COVERSHEET

Minister | Hon Stuart Nash  
          | Hon Kris Faafoi  
Portfolio | Small Business  
          | Commerce and Consumer  
Affairs  
Title of  |
Cabinet paper | Unfair Commercial Practices: Policy Decisions  
Date to be | published | 19 August 2019  

List of documents that have been proactively released

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Information redacted  YES / NO (please select)

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Some information has been withheld for the reason of Confidential advice to Government.

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Unfair Commercial Practices: Policy Decisions

Portfolios Small Business / Commerce and Consumer Affairs

On 24 July 2019, the Cabinet Economic Development Committee (DEV):

Background

1 noted that on 28 November 2018, DEV:
   1.1 agreed to the release of a discussion document seeking feedback on whether existing protections against unfair commercial practices need to be strengthened;
   1.2 invited the Minister for Small Business and the Minister of Commerce and Consumer Affairs to report back by 31 July 2019 on the outcome of consultation and with any proposed policy changes;

2 noted that 44 submissions were received on the discussion document, with submitters relatively evenly divided for and against reform;

Unconscionable conduct

3 agreed to introduce a new prohibition against unconscionable conduct in connection with the supply (or possible supply) and acquisition (or possible acquisition) of goods or services;

4 agreed to provide a list of factors for a court to consider in determining whether conduct is unconscionable, consistent with the guidance in the Australian Consumer Law;

5 agreed that it be an offence to engage in unconscionable conduct, subject to maximum penalties of $600,000 for bodies corporate and $200,000 for individuals;

6 agreed that the civil remedies under the Fair Trading Act 1986 apply in respect of unconscionable conduct;

Unfair contract terms

7 agreed to extend the Fair Trading Act’s unfair contract terms protections to standard form business arrangements with a value below $250,000 (or a value below $250,000 in a given year, in some cases where the arrangement spans more than one year);
agreed that the courts can have regard to factors set out in legislation, and have discretion to consider the substance of the relationship between parties and look behind the specific legal form of arrangements, when determining whether the unfair contract terms protections apply;

agreed to provide for a regulation-making power to allow for clarification of the scope and value of an arrangement, for the purposes of determining whether the unfair contract terms protections apply;

noted that the Minister of Commerce and Consumer Affairs may seek Cabinet agreement to changes to the enforcement regime for unfair contract terms following the completion of a broader review of the Fair Trading Act;

agreed to extend the current exemptions from the consumer unfair contract terms regime for certain terms in insurance contracts to the business unfair contract term regime, until final decisions on the insurance exemptions are made as part of the insurance contract law review;

Technical amendments

agreed to the minor policy changes to the Fair Trading Act set out in Annex 1 to the paper under DEV-19-SUB-0189;

Financial implications

noted that the policy proposals in the paper under DEV-19-SUB-0189 will have resource implications for the Commerce Commission. Confidential advice to Government

Legislative implications

agreed to give effect to the above proposals through a Fair Trading Amendment Bill (and associated regulations if necessary);

noted that the Fair Trading Amendment Bill has category Confidential advice to Government

invited the Minister of Commerce and Consumer Affairs to issue drafting instructions to the Parliamentary Counsel Office to give effect to the above paragraphs;

authorised the Minister of Commerce and Consumer Affairs and the Minister for Small Business to make additional policy decisions and minor or technical changes, consistent with the policy intent of the paper under DEV-19-SUB-0189, on issues that arise in drafting and legislative passage.

Janine Harvey
Committee Secretary

Hard-copy distribution: (see over)
Present:
Rt Hon Winston Peters
Hon Kelvin Davis
Hon Grant Robertson (Chair)
Hon Phil Twyford
Hon Dr Megan Woods
Hon Chris Hipkins
Hon David Parker
Hon Nanaia Mahuta
Hon Stuart Nash
Hon Iain Lees-Galloway
Hon Jenny Salesa
Hon Shane Jones
Hon James Shaw
Hon Eugenie Sage

Officials present from:
Officials Committee for DEV

Hard-copy distribution:
Minister for Small Business
Minister of Commerce and Consumer Affairs
Annex 1: Technical amendments to the Fair Trading Act 1986

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<th>Topic</th>
<th>Status quo</th>
<th>Reason for change</th>
<th>Proposed change</th>
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<tbody>
<tr>
<td>Disclosure requirements relating to</td>
<td>S36U provides that when a consumer purchases an extended warranty, a copy</td>
<td>It may be difficult to comply with the requirement to provide a copy of the</td>
<td>Align the provisions for disclosure of extended warranty agreements purchased</td>
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<td>extended warranty agreements</td>
<td>of the agreement must be provided to the customer at the time of purchase. This includes purchases made over the phone.</td>
<td>extended warranty at the time of purchase for agreements made by phone. This</td>
<td>over the phone with those for uninvited direct sales. In the event an extended</td>
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<td>requirement is also inconsistent with the Act's provisions for uninvited direct</td>
<td>warranty is purchased over the phone, the business would have five working days</td>
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<td>sales, where in the case of an agreement entered into over the phone, a copy must</td>
<td>to provide the agreement to the consumer. Consumers would still have five</td>
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<td>be provided within five working days after the date on which the agreement was</td>
<td>working days to cancel an extended warranty, commencing from the time the</td>
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<td>entered into.</td>
<td>consumer receives the agreement.</td>
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<td>Referring Fair Trading Act matters to</td>
<td>The Commerce Commission has no express power to ‘state a case’ for the</td>
<td>Stating a case allows the Commerce Commission to take a ‘test case’ to get</td>
<td>Give the Commerce Commission an express power to state a case for the opinion of</td>
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<td>the High Court</td>
<td>opinion of the High Court on any question of law relating to the Fair</td>
<td>clarity over unclear or novel areas of law, without necessarily naming a</td>
<td>the High Court on Fair Trading Act matters.</td>
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<td>Trading Act. It has this power under the Credit Contracts and Consumer</td>
<td>defendant. At present, the Commission can seek ‘declaratory relief’, but this</td>
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<td>Finance Act 2003 (CCCFA) and Commerce Act 1986.</td>
<td>requires naming a defendant and subjecting them to the costs of a full trial, and</td>
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<td>is case-specific, so may not provide the required clarification.</td>
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<td>Disclosure of information in the course</td>
<td>The Commerce Commission does not have the power to restrict the disclosure</td>
<td>The lack of this power presents a risk of investigations being prejudiced by, for</td>
<td>Give the Commerce Commission the power to restrict the disclosure of information</td>
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<td>of a Fair Trading Act investigation</td>
<td>of information provided to it during an investigation, or restrict the</td>
<td>example, investigation subjects who are being interviewed separately discussing</td>
<td>provided to it during an investigation (including its line of questioning).</td>
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<td>disclosure of the Commission’s line of questioning in an investigation</td>
<td>what information should be provided to the Commission. In addition, the lack of</td>
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<td>under the Fair Trading</td>
<td>a power under the Fair Trading Act creates issues</td>
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<td>Enforceable undertakings</td>
<td>Management banning orders</td>
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| When the Commerce Commission takes out-of-court enforcement action under the Fair Trading Act, it is able to accept enforceable undertakings. These are able to be enforced much more easily than a standard settlement if they are breached. However, unlike the Commerce Act, the current provision does not explicitly provide that undertakings may include an undertaking to pay compensation, or to reimburse the Commission for its investigation costs. | Currently, The Fair Trading Act provides that a court may make a management banning order against an individual who, within a 10 year period either:  
- personally committed an offence on at least two occasions, or  
- was a director of a business that committed an offence on at least two occasions.  
  The current situation does not allow action to be taken against individuals who have:  
  - been involved with multiple businesses that have breached the Act, if each business has only breached it once, or  
  - personally breached the Act once themselves, and (on a different matter) been a director or manager of a business that has breached the Act.  
  Amend s46C to provide that a court may also make a management banning order against an individual who has:  
- been a director or manager of one or more businesses that have cumulatively committed offences under the Act on at least two occasions within a 10 year period, or  
- personally breached the Act once themselves, and (in relation to different conduct) been a director or manager of a business that has breached the Act. |
| There is a theoretical risk that the Commission may not be able to accept undertakings of this nature. Such undertakings are critical for ensuring timely and cost-effective resolution of cases, and ensuring that affected parties can benefit from appropriate redress. | |