

# Departmental Disclosure Statement

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Fair Trading Amendment Bill
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The departmental disclosure statement for a government Bill seeks to bring together in one place a range of information to support and enhance the Parliamentary and public scrutiny of that Bill.

It identifies:

- the general policy intent of the Bill and other background policy material;
- some of the key quality assurance products and processes used to develop and test the content of the Bill;
- the presence of certain significant powers or features in the Bill that might be of particular Parliamentary or public interest and warrant an explanation.

This disclosure statement was prepared by the Ministry of Business, Innovation and Employment (MBIE).

MBIE certifies that, to the best of its knowledge and understanding, the information provided is complete and accurate at the date of finalisation below.

4 December 2019

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## Part One: General Policy Statement

Unfair commercial practices – such as the use of pressure tactics, deception, one-sided contract terms, and practices that generally exploit a consumer’s or small business’s vulnerabilities – can prevent markets from functioning effectively by decreasing trust, increasing search and transaction costs, and skewing the playing field in favour of businesses that act dishonestly. They may restrict competition and, with it, productivity and innovation. Even where practices are not strictly anti-competitive, they may restrict the ability of firms to grow and thrive, by diverting their attention away from their core business. Unfair practices can also lead to high levels of financial detriment and stress for consumers.

While there are already a number of legislative protections against unfair practices, consultation undertaken by the Ministry of Business, Innovation, and Employment in 2018 found that gaps in the protections remain.

To address these issues, this Bill amends the Fair Trading Act 1986 (the Act) to introduce two new protections against unfair practices:

- It prohibits unconscionable conduct in trade. Unconscionable conduct is serious misconduct that goes far beyond being commercially necessary or appropriate.
- It extends the Act’s existing protections against unfair contract terms in standard form consumer contracts to also apply to small trade contracts. These are contracts between businesses that form part of trading relationships with an actual or expected total value of less than \$250,000 in any 12-month period.

In addition, the Bill strengthens the ability of consumers to require uninvited direct sellers to leave or not enter their property, including through the use of generally worded written notices. It also makes a number of minor changes to improve the functioning of the Act and support consistency with other legislation enforced by the Commerce Commission.

These changes seek to support the overall purpose of the Act, which is to contribute to a trading environment in which:

- the interests of consumers are protected;
- businesses compete effectively; and
- consumers and businesses participate confidently.

The Bill aims to achieve these objectives while also ensuring that:

- the measures to protect businesses and consumers do not overreach or unduly undermine commercial certainty; and
- businesses can continue to negotiate firmly and enter freely into contracts that reflect their wishes.

## Part Two: Background Material and Policy Information

### Published reviews or evaluations

<b>2.1. Are there any publicly available inquiry, review or evaluation reports that have informed, or are relevant to, the policy to be given effect by this Bill?</b>	YES
Discussion paper: Protecting businesses and consumers from unfair commercial practices, Ministry of Business, Innovation and Employment, December 2018, accessible on MBIE's website: <a href="https://www.mbie.govt.nz/have-your-say/protecting-businesses-and-consumers-from-unfair-commercial-practices/">https://www.mbie.govt.nz/have-your-say/protecting-businesses-and-consumers-from-unfair-commercial-practices/</a>	

### Relevant international treaties

<b>2.2. Does this Bill seek to give effect to New Zealand action in relation to an international treaty?</b>	NO
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### Regulatory impact analysis

<b>2.3. Were any regulatory impact statements provided to inform the policy decisions that led to this Bill?</b>	YES
<p>Impact Statement: Consumer credit regulation review, Ministry of Business, Innovation and Employment, 24 September 2018, accessible on MBIE's website: <a href="https://www.mbie.govt.nz/business-and-employment/consumer-protection/review-of-consumer-credit-law/review-of-consumer-credit-law-2018/">https://www.mbie.govt.nz/business-and-employment/consumer-protection/review-of-consumer-credit-law/review-of-consumer-credit-law-2018/</a></p> <p>Impact Statement: Protecting business and consumers from unfair commercial practices, Ministry of Business, Innovation and Employment, 20 June 2019, accessible on MBIE's website: <a href="https://www.mbie.govt.nz/business-and-employment/consumer-protection/review-of-consumer-law/protecting-businesses-and-consumers-from-unfair-commercial-practices/">https://www.mbie.govt.nz/business-and-employment/consumer-protection/review-of-consumer-law/protecting-businesses-and-consumers-from-unfair-commercial-practices/</a></p>	

<b>2.3.1. If so, did the RIA Team in the Treasury provide an independent opinion on the quality of any of these regulatory impact statements?</b>	NO
<p>The Regulatory Impact Statements identified above did not meet the threshold for receiving an independent opinion on the quality of the Regulatory Impact Statement from the RIA Team based in the Treasury. MBIE's Regulatory Impact Analysis Review Panel reviewed the Regulatory Impact Statements. The Panel considered that the information and analysis summarised in the Regulatory Impact Statements met the criteria necessary for Ministers to make informed decisions on the proposals.</p>	
<b>2.3.2. Are there aspects of the policy to be given effect by this Bill that were not addressed by, or that now vary materially from, the policy options analysed in these regulatory impact statements?</b>	YES
<p>A number of technical amendments are not addressed in the Impact Statements. This is because the Regulatory Quality Team at the Treasury determined that the regulatory decisions sought were exempt from the requirement to provide a Regulatory Impact Assessment as they have no or minor impacts on businesses, individuals or not for profit entities.</p>	

## Extent of impact analysis available

<b>2.4. Has further impact analysis become available for any aspects of the policy to be given effect by this Bill?</b>	NO
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<b>2.5. For the policy to be given effect by this Bill, is there analysis available on:</b>	
<b>(a) the size of the potential costs and benefits?</b>	YES
<b>(b) the potential for any group of persons to suffer a substantial unavoidable loss of income or wealth?</b>	NO
Qualitative analysis on the size of the potential costs and benefits of the policy to be given effect by this Bill is included in the Impact Statements available on MBIE's website at: <a href="https://www.mbie.govt.nz/business-and-employment/consumer-protection/review-of-consumer-law/protecting-businesses-and-consumers-from-unfair-commercial-practices/">https://www.mbie.govt.nz/business-and-employment/consumer-protection/review-of-consumer-law/protecting-businesses-and-consumers-from-unfair-commercial-practices/</a> <a href="https://www.mbie.govt.nz/business-and-employment/consumer-protection/review-of-consumer-credit-law/review-of-consumer-credit-law-2018/">https://www.mbie.govt.nz/business-and-employment/consumer-protection/review-of-consumer-credit-law/review-of-consumer-credit-law-2018/</a>	

<b>2.6. For the policy to be given effect by this Bill, are the potential costs or benefits likely to be impacted by:</b>	
<b>(a) the level of effective compliance or non-compliance with applicable obligations or standards?</b>	YES
<b>(b) the nature and level of regulator effort put into encouraging or securing compliance?</b>	YES
Brief analysis on the need for effective compliance and the level of regulator effort is included in the Impact Statements available on MBIE's website at: <a href="https://www.mbie.govt.nz/business-and-employment/consumer-protection/review-of-consumer-law/protecting-businesses-and-consumers-from-unfair-commercial-practices/">https://www.mbie.govt.nz/business-and-employment/consumer-protection/review-of-consumer-law/protecting-businesses-and-consumers-from-unfair-commercial-practices/</a> <a href="https://www.mbie.govt.nz/business-and-employment/consumer-protection/review-of-consumer-credit-law/review-of-consumer-credit-law-2018/">https://www.mbie.govt.nz/business-and-employment/consumer-protection/review-of-consumer-credit-law/review-of-consumer-credit-law-2018/</a>	

## Part Three: Testing of Legislative Content

### Consistency with New Zealand's international obligations

**3.1. What steps have been taken to determine whether the policy to be given effect by this Bill is consistent with New Zealand's international obligations?**

No international obligations have been identified or raised through the policy process as being relevant to the Bill.

### Consistency with the government's Treaty of Waitangi obligations

**3.2. What steps have been taken to determine whether the policy to be given effect by this Bill is consistent with the principles of the Treaty of Waitangi?**

No inconsistencies between the proposals and the principles of the Treaty of Waitangi have been identified or raised through the policy process. Neither the principal Act nor the amending Bill specifically impact rights or obligations for Māori.

### Consistency with the New Zealand Bill of Rights Act 1990

**3.3. Has advice been provided to the Attorney-General on whether any provisions of this Bill appear to limit any of the rights and freedoms affirmed in the New Zealand Bill of Rights Act 1990?**

NO

No concerns have been raised by the Ministry of Justice in relation to provisions in the Bill limiting any of the rights and freedoms affirmed in the New Zealand Bill or Rights Act 1990.

### Offences, penalties and court jurisdictions

**3.4. Does this Bill create, amend, or remove:**

**(a) offences or penalties (including infringement offences or penalties and civil pecuniary penalty regimes)?**

YES

**(b) the jurisdiction of a court or tribunal (including rights to judicial review or rights of appeal)?**

YES

The insertion of the provisions relating to unconscionable conduct, unfair contract terms in standard form small trade contracts, and directions to leave premises or not enter premises (clauses 6, 7, and 9) extend the scope of the existing offence provisions in section 40 of the Act. Clauses 15 to 18 expand the ability of a High Court to declare contract terms to be unfair to include small trade contracts.

The Bill also clarifies the ability of the Commerce Commission to 'state a case' for the opinion of the High Court on any question of law relating to the Act (clause 11).

<b>3.4.1. Was the Ministry of Justice consulted about these provisions?</b>	YES
<p>The Ministry of Justice was consulted on the proposals prior to Cabinet policy decisions, and again prior to Cabinet consideration of the Bill.</p> <p>In relation to unconscionable conduct, the Ministry of Justice raised concerns about:</p> <ul style="list-style-type: none"> <li>• there being a criminal offence for unconscionable conduct, in addition to civil remedies;</li> <li>• the level of penalty being proposed for individuals for breach of the prohibition; and</li> <li>• the strict liability nature of the offence.</li> </ul> <p>MBIE has worked with the Ministry of Justice to address its concerns, including by noting that:</p> <ul style="list-style-type: none"> <li>• parallel civil and criminal remedies are an existing feature of the Act, as well as a range of other commercial legislation;</li> <li>• the level of penalty is consistent with the existing penalties in the Act, and reflects the serious nature of unconscionable conduct; and</li> <li>• while there is no explicit 'mens rea' element to the offence, unconscionable conduct is inherently conduct in which a level of intent is likely to be necessary for there to be breach of the prohibition.</li> </ul> <p>The Ministry of Justice also raised concerns about the offence related to directions to leave premises or not enter premises, including:</p> <ul style="list-style-type: none"> <li>• the provision capturing an overly broad range of conduct; and</li> <li>• the significant penalties that individuals would face on conviction.</li> </ul> <p>In response, MBIE noted that:</p> <ul style="list-style-type: none"> <li>• the provision only has effect in relation to uninvited direct sales, and not for personal visits or those by organisations such as charities or political parties;</li> <li>• the provision only applies where there is a visible or audible direction to leave; and</li> <li>• the Commerce Commission would likely only take formal court action in rare circumstances, and such action would normally be directed at businesses rather than particular individuals.</li> </ul> <p>We also separately consulted the Ministry of Justice on the power for the Commerce Commission to state a case for the opinion of the High Court. The Ministry of Justice supported this proposal.</p>	

## Privacy issues

<b>3.5. Does this Bill create, amend or remove any provisions relating to the collection, storage, access to, correction of, use or disclosure of personal information?</b>	NO
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## External consultation

<b>3.6. Has there been any external consultation on the policy to be given effect by this Bill, or on a draft of this Bill?</b>	YES
<p>A survey of (mostly small) businesses was undertaken in June 2018 to help MBIE to understand the nature and extent of the problem. In addition, a discussion paper titled <i>Protecting businesses and consumers from unfair commercial practices</i> was released for consultation between December 2018 and February 2019, which sought feedback on both issues and options. Feedback on the discussion paper was mixed, with around half of stakeholders in favour of additional protections against unfair commercial practices, and half opposed. To complement formal submissions received, MBIE also met with a number of stakeholders.</p>	

### Other testing of proposals

<b>3.7. Have the policy details to be given effect by this Bill been otherwise tested or assessed in any way to ensure the Bill's provisions are workable and complete?</b>	YES
Departmental consultation has been undertaken with the Ministry of Justice, the Treasury, and the Ministry for Primary Industries. In addition, the Legislation Design and Advisory Committee and the Commerce Commission (the enforcement agency for the current Act) have been consulted, to ensure that the provisions are workable and complete.	

## Part Four: Significant Legislative Features

### Compulsory acquisition of private property

<b>4.1. Does this Bill contain any provisions that could result in the compulsory acquisition of private property?</b>	NO
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### Charges in the nature of a tax

<b>4.2. Does this Bill create or amend a power to impose a fee, levy or charge in the nature of a tax?</b>	NO
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### Retrospective effect

<b>4.3. Does this Bill affect rights, freedoms, or impose obligations, retrospectively?</b>	NO
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### Strict liability or reversal of the usual burden of proof for offences

<b>4.4. Does this Bill:</b>	
<b>(a) create or amend a strict or absolute liability offence?</b>	YES
<b>(b) reverse or modify the usual burden of proof for an offence or a civil pecuniary penalty proceeding?</b>	NO

The insertion of the provisions relating to unconscionable conduct, unfair contract terms in standard form small trade contracts, and directions to leave premises or not enter premises (clauses 6, 7, and 9) all create what are, technically, strict liability offences by reference to section 40 of the Fair Trading Act.

In respect of unconscionable conduct, as described in section 3.4.1, while there is no explicit 'mens rea' element to the offence, unconscionable conduct is inherently conduct in which a level of intent is likely to be necessary for there to be breach of the prohibition. For example, in determining whether conduct is unconscionable, a court may consider elements such as the extent to which a trader acted in good faith, whether the trader subjected an affected person to any unfair pressure or tactics, and whether a person was induced to enter into a contract.

In relation to unfair contract terms in small trade contracts, such conduct is only subject to an offence if:

- the Commerce Commission seeks a court declaration that a term in a standard form contract is unfair;
- a court declares that the term is unfair, after assessing the term against a number of tests, including whether the term is imbalanced and would cause detriment; and
- following a declaration, a party continues to include the term in the contract.

The Fair Trading Act contains a number of defences, including that contravention was due to a reasonable mistake. Each of the provisions can also be viewed as a public welfare regulatory offence, for which strict liability is appropriate.

We considered providing for explicit mens rea offences, but are of the view that this would impose undue barriers to enforcement, particularly against companies and other bodies corporate, and therefore reduce the effectiveness of the prohibitions. In the case of unconscionable conduct, given the high threshold for something to be 'unconscionable', a mens rea offence would arguably add little in terms of protection for defendants.

## Civil or criminal immunity

<b>4.5. Does this Bill create or amend a civil or criminal immunity for any person?</b>	NO
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## Significant decision-making powers

<b>4.6. Does this Bill create or amend a decision-making power to make a determination about a person's rights, obligations, or interests protected or recognised by law, and that could have a significant impact on those rights, obligations, or interests?</b>	YES
Clause 14 amends the Fair Trading Act's existing provisions relating to management banning orders, to slightly broaden the situations in which a court may impose a management banning order. The existing provisions provide significant safeguards, including that a court may make a banning order only if it is satisfied that the order is necessary to protect the public from the risk that the manager or director in question will commit further offences. The amendments in this Bill do not alter this safeguard.	

## Powers to make delegated legislation

<b>4.7. Does this Bill create or amend a power to make delegated legislation that could amend an Act, define the meaning of a term in an Act, or grant an exemption from an Act or delegated legislation?</b>	YES
In relation to the unfair contract term provisions, the Bill provides a regulation making power to: <ul style="list-style-type: none"><li>• deem classes of contracts that are between parties in trade, and are not consumer contracts, to be small trade contracts, or</li><li>• exclude classes of contracts from being small trade contracts (subject to any terms and conditions).</li></ul> This power is necessary to ensure that there is an ability to deal with classes of contracts where the standard rules for determining whether a contract is a small trade contract will not necessarily be appropriate. This power is subject to a number of limitations, including that: <ul style="list-style-type: none"><li>• the Minister has consulted with affected parties and has considered their comments;</li><li>• in the case of regulations that deem contracts to be small trade contracts, the Minister is satisfied that the regulations are necessary or desirable to promote the purpose of the Act; and</li><li>• in the case of regulations that exclude contracts from being small trade contracts, the Minister is satisfied that the costs of compliance would have been unduly onerous.</li></ul>	

<b>4.8. Does this Bill create or amend any other powers to make delegated legislation?</b>	NO
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## Any other unusual provisions or features

<b>4.9. Does this Bill contain any provisions (other than those noted above) that are unusual or call for special comment?</b>	NO
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