohibited? Why or why not?
6. If indemnification is prohibited, should this prohibition extend to all provisions of the Act, or only certain ones? Please indicate which provisions you consider should be covered and outline why?

### Option G

7. Should harassment and coercion be defined in the Fair Trading Act? If so, how?
8. Should harassment and coercion that is prohibited conduct be subject to a civil pecuniary penalty or strict liability offence, with Tier 1 penalties (see Option B, Table 1)? If so, should the penalties relate to harassment and coercion outright, undue harassment and coercion (as in Australia), or only harassment and coercion that meets certain other conditions?

## **Chapter 2 questions: Product Safety Standards: allowing automatic updates**

### **Allow automatic updates to product safety standards**

9. Do you support allowing automatic updates to product safety standards under the Act? Why or why not?
10. What impacts would this change have on your organisation or sector?
11. Are there any risks or safeguards that should be considered?

### **Delegate adoption of international product safety standards**

12. Should MBIE's Chief Executive be able to adopt international standards by notice?
13. What types of standards should be eligible for adoption under this process?
14. What safeguards or oversight mechanisms should be in place to ensure standards are adopted appropriately?

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

### **Allow private parties to challenge unfair contract terms**

15. Do you support allowing private parties to challenge unfair contract terms? Why or why not?
16. What types of parties should be able to take action (e.g. individuals, businesses party to a small trade contract)?
17. What impacts would this change have on your organisation or sector?

### **Remove the requirement for a second breach before penalties apply**

18. Do you support introducing penalties for including unfair terms, even if they haven't been declared unfair by a court in a previous case?
19. If so, what types of penalties (e.g. pecuniary penalties, offences) would be appropriate?
20. Should penalties be restricted to where a business knew or was negligent in using a term that was unfair?