



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

Date	Title	Author
24 July 2019	Unfair Commercial Practices: Policy Decisions	Office of the Minister of Small Business Office of the Minister of Commerce and Consumer Affairs
24 July 2019	Unfair Commercial Practices: Policy Decisions DEV-19-MIN-0189	Cabinet Office

Information redacted

YES / NO (please select)

Any information redacted in this document is redacted in accordance with MBIE's policy on Proactive Release and is labelled with the reason for redaction. This may include information that would be redacted if this information was requested under Official Information Act 1982. Where this is the case, the reasons for withholding information are listed below. Where information has been withheld, no public interest has been identified that would outweigh the reasons for withholding it.

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



Cabinet Economic Development Committee

Minute of Decision

This document contains information for the New Zealand Cabinet. It must be treated in confidence and handled in accordance with any security classification, or other endorsement. The information can only be released, including under the Official Information Act 1982, by persons with the appropriate authority.

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;

[DEV-18-MIN-0270]

- 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);

- 8 **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;
- 9 **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;
- 10 **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;
- 11 **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

- 12 **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

- 13 **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

- 14 **agreed** to give effect to the above proposals through a Fair Trading Amendment Bill (and associated regulations if necessary);
- 15 **noted** that the Fair Trading Amendment Bill has category Confidential advice to Government
- 16 **invited** the Minister of Commerce and Consumer Affairs to issue drafting instructions to the Parliamentary Counsel Office to give effect to the above paragraphs;
- 17 **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

PROACTIVELY RELEASED

Annex 1: Technical amendments to the Fair Trading Act 1986

Topic	Status quo	Reason for change	Proposed change
Disclosure requirements relating to extended warranty agreements	S36U provides that when a consumer purchases an extended warranty, a copy of the agreement must be provided to the customer at the time of purchase. This includes purchases made over the phone.	It may be difficult to comply with the requirement to provide a copy of the extended warranty at the time of purchase for agreements made by phone. This requirement is also inconsistent with the Act's provisions for uninvited direct sales, where in the case of an agreement entered into over the phone, a copy must be provided within five working days after the date on which the agreement was entered into.	Align the provisions for disclosure of extended warranty agreements purchased over the phone with those for uninvited direct sales. In the event an extended warranty is purchased over the phone, the business would have five working days to provide the agreement to the consumer. Consumers would still have five working days to cancel an extended warranty, commencing from the time the consumer receives the agreement.
Referring Fair Trading Act matters to the High Court	The Commerce Commission has no express power to 'state a case' for the opinion of the High Court on any question of law relating to the Fair Trading Act. It has this power under the Credit Contracts and Consumer Finance Act 2003 (CCCFA) and Commerce Act 1986.	Stating a case allows the Commerce Commission to take a 'test case' to get clarity over unclear or novel areas of law, without necessarily naming a defendant. At present, the Commission can seek 'declaratory relief', but this requires naming a defendant and subjecting them to the costs of a full trial, and is case-specific, so may not provide the required clarification.	Give the Commerce Commission an express power to state a case for the opinion of the High Court on Fair Trading Act matters.
Disclosure of information in the course of a Fair Trading Act investigation	The Commerce Commission does not have the power to restrict the disclosure of information provided to it during an investigation, or restrict the disclosure of the Commission's line of questioning in an investigation under the Fair Trading	The lack of this power presents a risk of investigations being prejudiced by, for example, investigation subjects who are being interviewed separately discussing what information should be provided to the Commission. In addition, the lack of a power under the Fair Trading Act creates issues	Give the Commerce Commission the power to restrict the disclosure of information provided to it during an investigation (including its line of questioning).

	Act. It has these powers under the Commerce Act and the CCCFA.	when an investigation spans both the Fair Trading Act and the CCCFA.	
Enforceable undertakings	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.	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.	Amend s46A to clarify that an undertaking may include an undertaking to pay compensation, or to reimburse the Commission for its investigation costs.
Management banning orders	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: <ul style="list-style-type: none"> 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: <ul style="list-style-type: none"> 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: <ul style="list-style-type: none"> 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.