



COVERSHEET

Minister	Hon Dr David Clark	Portfolio	Commerce and Consumer Affairs
Title of Cabinet paper	Fair Trading Amendment Bill: Supplementary Order Paper	Date to be published	23 June 2021

List of documents that have been proactively released

Date	Title	Author
11 March 2021	Fair Trading Amendment Bill: Supplementary Order Paper	<i>Office of the Minister of Commerce and Consumer Affairs</i>
11 March 2021	LEG-21-MIN-0020 Cabinet Legislation Committee: Minute of Decision: Fair Trading Amendment Bill: Supplementary Order Paper	<i>Cabinet Office</i>

Information redacted

YES / NO

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Some information has been withheld to maintain the confidentiality of advice to Government.

In Confidence

Office of the Minister of Commerce and Consumer Affairs
Chair, Cabinet Legislation Committee

Fair Trading Amendment Bill: Supplementary Order Paper

Proposal

- 1 I am seeking Cabinet's approval to lodge a supplementary order paper to make minor and technical changes to the Fair Trading Amendment Bill.

Executive Summary

- 2 The Fair Trading Amendment Bill gives effect to Cabinet decisions to introduce new protections against unfair commercial practices, including extending protections against unfair contract terms to small trade contracts between businesses.
- 3 The attached supplementary order paper makes minor changes to the Fair Trading Amendment Bill. The first change is to slightly amend the threshold for businesses covered by the unfair contract terms protections so that contracts between related parties do not count towards the threshold. The other change is to delay the commencement of the unfair contract terms provisions for insurance contracts so that commencement is set by Order in Council (with a backstop date of 1 April 2025). This delay will enable these changes to line up with changes that are likely to occur to the same provisions through the Government's review of insurance contract law.
- 4 I intend to introduce the supplementary order paper during the Committee of the whole House stage.

Background

- 5 The Fair Trading Amendment Bill (**the Bill**) amends the Fair Trading Act 1986 (**the Act**) to introduce new protections against unfair commercial practices. The Bill gives effect to Cabinet decisions [DEV-19-MIN-0189, DEV-18-MIN- 0204] to:
 - 5.1. prohibit unconscionable conduct in trade;
 - 5.2. extend the Act's existing protections against unfair contract terms in consumer contracts to also apply to small trade contracts between businesses (where the contracts are worth under \$250,000 per annum); and
 - 5.3. strengthen the ability of consumers to require uninvited direct sellers to leave or not enter their property, including through the use of "do not knock" stickers.
- 6 The Bill had its first reading on 12 February 2020 and was referred to the Economic Development, Science and Innovation Committee (**the Committee**). The Bill is currently awaiting second reading. It was discharged from the select committee on

12 August 2020 without a report and returned to the House for second reading as introduced.

7 I intend to make minor and technical changes to the Bill via a supplementary order paper (**SOP**) during the Committee of the whole House. These include the changes recommended in the departmental report by the Ministry of Business, Innovation and Employment (**MBIE**), which were not adopted by the Committee, as it did not produce a report.

8 These changes are:

8.1. simplifying the definition of 'small trade contract' by removing the concept of 'related parties';

8.2. allowing the application of unfair contract terms to business-to-business insurance contracts to be delayed until changes arising from the Government's review of insurance contract law are developed and passed; and

8.3. technical clarifications.

Removing the concept of 'related parties'

9 The Bill extends the existing protections against unfair contract terms in consumer contracts to standard form 'small trade contracts'. Small trade contracts are between businesses that form part of a trading relationship which, at the point the trading relationship is first entered into, have an expected total value of less than \$250,000 in any 12-month period. A trading relationship as currently defined includes contracts that are on the same or substantially similar terms as each other, and are between the same *or related parties*. Related parties would be, for example, subsidiary and parent companies.

10 During the select committee process, it was raised that this concept could be difficult for businesses to practically implement. Businesses would have to work out if the other party to the contract had related parties, and this could impact whether the unfair contract term provisions applied or not. This may lead to unintended consequences where businesses wrongly believe they do or do not have the protections of the unfair contract terms regime, and thus open themselves up to legal challenges.

11 By removing the concept of related parties it will be easier for contracting parties to know which other contracts are part of the trading relationship between them, and whether the total annual value of these contracts fall in or out of the unfair contract terms regime. The consequence of this change is that a relatively small number of additional contracts will likely fall within the unfair contract terms protections, because businesses that have different legal entities will be treated separately for the purpose of the provisions. I consider the associated costs to be minor and outweighed by the benefits of greater clarity and certainty for businesses and regulators.

Commencement of application of unfair contract terms provisions to business-to-business insurance contracts

- 12 During the select committee process for this Bill, the Insurance Council of New Zealand (the body advocating on behalf of fire and general insurers) submitted that concurrent amendments to the unfair contract terms provisions for insurance contracts will mean that insurers will need to review their contracts twice – once following the passing of the Bill, and again once changes are made giving effect to Cabinet decisions on insurance contract law. In November 2019, Cabinet agreed to reduce the exceptions for insurance from the unfair contract terms provisions in standard form consumer contracts [DEV-19-MIN-0189].
- 13 I am seeking to make a change via SOP to enable the application of unfair contract terms to business-to-business insurance contracts to be delayed until the changes to insurance contract law are developed and passed. The SOP provides that the unfair contract terms provisions of the Bill be commenced for business insurance contracts by Order in Council. A backstop provision would be inserted so that if no Order in Council is made, unfair contract terms would apply to business-to-business insurance contracts from 1 April 2025 instead.
- 14 While this change treats insurers differently, I consider it to be justified as they face the unique situation of having concurrent amendments which affect their contracts. This change reduces compliance costs for insurers.

Impact Analysis

- 15 Regulatory impact assessments were prepared and submitted at the time that Cabinet approval of the policy relating to the Bill was sought [DEV-19-MIN-0189, DEV-18-MIN-0204].
- 16 MBIE's Regulatory Impact Analysis Review Panel considered that the information and analysis summarised in the regulatory impact assessments met the criteria necessary for Ministers to make informed decisions on the proposals.

Compliance

- 17 The Bill complies with each of the following:
 - 17.1. the principles of the Treaty of Waitangi;
 - 17.2. the rights and freedoms contained in the New Zealand Bill of Rights Act 1990 and the Human Rights Act 1993;
 - 17.3. the disclosure statement requirements (a disclosure statement was prepared and attached at the time Cabinet approved the Bill for introduction [LEG-19-MIN-0208]);
 - 17.4. the principles and guidelines set out in the Privacy Act 1993;
 - 17.5. relevant international standards and obligations;

- 17.6. the Legislation Guidelines (2018 edition), which are maintained by the Legislation Design and Advisory Committee.

Consultation

- 18 The Treasury, the Ministry of Justice and Inland Revenue were consulted on the attached SOP. The Department of the Prime Minister and Cabinet has been informed.
- 19 The Economic Development, Science and Innovation Committee received 51 written submissions and heard 20 oral submissions on the Bill. These included submissions from industry and consumer organisations, businesses and law firms, and the Commerce Commission. That consultation has informed these proposals.
- 20 MBIE has undertaken targeted consultation with the Insurance Council of New Zealand on when the unfair contract terms provisions will commence for insurance contracts.

Binding on the Crown

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

Other instruments

- 22 The provision empowering the making of an Order in Council to appoint a commencement date for the unfair contract terms provisions to apply to business-to-business insurance contracts is secondary legislation.

Commencement of legislation

- 23 The substantive changes already in the Bill will come into force one year after the date of Royal assent.
- 24 The SOP provides that the new protections against unfair terms in small trade insurance contracts will commence on a date to be appointed by Order in Council, or, if no earlier date is appointed, before 1 April 2025. This is intended to enable the new protections to be coordinated with the insurance contract law review being carried out by Government, so that insurance businesses do not need to review their contracts twice. This is set out in the explanatory note to the SOP.

Parliamentary stages

- 25 The Bill was introduced on 17 December 2019. It is currently awaiting second reading and Confidential advice to Government
- 26 The SOP should be lodged with the Clerk of the House on 16 March 2021.

Proactive Release

- 27 This paper will be published on MBIE's web site within 30 days, subject to withholdings as appropriate under the Official Information Act 1982.

Recommendations

The Minister of Commerce and Consumer Affairs recommends that the Committee:

- 1 **note** that the Fair Trading Amendment Bill amends the Fair Trading Act 1986 to introduce new protections against unfair commercial practices, including a prohibition on unconscionable conduct and protections against unfair contract terms in small trade contracts (where the contracts are worth under \$250,000 per annum);
- 2 **note** that Cabinet approved the introduction of the Fair Trading Amendment Bill on 10 December 2019 [LEG-19-MIN-0208];
- 3 **note** that the Fair Trading Amendment Bill Confidential advice to Government
- 4 **note** that the Fair Trading Amendment Bill was discharged from the Economic Development, Science and Innovation Committee without a report on 12 August 2020 and returned to the House for second reading as introduced;
- 5 **note** that the Minister of Commerce and Consumer Affairs intends to make the following changes at the Committee of the whole House stage via the attached Supplementary Order Paper:
 - 5.1. simplifying the definition of 'small trade contract' by removing the concept of 'related parties', with the effect that contracts between related parties such as a parent and subsidiary company will not count towards the \$250,000 annual value threshold to come under the unfair contract terms protections;
 - 5.2. allowing the application of the unfair contract terms provisions to business insurance contracts to be delayed until changes arising from the Government's review of insurance contract law are developed and passed; and
 - 5.3. technical clarifications to improve drafting;
- 6 **authorise** the Minister of Commerce and Consumer Affairs to make any necessary minor or technical changes to the Supplementary Order Paper prior to lodgement;
- 7 **agree** that the Supplementary Order Paper be lodged by 16 March 2021.

Authorised for lodgement

Hon Dr David Clark
Minister of Commerce and Consumer Affairs