

# Legislative statement: Fair Trading Amendment Bill

## Second Reading

### Overview

The Fair Trading Amendment Bill (**the Bill**) amends the Fair Trading Act 1986 (**the Act**) to introduce new protections against unfair commercial practices. Unfair commercial practices can include the use of pressure tactics, deception, one-sided contract terms, and practices that generally exploit the vulnerabilities of a consumer or small business. The Bill adds another layer to the existing protections in the Act by doing the following:

- It prohibits unconscionable conduct in trade.
- It extends the Act's existing protections against unfair contract terms in standard form consumer contracts to also apply to small trade contracts.
- It strengthens the ability of consumers to require uninvited direct sellers to leave or not enter their property.

The Bill also makes a number of minor technical changes to improve the functioning of the Act and support consistency with other legislation enforced by the Commerce Commission.

The following briefly describes the substantive changes in the Bill.

### New prohibition against unconscionable conduct

The Bill includes a new prohibition on unconscionable conduct to protect both consumers and businesses. Unconscionable conduct is conduct that goes beyond what is commercially necessary or appropriate. The prohibition applies to conduct during the formation of a contract, the terms of the contract itself, and the way in which a contract is enforced.

The prohibition is modelled on the approach in Australia, where the concept of unconscionable conduct has developed in case law. Australian courts have declared conduct unconscionable if it is 'against conscience by reference to the norms of society'. Such norms can include acting honestly, fairly and without deception or pressure. The Bill does not define what is unconscionable, but includes a list of factors that a court may have regard to in determining whether conduct meets the threshold. Those factors include the relative bargaining power of the parties, whether one party was required to comply with conditions that were not reasonably necessary to protect the legitimate interests of the other, whether one party exerted undue influence or pressure, and the extent to which the parties acted in good faith.

The Bill makes it an offence to engage in unconscionable conduct, with maximum penalties of \$600,000 for bodies corporate and \$200,000 for individuals. The range of civil remedies in the Act will apply (including injunctions, refunds and having contract terms altered or declared void).

### Unfair contract terms in small trade contracts

The Act currently provides protections against unfair contract terms in standard form consumer contracts. Standard form contracts are 'take it or leave it' contracts, where the party accepting the contract has no real ability to negotiate its terms. A term is unfair if it would cause a significant imbalance in the rights and obligations of the parties, is not reasonably necessary to protect the legitimate interests of the party benefitting from the term, and would cause detriment to one of the parties.

The Bill extends these protections against unfair contract terms to standard form 'small trade contracts'. These are contracts between businesses with an actual or expected total value of less than \$250,000 in any 12-month period. Limiting the protections to standard form contracts under

\$250,000 will ensure protections target businesses less likely to have the resources to perform due diligence on lower value contracts and that may have less bargaining power.

The Bill retains the existing enforcement regime for unfair contract terms, which allows the Commerce Commission to seek a court declaration that a contract term is unfair. Following such a declaration, the business must not apply, enforce or rely on the term.

The Bill provides a regulation-making power to deem classes of contracts to be small trade contracts, or to exempt contracts from being so. This is intended to ensure that the rules for determining small trade contracts do not inadvertently place classes of contracts inside or outside the protections where this outcome would be contrary to the policy intent. This power is subject to requirements for consultation and other analysis.

### **Empowering consumers to direct uninvited sellers to not enter property**

The Bill provides that a person engaging in an uninvited direct sale (for example, a door-to-door salesperson or a mobile trader) must leave or not enter a consumer's property as soon as possible if directed by the consumer. A direction may be made in the form of a generally worded written notice, such as one of the 'Do Not Knock' stickers promoted by Consumer NZ. The provision addresses a gap in the Trespass Act 1980, because it means that signage does not need to specifically identify the person being required to leave the property.

The Bill provides for enforcement by the Commerce Commission, alongside its enforcement of other laws relating to uninvited direct sales and mobile traders. A breach will be an offence, with penalties of up to \$30,000 for bodies corporate and \$10,000 for individuals. This is in line with existing penalties for other breaches of uninvited direct sales provisions.