



**MINISTRY OF BUSINESS,
INNOVATION & EMPLOYMENT**
HIKINA WHAKATUTUKI



Review of consumer law

Fair Trading Act evaluation report

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How to get in contact with us

This document is not formally seeking submissions from stakeholders. However, MBIE generally welcomes feedback, submissions, and proposals for reform from stakeholders on any aspect of consumer law.

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List of Acronyms

CCCFA Credit Contracts and Consumer Finance Act 2003

CGA Consumer Guarantees Act 1993

FTA Fair Trading Act 1986

MBIE Ministry of Business, Innovation and Employment

OECD Organisation for Economic Cooperation and Development

UCT Unfair Contract Term

UGSA Unsolicited Goods and Services Act 1975

Executive Summary

Between 2010 and 2015, New Zealand's consumer laws were comprehensively reviewed and updated. These consumer law reforms resulted in substantive amendments to the Fair Trading Act 1986 (FTA), the Consumer Guarantees Act 1993 (CGA), and created a new Auctioneers Act 2013, in addition to amending other consumer legislation.

This report seeks to evaluate the changes made to the FTA as part of that process, and outlines some additional areas where further work may be desirable. The evaluation process involved interviews with stakeholders, data analysis (where possible), consumer surveys, and the use of any other relevant evidence, such as academic papers. In addition to evaluating changes made as part of the consumer law reforms, we also looked at a number of other matters related to fair trading such as 'drip pricing'.

Our evaluation has found that the FTA reforms have largely had a positive impact on the outcomes that they were trying to achieve, though some reforms were more successful than others.

In particular, the new unsubstantiated representations provisions appear to have been particularly effective at increasing confidence that claims made about goods and services are required to be, and generally are able to be, backed up with evidence. The introduction of the unfair contract terms provisions, increases in penalties, and new enforcement tools for the Commerce Commission have also been important.

However, there are a range of areas where further work may be justified. Annex 1 summarises these areas.

This report is not proposing or seeking feedback on particular policy options. Rather, it is intended to feed in to a future discussion paper on potential further amendments to the Fair Trading Act. The discussion paper is likely to be released in the first half of 2020, and will focus on areas where the case for change is strongest.

For several of the reforms, we do not propose further legislative change, either because they have largely achieved the desired result, or because non-regulatory approaches are likely to be more effective. For example, the biggest theme that came through the interview process was that more education and advocacy is needed in order to increase the effectiveness of the reforms and of consumer law in general. However, this was tempered with a view that merely providing more information to consumers and businesses about consumer law is insufficient and that further ways of developing understanding and empowering consumers should be investigated.

The issues considered in this report sit alongside other projects that are also likely to result in changes to the FTA. This includes work to address unfair commercial practices, a review of insurance contract law, and strengthening the ability of consumers to require mobile traders to leave their premises.

1 Introduction

1.1 About this document

1. Between 2010 and 2015, New Zealand’s consumer laws were comprehensively reviewed and updated. The 2010-2015 consumer law reforms aimed¹ to update consumer law so that it:
 - a. is principles-based
 - b. enables consumers to transact with confidence
 - c. protects suppliers and consumers from inappropriate market conduct
 - d. is easily accessible to those who are affected by it
 - e. achieves alignment, as appropriate, with the Australian Consumer Law.
2. These consumer law reforms resulted in substantive amendments to the Fair Trading Act 1986 (FTA), the Consumer Guarantees Act 1993 (CGA), the Weights and Measures Act 1987, the Carriage of Goods Act 1979, the Sale of Goods Act 1908, and the Secondhand Dealers and Pawnbrokers Act 2004, and created a new Auctioneers Act 2013.²
3. This report seeks to evaluate the changes made to the FTA as part of that process, and outlines some additional areas where further work may be desirable. It is not a review of the entire FTA, and it is not proposing or seeking feedback on particular policy options (although we welcome general feedback and proposals for reform). Rather, it is intended to feed into a forthcoming discussion paper which will consider whether additional amendments to the FTA are warranted.
4. This report is a result of MBIE’s ongoing and proactive commitment to monitor and evaluate consumer law as part our regulatory stewardship role. The regulatory impact statements relating to the consumer law reforms proposed that a review of the effectiveness of the new laws would be reported back within five years.

1.2 The role of consumer law

5. The consumer and commercial regulatory system focuses on the interactions that businesses and consumers have before, during, and after the point of sale of a good or service. It does this by providing important consumer protections and business obligations, but also provides a framework for interactions between private individuals, and between businesses, to some extent.
6. The overall goal of the consumer and commercial regulatory system, which includes the FTA, is to promote the long-term interests of consumers by seeking to ensure that:
 - a. consumers and businesses have the information they need to transact with confidence;
 - b. consumers and businesses are protected from high levels of detriment; and

¹ Consumer Law Reform Bill 2011 (287-1)

² Further information on the 2010-2015 reforms is available here: <https://www.mbie.govt.nz/business-and-employment/consumer-protection/review-of-consumer-law/review-of-consumer-law-2010-2015/>

- c. consumers and businesses have access to redress if things go wrong.³
7. The FTA contributes to these goals by prohibiting misleading and deceptive conduct and other unfair practices by businesses in trade. It provides for the making of consumer information standards and the use of product safety tools to inform and protect consumers. It also governs a range of specific forms of consumer transactions such as layby sales, extended warranties, uninvited direct sales and auctions.
8. Much of the time, consumers do not have to worry about consumer laws because they work in the background to prevent or deter actions that would negatively affect them. Most businesses, most of the time, provide an effective marketplace for consumers to transact with confidence.
9. The most significant issues tend to occur when a small number of consumers run into a minority of businesses, who through either deliberate or accidental action lead to consumer harm. The detriment to these consumers can be large and can significantly impact their lives. However, a wide range of consumers experience some kind of issue. The 2018 New Zealand Consumer Survey found that 56 per cent of consumers had experienced a consumer 'issue' with a specific product in the past two years. This indicates that consumer detriment can be widespread, although many issues raised by consumers are likely to be minor.
10. It is not the goal of the consumer and commercial regulatory system – including the FTA – to protect consumers or businesses from all forms of potential detriment. Rather, it seeks to achieve the objectives outlined above while also ensuring that businesses and consumers are not unnecessarily prevented from entering into contracts that reflect their wishes, that the law is predictable for businesses (and consumers), and that compliance costs are reasonable.

1.3 Scope of this report

11. In this report, we assess and provide insights into the following FTA reforms⁴:
 - a. unfair contract terms (UCTs);
 - b. consumer product safety requirements;
 - c. uninvited direct sales;
 - d. extended warranties;
 - e. unsubstantiated representations;
 - f. layby sales;
 - g. online selling;
 - h. unsolicited selling;
 - i. business-to-business contracting out; and
 - j. enforcement and penalties.
12. While not relating to specific changes made as part of the consumer law reforms, this report also considers the issues of drip pricing, the role of intermediaries, search and switching costs, and education and advocacy. These matters have been raised with us as potential gaps, or identified internally, since the reforms were implemented.

³ More information on the consumer and commercial regulatory system is available here:

<https://www.mbie.govt.nz/assets/9eee4bbf45/regulatory-charter-consumer-commercial.pdf>

⁴ Note the FTA auctions reforms were not assessed as part of this process and are likely to be considered at a later date alongside the Auctioneers Act.

13. Other issues that have been raised with us or identified internally include cross-border enforcement, consumer data rights, and access to redress generally. Due to their size and multi-agency applicability, we think these issues are better suited to stand-alone reviews and we have not addressed them in this report.

1.4 Other potential changes to the FTA

14. There are a number of concurrent projects underway that will or may result in changes to the FTA. These include:
 - a. **Unfair commercial practices.** The Government has decided to introduce a prohibition against unconscionable conduct and to expand the existing protections against UCTs in standard form consumer contracts to also protect business-to-business contracts with a value below \$250,000. These changes will be implemented through a forthcoming Fair Trading Amendment Bill.
 - b. **Review of insurance contract law.** This review is considering options around removing or amending the exemptions from the unfair contract term provisions of the FTA for certain insurance contracts
 - c. **Credit Contracts and Consumer Finance Act (CCCFA) review.** As part of this review, Cabinet has made a decision to give legal effect to 'Do Not Knock' stickers under the FTA uninvited direct sales provisions. These changes will be given effect to through the Fair Trading Amendment Bill.

Minor, technical amendments

15. Outside of this broader evaluation of the FTA, as part of MBIE's general regulatory stewardship functions, we have also proposed a number of minor, technical amendments to the FTA. These will be implemented through the Fair Trading Amendment Bill. These include:
 - a. **Aligning the provisions for disclosure of extended warranty agreements purchased over the phone with those for uninvited direct sales.** The current provision requires 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 may be difficult to comply with for agreements made over the phone and hence the amendment proposes using the uninvited direct sales approach whereby the business would have five working days to provide the extended warranty agreement to the consumer for purchases made over the phone. The cooling off period would commence when the consumer receives the agreement.
 - b. **Giving the Commerce Commission an express power to state a case for the opinion of the High Court on FTA matters.** This would allow the Commission to take a 'test case' to get clarity over unclear or novel areas of law, without necessarily naming a defendant.
 - c. **Empowering the Commerce Commission to prohibit disclosure of information provided to it in the course of a FTA investigation.** 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. A similar power to impose confidentiality orders currently exists in section 100 of the Commerce Act.
 - d. **Clarifying that an enforceable undertaking may include an undertaking to pay compensation, or to reimburse the Commerce 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.

- e. **Addressing gaps in the FTA's management banning order provisions.** The FTA will be amended to provide that a court may 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 FTA on at least two occasions within a 10 year period, or personally breached the FTA once themselves, and (in relation to different conduct) been a director or manager of a business that has breached the FTA.

2 Methodology

2.1 Overview of our methodology

17. First, we developed an evaluation baseline of intended outcomes, as no evaluation baseline was developed at the time of the reforms. This was based on the original regulatory impact statements created for the reforms, and other relevant information, such as consultation documents.
18. We then gathered data and insights using a mixed-methods approach. Methods included interviews with key stakeholders, data analysis and a consumer stakeholder survey.
19. Finally, we assessed the issues, and proposed a number of matters to be explored further. We note that these are not conclusive recommendations for reform. Rather, it is a set of areas where we think further investigation would be merited. To make a full case for reform, we would want to collect further evidence on the costs and benefits. Further, the public should be given an opportunity to comment on the extent to which these are significant issues worthy of attention and what options could and should be used to address the issues.

Interviews

20. Interviews with key stakeholders identified detailed reasons why the reforms have or have not been effective. The interviews were semi-structured and included specific evaluation questions as well as opportunities for open dialogue about consumer law matters more generally.
21. The interviews were successful at attaining different stakeholder viewpoints about the reforms, whilst also providing the opportunity for stakeholders to discuss ideas and information that had not been previously considered.

Data analysis

22. Where it was possible to source relevant quantitative data, we used it to inform our assessment. Sources include Commerce Commission complaints data, the 2016 National Consumer Survey⁵, and the 2018 New Zealand Consumer Survey⁶, amongst others. In some instances, the nature and form of the data limited its usefulness.

Consumer stakeholder survey

23. In addition to the 2016 National Consumer Survey and the 2018 New Zealand Consumer Survey, we also developed a consumer stakeholder survey that was focused specifically on the consumer law reforms.
24. The survey was created using a MBIE Survey Monkey account. It was distributed to stakeholders via consumer networks at Consumer NZ, Community Law Centre and Citizens Advice Bureau, as well as social media posts by MBIE's Consumer Protection team and the Commerce Commission.

⁵ MBIE. (2017). *National Consumer Survey 2016: Summary Findings*. Retrieved from <https://www.consumerprotection.govt.nz/assets/PDFs/NCS-Final-Report-Summary-Findings.pdf>

⁶ MBIE. (2019). *New Zealand Consumer Survey 2018: Summary Findings*. Retrieved from <https://www.mbie.govt.nz/dmsdocument/5709-nz-consumer-survey-2018-report-pdf>

25. The survey comprised mostly quantitative Likert-type scale questions regarding consumer's experiences with the reforms but also provided opportunities for qualitative responses.
26. The survey aimed to provide a key avenue for the 'consumer voice' to be heard in the project. Unfortunately the response rate was low, with only 28 responses. As a result, this survey is not heavily relied on in this report. There are many possible reasons why the low response rate occurred, including lack of consumer interest, the length of the survey, and poor survey distribution. Regardless of the underlying cause, the 'consumer voice' has not been well heard and other avenues for engaging with consumers will be need to be explored in future.

2.2 Approach to evaluating the reforms

27. The approach taken in this report to evaluating the reforms involves five key steps:
 - a. **Description of the reform** – an overview of what changes the reform made to the FTA.
 - b. **Intended outcomes** – identifying the outcomes the reform intended to achieve.
 - c. **Evidence** – results from the interviews, data analysis and consumer stakeholder survey, plus any other evidence sources that provide indications of how effective the reforms have been at achieving their intended objectives.
 - d. **Assessment** – an assessment of the evidence that draws conclusions as to what extent the reforms have been effective and, if necessary, any potential inferences for why the reforms have or have not been effective.
 - e. **Potential areas for further work** – a proposal as to whether or not further work should be considered in relation to this reform area.

2.3 Approach to assessing other potential gaps

28. For the matters that were not part of the 2010-2015 consumer law reforms, we have:
 - a. defined the problems and considered what outcomes would be desired from any reforms in these areas;
 - b. identified what evidence and data there is about the problem, and the potential extent of the issues; and
 - c. in some cases, we have also identified interventions that are being explored overseas or may be worth looking at further.

3 General evaluation results

29. This chapter provides a general overview of how the FTA reforms have contributed towards their intended outcomes. Chapters 4 and 5 discuss the individual reforms that were made.

3.1 Supporting the purpose of the Fair Trading Act

30. The purpose of the FTA, as outlined in section 1A, is:
- “to contribute to a trading environment in which
- (a) the interests of consumers are protected; and
 - (b) businesses compete effectively; and
 - (c) consumers and businesses participate confidently.”
31. Stakeholders noted that consumer laws are generally well placed to promote the long-term interests of consumers, and that the reforms have improved consumer protection, enabled productive businesses to compete on a more level playing field, and contributed towards consumers and businesses participating more confidently.
32. This is reinforced by the results of the 2018 New Zealand Consumer Survey, in which 58 per cent of consumers strongly agreed or agreed that New Zealand has adequate laws to protect consumers from being misled or cheated by businesses, compared to only 12 per cent who disagreed or strongly disagreed with this statement.
33. While it is likely the reforms have had some positive impacts on the outcomes underlying the purpose of the FTA, the impact of the reforms was generally seen to be fairly modest, with most of the substantive aspects of the FTA already existing prior to the reforms.
34. Some stakeholders considered that further reform to some aspects of the FTA may be needed to better achieve its purpose.

3.2 Education and advocacy

35. The most significant theme coming out of the initial evaluation and review has been the need to continue education, advocacy and promotion of consumer law. According to the 2018 New Zealand Consumer Survey, 46 per cent of consumers’ report that they either ‘know a lot’ or ‘know a moderate amount’ about their consumer rights. However, the Survey also tested the knowledge of consumers by posing 10 questions about consumer rights. Only 4 out of these 10 questions were responded to correctly by at least 50 per cent of respondents – indicating that actual knowledge of consumer laws is less than reported knowledge.
36. Every stakeholder we talked to mentioned further education as a way of improving outcomes for consumers.
37. Further discussion of education and advocacy is included in Chapter 6.

3.3 Access to redress and enforcement

38. The consumer law reforms had little impact on the channels in which consumers can access redress, although by introducing new protections, they have created further matters that consumers can seek redress for.
39. According to the 2018 New Zealand Consumer Survey, just over half (56 per cent) of consumers report having experienced a problem with a purchase in the past two years. Most consumers (72 per cent) took action to resolve their most recent problem, but only half of consumers (52 per cent) who experienced a problem said that their problem was resolved.
40. Many stakeholders commented on the dispute resolution system:
 - a. One stakeholder felt that the telecommunications and the electricity and gas dispute resolution schemes work well, and that generally independent resolution schemes play an important role.
 - b. Another stakeholder thought that disputes tribunal decisions are inconsistent and that there is not enough oversight.
 - c. Yet another stakeholder thought that the disputes tribunal should have higher compensation and that the maximum claims that disputes tribunals can settle is too low.⁷
 - d. Many stakeholders thought that consumers can find disputes resolution processes intimidating, confusing and not worth the effort. This is reflected in the 2018 New Zealand Consumer Survey, with only 5 per cent of consumers who took action to resolve a problem contacting a dispute resolution service.
41. In terms of enforcement, several stakeholders thought that, while the Commerce Commission does a good job of enforcing the FTA, there were still enforcement gaps. For example:
 - a. Some stakeholders thought that there needed to be more proactive monitoring of markets, such as regular price checking for the purposes of determining if 'specials' are misleading or deceptive.
 - b. One stakeholder thought that there are some ongoing and recurring problems that are not being effectively enforced, such as extended warranty agreements that do not meet the requirements.
 - c. Another thought the Commerce Commission could take more prosecutions in relation to breaches of product safety provisions.
42. Many stakeholders commented on the tools available to the Commerce Commission. Some thought that the current tools and approaches were insufficient and that many matters went unenforced because the current tools were not easy or cost-effective enough. Multiple stakeholders commented that infringement notices could be and should be able to be used in more circumstances. These issues are explored further in Chapter 5.
43. One stakeholder thought that businesses know that it is easy to get away with bad practices and some still see getting caught as an acceptable cost of business.

⁷ At the time of the stakeholder interviews, the disputes tribunal could only settle claims up to \$15,000 (or \$20,000 if all parties agreed) but this increased to \$30,000 as of 29 October 2019.

3.4 Alignment with Australia

44. One of the goals of the reforms was better alignment with the Australia consumer laws under the Single Economic Market agenda. Many of the law changes were the same as or similar to Australian legislation, including unsubstantiated claims, UCTs, uninvited direct selling, unsolicited selling, layby sales, court enforceable undertakings, and some aspects of the product safety reforms.
45. Stakeholders thought that it was generally helpful for traders to have the same or similar rules in both countries. Enforcement bodies in both countries share lessons and discuss approaches to new or emerging conduct in markets. Consistency in laws also allows Australian case law to be relied on. However, the importance of alignment should not be overstated.

3.5 Principles-based legislation

46. Another aim of the reforms was to move to a more principles-based approach to consumer law. One way this was supported was by including principles-based purpose statements in the FTA, CGA, and Auctioneers Act.
47. There is an inherent tension between principles-based rules that are flexible enough to deal with a multitude of situations, and the desires of both businesses and consumers for certainty. For example, one stakeholder noted that there is ambiguity and confusion around what constitutes misleading advertising around pricing during sales.
48. Whilst some stakeholders dislike the ambiguity associated with a principles-based approach, most agreed that it is a better alternative to a more prescriptive approach. Stakeholders also noted that, given rapid change in technology, legislation needs to be technologically-neutral and not reference specific technologies. Principles-based legislation is a key way of achieving this.

3.6 Consolidation of Acts

49. A final aim of the reforms was to consolidate a number of pieces of consumer legislation into fewer Acts, with the goal of simplifying consumer law so that both consumers and businesses have a better understanding of their rights and responsibilities.
50. Generally, stakeholders were either supportive or neutral as to the consolidation. One stakeholder considered that whilst the consolidation of the Acts makes it easier to find relevant legislation, it doesn't necessarily decrease compliance costs.

3.7 Other matters

51. Some stakeholders suggested that MBIE should be doing more to measure and monitor the effectiveness of consumer law, including capturing more data and having more regular feedback mechanisms, rather than just periodic evaluations. They also considered that MBIE should be looking 'end-to-end' across the consumer system and figuring out ways for interested parties to work better together.
52. With many emerging issues and features in the economy, stakeholders generally agreed that the consumer law system needs to be vigilant and continue to evolve to maintain its effectiveness into the future. Future issues that the consumer law system will have to contend with that were raised by stakeholders included:

- a. The 'internet of things', particularly how the interconnectedness of devices might impact on product safety.
 - b. Monitoring and policing false or misleading information is coming into New Zealand from overseas sources.
 - c. Needing to interact with customers online or via mobile phones, whilst also needing to deliver complex and detailed information.
53. Some stakeholders were concerned that businesses were seeing the law as a target – as one stakeholder noted, “laws are a backstop and good ethical businesses need to go beyond”. Several business stakeholders said that they or their members go beyond the minimum requirements in the law and promote best practice, rather than the aiming for mere compliance.

3.8 Consumer and Commercial Regulatory System Assessment

54. Many of the themes presented in this chapter are reinforced and expanded on in MBIE’s 2018 Consumer and Commercial Regulatory System Assessment, which was conducted independently of this evaluation.⁸
55. This Assessment found that the regulatory system is generally fit-for purpose. However, it also found that there are perceived issues with respect to enforcement and access to dispute resolution mechanisms, that the system does not serve vulnerable consumers well, that there is a heavy reliance on non-government actors, and that work is needed to address future issues and pressures for the system.

⁸ MBIE. (2018). *Consumer and Commercial Regulatory System Assessment*. Retrieved from: <https://www.mbie.govt.nz/assets/9f6871846f/consumer-and-commercial-regulatory-system-assessment.pdf>

4 Specific evaluation results: Substantive changes to the FTA

4.1 Introduction

56. This chapter presents our evaluation of the individual FTA reforms. For each reform, we provide a brief description of the reform, followed by an outline of the outcomes that were sought. The available evidence is then discussed and assessed, and then some proposals for further work are outlined.
57. This chapter discusses the following changes:
 - a. unfair contract terms;
 - b. product safety requirements;
 - c. door-to-door and telemarketing sales (also known as uninvited direct sales);
 - d. extended warranties;
 - e. unsubstantiated representations;
 - f. layby sales;
 - g. online selling;
 - h. unsolicited selling; and
 - i. business-to-business contracting out.
58. Changes to the FTA's provisions relating to enforcement and penalties are considered in Chapter 5.

4.2 Unfair contract terms (UCTs)

Description of reform

59. The UCT provisions were introduced as part of the consumer law reforms to provide a mechanism to reduce the prevalence of UCTs in standard form consumer contracts. UCTs are defined as those that:
 - a. would cause a significant imbalance in the parties to the contract's rights and obligations;
 - b. are not reasonably necessary to protect the legitimate interests of the advantaged party; and
 - c. would cause detriment to a party if they were applied, enforced, or relied on.
60. Standard form contracts are contracts where the terms of the contract have not been subject to 'effective negotiation', such as a gym membership or electricity contract, with businesses generally utilising the same contract with a range of consumers.
61. Some terms cannot be declared to be unfair. These include terms that relate to the main price or subject matter of the contract; terms that are required or expressly permitted by any enactment; or certain terms in contracts of insurance.

62. The reforms recognised that a range of terms in contracts can unfairly shift risk and liability onto consumers, potentially resulting in significant detriment. They also recognised that, in reality, consumers often do not have any real ability to negotiate the terms in standard form contracts.
63. In response, the reforms sought to promote a better balance in the rights and obligations that contracts may impose on consumers and businesses, without preventing businesses from including terms that are core to the nature of the agreement.
64. In terms of enforcement, only the Commerce Commission may seek a court order to declare that a term in a standard form consumer contract is unfair. Private parties are not able to apply to have a term declared to be unfair. If a court has declared that a term in a standard form consumer contract is an unfair contract term, then the business must not include the unfair contract term in a standard form contract. The business must also not apply, enforce, or rely on the UCT. The contract will continue to bind the parties to the extent it is capable of operating without the term.
65. There are no penalties for businesses that are found to have included UCTs in a standard form consumer contract, unless the term has previously been declared to be unfair.
66. Currently, the UCTs protections in the FTA only apply in business-to-consumer standard form contracts, although this will be extended to some business contracts through the upcoming Fair Trading Amendment Bill.

The 'grey list'

67. The FTA includes the following 'grey list' of contract terms that *may* be unfair:

The 'grey list' of unfair contract terms in the FTA

The following are examples of the kind of terms that, if in a consumer contract, may be unfair contract terms:

- a. a term that permits, or has the effect of permitting, one party (but not another party) to avoid or limit performance of the contract
- b. a term that permits, or has the effect of permitting, one party (but not another party) to terminate the contract
- c. a term that penalises, or has the effect of penalising, one party (but not another party) for a breach or termination of the contract
- d. a term that permits, or has the effect of permitting, one party (but not another party) to vary the terms of the contract
- e. a term that permits, or has the effect of permitting, one party to vary the upfront price payable under the contract without the right of another party to terminate the contract
- f. a term that permits, or has the effect of permitting, one party unilaterally to vary the characteristics of the goods or services to be supplied, or the interest in land to be sold or granted, under the contract
- g. a term that permits, or has the effect of permitting, one party unilaterally to determine whether a contract has been breached or to interpret its meaning

- h. a term that limits, or has the effect of limiting, one party's vicarious liability for its agents
- i. a term that permits, or has the effect of permitting, one party to assign the contract to the detriment of another party without that other party's consent
- j. a term that limits, or has the effect of limiting, one party's right to sue another party
- k. a term that limits, or has the effect of limiting, the evidence one party can adduce in proceedings relating to the contract
- l. a term that imposes, or has the effect of imposing, the evidential burden on one party in proceedings relating to the contract.

68. The intention of introducing a grey list was to provide guidance around the types of terms that could be considered to be unfair. The list is intentionally not determinative as there may be situations when the terms on the grey list are not unfair.

Outcomes

69. The key outcomes sought by the UCTs reforms were:
- a. Fewer UCTs in standard form contracts, resulting in a fairer spread of risk between parties to the contract and reduced consumer detriment (both financial and otherwise).
 - b. Consumers being able to transact with increased confidence knowing that firms have incentives to ensure that standard form contracts do not contain UCTs.

Evidence

MBIE consumer surveys

70. Most consumers who responded to our consumer stakeholder survey identified that they had entered into a least one standard form contract in past three years, and none were very likely to read the fine print. Respondents provided examples of unfair terms they have come across in a variety of different industry contracts and many noted that consumers have no real choice but to accept the terms, if they want the good or service.

Complaints data and enforcement

71. At the time of writing, since 2014, the Commerce Commission had received 588 complaints related to UCTs. This is high compared to the number of complaints received relating to other provisions of the FTA, however perhaps not unexpected given the prevalence of standard form contracts.
72. No declarations of UCTs have been made to date. However, the Commerce Commission has recently taken its first two court proceedings seeking declarations that contracts contained unfair terms. The proceedings are against Switzerland-based ticket resale website Viagogo and Auckland mobile trader Home Direct.
- a. Viagogo's contract includes a term stating that all disputes brought by a consumer must be heard in Swiss courts under Swiss law, but Viagogo can choose to take court action against consumers in the consumer's own country. The Commission alleges that this term is unfair.
 - b. Home Direct customers were invited to opt-in to a "voucher entitlement scheme" when they signed up to purchase goods. Under the voucher scheme, direct debit payments did not stop after the goods were paid off. Instead they were converted every week into "voucher entitlements" which could be used towards purchasing more goods from Home Direct. The Commission alleges that terms of the scheme are unfair

because “vouchers” could not be refunded or exchanged for cash, and expired after 12 or 24 months with the proceeds forfeited to Home Direct.

73. Additionally, the Commission has so far undertaken three major reviews into UCTs in the telecommunications, energy retail and gym sectors. Some major public transport providers have also made changes to their standard terms of use for their re-usable pre-paid travel cards. When the Commission found contract terms that they considered unfair in these sectors, traders whose contracts were reviewed were generally responsive in terms of removing those terms from their contracts, or were otherwise able to satisfy the Commission that the terms in question were not unfair.

Stakeholder views

74. Stakeholders provided a number of comments on these reforms and potential amendments that should be considered.
75. Overall, there were mixed stakeholder views on the costs to business from the reform. One stakeholder noted that there were some one-off costs when the provisions came into force, but no ongoing costs. Another stakeholder thought that compliance with the UCT provisions remained complex, and that the initial review of contracts took considerable time and effort, involving a significant upfront cost as well as ongoing costs, without necessarily leading to greater consumer protection.
76. Some stakeholders thought that it would be worth considering whether the UCTs protections should be extended to also include standard form contracts entered into by small businesses, as has been done in Australia. They argued that small businesses are often in a similar situation to consumers in regards to ‘take it or leave it’ standard form contracts as they may not have effective bargaining power. The forthcoming Fair Trading Amendment Bill will extend the protections to business-to-business contracts with a value below \$250,000.
77. A few stakeholders we talked to expressed concerns about the unfair contract terms exceptions for insurance as not being sufficiently justified. Others thought that they made sense because they give insurance providers more certainty and that insurance is an inherently different product to other products to which unfair contract terms might apply to. The insurance exceptions are currently being considered as part of the Insurance Contract Law review.
78. Actions taken by the Commerce Commission in respect of UCTs, such as their sector reviews, enforcement action, and preparation of guidelines, were seen as largely positive. However, some stakeholders were concerned that, despite this action, there are still UCTs and more attention is potentially needed in relation to specific types of UCTs.
79. Stakeholders held mixed views about the ‘grey list’. As noted earlier, the list is intentionally not prescriptive. Whilst all agreed that the uncertainty created by this was a negative aspect, some thought that the principles-based model was nonetheless superior to a prescriptive ‘blacklist’ of prohibited terms.
80. Others thought that there could be ‘grey list’ or other terms that would be unfair in all circumstances and questioned whether the test that the Commerce Commission has to meet to challenge a ‘grey list’ or other term is too high or complicated.
81. Some stakeholders pointed to elements of contracts such as break fees or cancellation clauses, as potentially unfair. One stakeholder noted that the current exemption in the UCT regime for the upfront price of a contract may exclude these terms from being able to be considered as unfair, and that this definition should be changed so that these terms could be challenged as UCTs.

82. One stakeholder felt that consumers should be able to take private action in respect to UCTs and that a broader range of remedies should be available in the case of a breach of the provisions.

University of Auckland Study

83. A study was undertaken by the University of Auckland⁹ in 2016 that assessed the impact of the reforms by looking at the prevalence of 'grey list' terms in 114 standard form consumer contracts across a range of industries, both several months before, and several months after, the reforms came into effect.
84. Of the contracts studied, only four contained no 'grey list' terms before the reforms came into effect with the average number of 'grey list' terms being 10.74. After the reforms came into effect, none of the contracts that had contained UCTs had removed all of the 'grey list' terms but the average number of 'grey list' terms dropped to 9.52. We note, however, that the presence of a grey list term does not mean that it is unfair in the circumstances.
85. The researchers deemed that approximately a third of the contracts analysed were changed 'significantly' after the reforms, with 'significantly' being defined as an apparent attempt to ameliorate or remove a 'grey list' term.

Assessment

86. Overall, we consider that the UCTs reforms have had at least some positive impacts on the outcomes sought. However, it appears that a range of at least potentially unfair terms remain that are not being addressed.
87. While the Commission appears to be having a good level of success in achieving the removal of UCTs in areas where it is proactive, it does not have the resources to take action in respect of every UCT that it becomes aware of. While many businesses seek to comply with the law as a matter of course, given the design of the enforcement regime for the UCT provisions at present, businesses currently have limited incentives to remove UCTs from their contracts until they are approached by the Commission. These concerns appear to be reinforced by the University of Auckland's research. We think that changes to the enforcement regime may be needed to address this, alongside other potential reforms highlighted by stakeholders.

Potential areas for further work

88. There may be merit in further consideration of:
- a. Whether private parties should be able to take action in respect of UCTs, whether the FTA's full civil regime (including injunctions, refunds, and damages) should apply to UCTs, without terms needing to have previously been declared to be unfair, and whether some sort of penalty should apply if UCTs are included in standard-form contracts, without the need for that term to have previously been declared to be unfair.
 - b. Whether the definition of upfront price should be changed to better reflect what a reasonable consumer would define as being an 'upfront' price, and so that fees and charges for ancillary matters may be challenged as UCTs.
 - c. Whether there are some 'grey list' or other terms that should be prohibited in all circumstances, in order to provide more certainty and reduce enforcement costs.

⁹ Sims, A., & Mara, L. (2016). *Unfair Online Contract Terms in New Zealand: Evaluating the Effect of Regulatory Change*. Retrieved from

[https://researchspace.auckland.ac.nz/bitstream/handle/2292/31703/Unfair%20online%20contract%20terms%20in%20New%20Zealand-%20evaluating%20the%20effect%20of%20regulatory%20change%20final\(1\).pdf?sequence=19](https://researchspace.auckland.ac.nz/bitstream/handle/2292/31703/Unfair%20online%20contract%20terms%20in%20New%20Zealand-%20evaluating%20the%20effect%20of%20regulatory%20change%20final(1).pdf?sequence=19)

4.3 Product safety requirements

Overview

89. The current product safety system under the FTA is mostly reactive and based on joint regulation by MBIE (Trading Standards) and the Commerce Commission. Many aspects of the product safety system existed prior to the consumer law reforms.
90. The FTA is part of a broader network of product safety legislation which places the responsibility on suppliers for the safety of the products they supply. Outside of guarantees under the CGA regarding goods being of acceptable quality (which includes being safe), there is no legislated duty of care for suppliers to ensure the safety of their products. Rather, the FTA works in reverse, focusing on risk mitigation once an issue is identified.
91. Under the FTA, MBIE advises the Minister of Commerce and Consumer Affairs on the development and issuance of product and service safety standards. The requirements of product and service safety standards are mandatory for the goods they relate to. Once issued, these standards are enforced by the Commerce Commission.
92. MBIE also advises the Minister of Commerce and Consumer Affairs on the issuance of Unsafe Goods Notices. These notices ban the sale or supply of the goods specified in the notice. Again, once issued, these are enforced by the Commerce Commission.
93. The product safety system also relies heavily on the use of voluntary product recalls, which MBIE plays a key role in facilitating. Recalls are published on the Product Recalls website (recalls.govt.nz), which is the common portal for recall information on all products, including those administered by other government agencies (with the exception of food recalls). Businesses and consumers can subscribe to this for information about recalls that have been made, and businesses can use it to submit recall notifications to MBIE. The recalls are also shared on social media platforms to further publicise the message. The Minister of Commerce and Consumer Affairs may also order a compulsory product recall.

Description of reform

94. As part of the consumer law reforms, the government strengthened product safety requirements in a number of areas beyond the tools outlined above, including by:
 - a. Providing that the Minister of Commerce and Consumer Affairs can issue a product safety policy statement to provide guidance on the safety of a class or classes of goods. This effectively codified a tool already employed by MBIE and its predecessors.
 - b. Requiring businesses to notify MBIE within two working days if they voluntarily recall an unsafe product with certain details about the recall and the product safety issue. Prior to this, many recalls were notified to MBIE, but it was not compulsory to do so.
 - c. Expanding the scope of unsafe goods notices and compulsory recalls by providing that these can be used where it is reasonably foreseeable that use or misuse of goods may cause injury.
 - d. Allowing for the appointment of MBIE product safety officers who can enter and inspect places to determine whether suspect goods are in fact unsafe, with equivalent enforcement powers for Commerce Commission staff.
 - e. Providing that MBIE product safety officers may issue suspension of supply notices to prohibit a person from supplying a good where they know or believe on reasonable grounds that the good is unsafe.

Outcomes

95. Key outcomes sought from the product safety reforms included:
- a. Consumers (and MBIE) being able to easily find out about product safety recalls (including voluntary recalls), so that consumers have the information they need to return or otherwise take action on recalled products.
 - b. Making identification and withdrawal of unsafe products an easier process, with earlier action in response to unsafe goods, and a corresponding reduction in the number of instances of unsafe products causing harm to consumers.

Evidence

96. In general, there is not as much evidence around the effectiveness of the product safety reforms, as there is for some other areas in this report. This is, in part, because it is difficult to identify what potential product safety issues have been prevented by the reforms and interventions.
97. In addition, many of the new tools provided through the reforms have yet to be formally used extensively. For example, there has only been one product safety policy statement so far (on button batteries) and no formal reliance on the reasonably foreseeable use/misuse provisions. This section therefore relies heavily on what stakeholders told us in interviews.

Stakeholder views

98. One of the key views expressed in interviews was that New Zealand's product safety system remains much more reactive than proactive. For example, unsafe goods notices have been used a number of times to essentially ban certain products once it becomes clear that they are unsafe (i.e. reactively). However, they haven't yet been used in respect of *foreseeable* use or misuse yet. On the other hand, one stakeholder argued that the foreseeable use/misuse reforms clarified that suppliers could not ignore how a product could and was being used by consumers, and therefore strengthened suppliers' responsibility for their products across the product lifecycle.
99. One stakeholder noted that consumers have expectations that products are safe and that there is a myth that every product is tested. In reality, no country in the world has the capacity to test every product, and New Zealand is no exception to this.
100. Further, it is difficult to make overseas suppliers (where many products originate) comply with New Zealand safety laws. One stakeholder suggested that a more joined-up approach between Customs and other agencies could see a greater emphasis being placed on safety at the border, and that this could be leveraged through New Zealand's trade agreements.
101. On the recall process, one stakeholder thought that the legal requirement to inform MBIE about voluntary recalls has worked and is worthwhile, and noted that having one place consumers can go to find out about product safety recalls reduces the effort needed to find out this information. They also noted that feedback from users of the website to MBIE has been positive.
102. However, one stakeholder was of the view that the overall recall process is sometimes complex and there is generally not a great line of sight over the whole process, particularly for voluntary recalls. One stakeholder also argued that the average consumer doesn't want to engage with the recalls process. They thought that trying to respond to a recall can be intimidating, confusing, time consuming and not worth the effort, depending on the product and the risk (or perceived risk) involved.

103. Stakeholders also raised a number of other issues with the current laws and product safety system.
- a. One stakeholder told us that suspension of supply notices have too short a time limit attached to them (three working days, with a maximum of two renewals). This effectively prevents them from being used to stop the supply of a product whilst a product safety standard or policy statement is being developed. Testing a product in a laboratory and subsequently developing a product safety standard or policy statement can take several weeks (if not months) to develop and confirm regulations via an Order in Council.
 - b. Stakeholders also suggested to us that it might be more efficient to bring all of the product safety regulatory functions under a single agency. There are multiple regulators for product safety depending on the type of product and the situation that it is used in. These include MBIE, the Commerce Commission, Medsafe, Worksafe, the Environmental Protection Authority, and the Ministry for Primary Industries.
 - c. One stakeholder thought that the Commerce Commission could take more prosecutions for product safety.¹⁰ Another noted that the funding and capacity for enforcement may not be sufficient in the product safety space to sufficiently enforce the FTA product safety provisions.
104. Generally, stakeholders noted that product safety is a dynamic environment and that there are emerging issues, particularly around new safety hazards posed by the ‘internet of things’ or interconnected home products. One stakeholder noted that product safety issues are becoming more complex, with the breadth of issues increasing. For example, there are increasing safety concerns arising around the use of potential toxic chemicals and new technologies such as nanotechnologies where knowledge around potential harms and longer term adverse effects are unknown at present.

Assessment

105. As outlined above, it is difficult to assess the overall impact of the product safety reforms. However, we consider that these are likely to have at least a modest positive effect.
106. While it is difficult to identify how product recall trends have changed since the reforms, the changes around voluntary recalls have nevertheless provided MBIE with more confidence that suppliers will notify recalls, meaning that enforcement officers can spend more time working with suppliers, rather than seeking out non-notified recalls.
107. The strengthened compulsory recall provisions also provide guidance and strong incentives for suppliers to initiate voluntary recalls. While only two compulsory recalls have been ordered since 1986, this reflects the fact that the term ‘voluntary’ extends to recalls which are initiated by a supplier after significant negotiations with MBIE.
108. However, issues with the recall system remain. It is difficult for MBIE to reach all relevant consumers via current avenues to notify them of recalls, and businesses are not required to update MBIE on the status of their recalled products. There is little visibility regarding how successful recalls are at removing potentially unsafe products and protecting consumers from harm. Looking at ways to improve this visibility and the recall regime in general – such as by making better use of social media – could be a useful avenue to ensure that recalls are effective at reducing harm to consumers.

¹⁰ In the 2018 calendar year the Commerce Commission concluded 8 product safety prosecutions. They also have a further 5 prosecutions currently before the courts.

109. In terms of the amendments around reasonably foreseeable use and misuse, whilst there have been no formal actions taken to date, the fact that these provisions are now enshrined in the FTA means that this is factored into decisions and dialogue with suppliers when product safety related risks are being examined.
110. More generally, the current product safety system continues to be largely reactive. Given the significant changes in the market since the FTA was established, questions have been raised about the suitability of this approach. Absence of formal pre-market obligations for product safety can mean safety is overlooked or deprioritised within a business. On the other hand, the extent of the problem is unclear.
111. Australia is currently considering whether a 'general safety provision' should be introduced in order to put the onus on businesses to supply a safe product. Such an approach could potentially make the product safety system more proactive. Other alternatives that may be worthwhile considering include greater promotion of the NZS ISO 10377:2017 standard¹¹. This standard provides guidelines for businesses to ensure their products are safe.

Potential areas for further work

112. There may be merit in further consideration of:
 - a. Ways to achieve greater visibility of voluntary product safety recalls and improve the effectiveness and oversight of the recalls regime in general.
 - b. Whether the enforcement powers of MBIE product safety officers should be expanded, such as in relation to the issuance of suspension of supply notices and the ability to require the provision of information.
 - c. Whether the current system should move to being more proactive than reactive and, if so, how to do so.
 - d. Whether improvements can be made in how product safety regulators work together to promote and achieve good product safety outcomes.

4.4 Uninvited direct sales

Description of reform

113. The uninvited direct sales reforms involved repealing the Door to Door Sales Act 1967, and added provisions into the FTA relating to door-to-door sales and telemarketing sales, collectively known as uninvited direct sales.
114. Where the Door to Door Sales Act applied, it required sales agreements to be in writing, and provided a seven-day right of cancellation (a 'cooling-off' period) to purchasers following entering into the agreement. However, the Act had a number of limitations. Most notably, it did not apply sale of goods by cash or credit card (only credit agreements), and there was uncertainty as to the types of selling situations it applied to (such as whether it applied in situations such as trade fairs, one-off venues, and TV shopping).
115. The uninvited direct sales reforms sought to address these issues by clarifying that the protections applied in relation to any sales of goods or services in a consumer's home, workplace, or over the phone, that are not initiated by the consumer and have a purchase price that is more than \$100 (or otherwise cannot be ascertained at the time of supply).

¹¹ More information on this standard is available here: <https://productsafety.tradingstandards.govt.nz/for-business/consumer-product-safety-guidelines-for-suppliers/>.

116. The reforms also amended the disclosure requirements for uninvited direct sales, and now provide, amongst other things, that agreements must:
- a. be in writing, including details of the goods or services to be supplied and the price payable;
 - b. be expressed in plain language;
 - c. have the supplier's contact information;
 - d. contain a summary of the consumer's rights to cancel the agreement within 5 working days or if the supplier failed to comply with their requirements; and
 - e. be accompanied by oral notice of the consumer's rights in regards to cancellation, before the agreement is entered into.
117. The protections do not apply to other locations (such as shopping malls or other public places) or mediums (such as marketing via electronic messaging). They also do not apply to renewal agreements or certain financial products.
118. The uninvited direct sales protections recognise that in some instances, uninvited direct sellers may rely on pressure tactics, or consumers may otherwise be in a vulnerable position, that justifies protections over and above those provided for other forms of transactions.

Outcomes

119. Key outcomes sought through the uninvited direct sale reforms were:
- a. Consumers and businesses are clear about what types of uninvited direct sales are covered and what are not by the law.
 - b. Consumers have cancellation and other rights in appropriate situations, regardless of the method of payment.

Evidence

General evidence

120. Door-to-door sales are unpopular with many consumers. A Consumer NZ survey¹² showed that 70 per cent of their members dislike door-to-door salespeople and want them to stop calling. Since 2014, Consumer NZ has been running a campaign where they distribute free 'Do Not Knock' stickers with the aim of deterring direct sellers. In response to this campaign, the Direct Selling Association has stated that they will tell their members not to enter premises with a sticker. The Electricity Retailers' Association of New Zealand also has a code that provides that their members will respect 'Do Not Knock' stickers.

Complaints data and enforcement

121. Since 2014, at the time of writing, the Commerce Commission had received 208 complaints related to uninvited direct selling. This appears to be a fairly high number of complaints, given the relatively small number of people who purchase a product via uninvited direct selling (although many more may be approached).
122. A number of complaints to the Commerce Commission are about direct selling in malls or shopping centres (which are not covered by the uninvited direct selling provisions in the FTA). In particular, the Commission has received complaints about sales in shopping centres related to paintball 'vouchers', photography and skincare products, and tax refund services.

¹² Consumer NZ. (2014). *Consumer launches Do Not Knock campaign*. Retrieved from: <https://www.consumer.org.nz/articles/consumer-fights-back-against-door-to-door-sellers-728>

Anonymised examples of sales tactics in malls from Commerce Commission complaint data

“I was approached by someone outside of Manukau mall who said they could give me free info on tax refunds and misled me to believe they were from the IRD ... later I find out that they added me to their tax agent client list and that my tax refund went directly into their bank account” (2017)

“A few months ago at Pakaranga Plaza ... C got her son photographed, then went back to order photos, paid \$1000, T said they would deliver within six weeks, it has been 2 months and C is still waiting. C can't get through on phone, no replies to emails.” (2016)

123. Some enforcement action has been taken by the Commerce Commission since the reforms have come into effect. For example, the Commission took a prosecution against Auckland Academy of Learning Ltd, which included two charges of failing to give consumers oral notice of the rights to cancel an uninvited direct selling agreement. The company pleaded guilty and was fined a total of \$351,000 for all charges.

MBIE consumer surveys

124. The 2018 New Zealand Consumer Survey provides some evidence regarding the uninvited direct selling provisions.

125. This survey found that only seven per cent of consumers have purchased from a telemarketer or door-to-door salesperson in the past two years. The results also highlight that consumers have some knowledge of key uninvited direct sales provisions, with 65 per cent of consumers correctly identifying that there is a cooling off period allowed with agreements made through uninvited direct sales.

126. The 2016 National Consumer Survey found that, of consumers whose most recent sales agreement was from a door-to-door or telemarketing salesperson, 76 per cent felt they were given clear and full information about the features, terms and conditions of the agreement and 89 per cent felt confident that they understood the agreement well enough to make an informed decision to enter it. These results are consistent with businesses following the uninvited direct selling requirements about providing certain information to consumers in order to help them make well-informed decisions.

127. Even for those who had a problem with their uninvited direct sale, 63 per cent managed to resolve their problem. This compares favourably to those who had a problem purchasing in person from a shop, with only 52 per cent of these people managing to have their problem resolved.

Stakeholder views

128. Interviews with several stakeholders identified that some direct sellers, particularly mobile traders (or 'truck shops'), have been causing issues for consumers.

129. One stakeholder argued that some of these sellers are deliberately targeting lower socio-economic areas, offering low quality goods for over-inflated prices, and generally engaging in predatory conduct. This stakeholder thought that door-to-door selling by businesses in trade should be banned.

130. Another stakeholder noted that mobile traders are – unfortunately – necessary for some people, though can act as an unwelcome enticement for others. This stakeholder considered that there should be greater communication about other services that these people could use, such as social services, buying goods for delivery online, and more affordable credit options. One stakeholder suggested that some door-to-door sellers are deliberately ignoring 'Do Not Knock' signs and are sometimes pushing their way into people's homes and

persuading or intimidating people into entering into transactions they do not want to make. This stakeholder considered that the reforms haven't changed this behaviour.

131. Interviewees indicated that the reforms had not had any significant adverse impact on businesses. One stakeholder indicated that the number of complaints their organisation had received about uninvited direct sales had not changed significantly since the reforms, and that there hadn't been any significant change in the number of consumers relying on the cooling-off period to return goods. It was also noted that overall sales from direct selling have increased by a small margin since the reforms came into effect.

Assessment

132. We consider that the reforms are likely to have had some positive impact on the outcomes sought.
133. While some uninvited direct selling appears to remain problematic, survey data indicates that such problems are likely to be relatively concentrated rather than widespread.
134. Mobile truck shops appear to be a particular source of harm, with the recent review of consumer credit regulation looking at this issue in some depth.¹³ As a result, the Credit Contracts Legislation Amendment Bill will require sales by mobile traders to be subject to the protections offered in respect of consumer credit contracts, including that traders comply with responsible lending requirements and undergo 'fit and proper person' assessments. In addition, the forthcoming Fair Trading Amendment Bill will provide legal backing to 'Do Not Knock'-style notices.
135. Beyond this, there is some evidence that direct selling in locations other than those covered by the uninvited direct sales provisions – such as shopping mall concourses – is causing consumer harm of a similar nature to the harms that the uninvited direct selling laws were introduced to protect against (such as pressure selling tactics). Given this, there could be benefit in examining the case for extending the uninvited direct sales provisions to other situations – such as shopping malls – where uninvited direct sales may take place.

Potential areas for further work

136. There may be merit in further consideration of whether places other than a consumer's home, workplace, or over the phone (such as shopping mall concourses) should be covered by the uninvited direct sales provisions.

4.5 Extended warranties

Description of reform

137. An extended warranty is a guarantee offered to consumers to protect the goods they purchase, generally for a specified time period. They are an additional cost over and above the price of the good that is being purchased.
138. Extended warranties typically provide remedies that are similar to those already provided under the CGA, such as commitments to repair, replace, or refund faulty goods. They may also offer a range of benefits not covered by the CGA, such as on-site repair and coverage of wear and tear beyond a 'reasonable' time period.

¹³ More information is available here: <https://www.mbie.govt.nz/business-and-employment/consumer-protection/review-of-consumer-credit-law/review-of-consumer-credit-law-2018>

139. The extended warranty provisions introduced through the consumer law reforms allow consumers to cancel an extended warranty within five working days of purchase (a 'cooling-off' period), and require businesses to disclose in writing to consumers information including:
 - a. a comparison between the protections the extended warranty provides and standard CGA guarantees; and
 - b. the existence of the cooling-off period (and how they can cancel the extended warranty during that time).
140. Where reasonably practicable (such as a face-to-face or telephone sale) the business must also give the consumer oral notice of the cooling off period and how the consumer may cancel the agreement.
141. If businesses do not comply with this law, the consumer may cancel the warranty agreement at any time and have the right to a full refund.
142. This reform was driven by findings of research conducted by the Ministry of Consumer Affairs in 2009. This research found that most consumers incorrectly believe they get more protection from extended warranties than they receive under the CGA. A 2007 Consumer NZ Mystery Shopper exercise found that there was strong retailer emphasis on selling extended warranties, confusing or misleading sales pitches, and a distinct lack of knowledge of the CGA and its application to retail situations. The Commerce Commission had also indicated that enforcement regarding retailers' claims about extended warranties was difficult because of the lack of documentation.
143. Prior to the reforms, it was considered that consumers did not have sufficient information to make an informed decision regarding purchasing a warranty. Many consumers may have consequently been purchasing warranties that did not give them any added benefit, and therefore spent money unnecessarily.
144. Conversely, from a business perspective, some extended warranties that legitimately provided benefits beyond the CGA may have been perceived by consumers as not offering any benefit on top of the CGA. This potentially reduced their ability to promote and sell these warranties.

Outcomes

145. The intended outcomes of this reform were:
 - a. Consumers have the information they need to determine the value of the extended warranty beyond what is already guaranteed by the CGA, and are not wasting money on products that do not provide them additional benefits.
 - b. Businesses offering 'genuine' extended warranties are not disadvantaged as a result of businesses offering low value or worthless extended warranties.
 - c. The Commerce Commission is better able to assess and investigate representations regarding extended warranties.

Evidence

MBIE consumer surveys

146. The 2016 National Consumer Survey found that 26 per cent of consumers had purchased an extended warranty in the past two years, which decreased to 25 per cent in 2018. The Survey found that extended warranties were one of the 'products' least trusted by consumers, with only 41 per cent of consumers generally trusting that they will not be misled or treated

unfairly when purchasing an extended warranty. However, only 3 per cent of consumers reported having a problem with their extended warranty.

147. According to the 2016 Survey, consumers that purchased extended warranties were largely confident about the information they were receiving, with 81 per cent of consumers saying they were given full and clear information when buying an extended warranty, and 85 per cent stating that they are confident that they understood the extended warranty agreement well enough to make an informed decision to enter into it.
148. Unfortunately, consumer confidence appears to be higher than their actual understanding of their consumer rights in respect of consumer guarantees. According to the 2018 New Zealand Consumer Survey, 75 per cent of consumers surveyed could not identify or did not know whether a store must repair a broken refrigerator outside of the manufacturer's 12 month warranty period, as long as it is still within a reasonable lifespan for that product. These consumers did not believe that the CGA covers them in this situation (even though it does), suggesting that many extended warranties that are purchased may be unnecessary.

Complaints data and enforcement

149. At the time of writing, since 2014, the Commerce Commission had received 41 complaints related to extended warranties. This is low compared to the number of complaints received on other specific reform aspects, although this may reflect a lack of consumer understanding about their rights, as outlined above.
150. The Commerce Commission's 2016/17 Consumer Issues report¹⁴, which also includes data from several other organisations, recorded 694 complaints about the broader topic of warranties and guarantees. This was an increase of 160 per cent from the 2015 calendar year (267 complaints). Consistent with what we heard in interviews, the report notes that some traders offering extended warranties on high-value goods are not adequately explaining the benefits additional to the consumer's protection under the CGA.
151. The Commerce Commission has so far taken court action three times in respect of breaches of the FTA's extended warranty provisions.

Stakeholder views

152. We heard mixed opinions on the extended warranty reform. Some stakeholders thought that the reform has generally worked well. Other stakeholders thought that there are still substantial issues that need to be addressed, particularly around guidance and education.
153. In line with the survey results, we were also told that consumers do not understand the differences between their rights under the CGA and those provided by extended warranties, and that this can make it difficult for them to ask the right questions when considering whether to purchase an extended warranty.
154. A few stakeholders commented on the guidance that was or should be available. One stakeholder told us that there is not much guidance around how to interpret the protections provided in the reforms. Another stakeholder recommended enacting the regulations that were contemplated in section 36W of the FTA. These would specifically prescribe a statement of consumers' rights and remedies under the CGA for warrantors to use in their disclosure documents. This would avoid any ambiguity around what to include in a summary and potentially make enforcement easier.
155. We also heard about some concerning practices:

¹⁴ Commerce Commission. *Consumer Issues 2016/17*. Retrieved from: https://comcom.govt.nz/data/assets/pdf_file/0028/89092/Consumer-Issues-Report-2016-17.pdf

- a. One stakeholder became aware of a staff manual which included making sales of extended warranties as a performance measure, but did not include any guidance about the CGA. Consequently, the stakeholder found that staff knew very little about the CGA. Another stakeholder mirrored this concern, arguing that some businesses are not telling consumers what their rights are under the CGA and that retail staff do not know enough about the CGA.
- b. One stakeholder found that some stores are overstating the benefits of their extended warranties and make misleading claims about consumer rights under the CGA. According to a survey they conducted, many retailers are trying to ‘upsell’, and are using extended warranties as a means to do this.
- c. Some consumers have complained to one stakeholder that extended warranties had been sold to them without their permission.

Sample of businesses’ extended warranty agreements

156. We looked at extended warranty agreements (available online) from some large New Zealand retail stores. All of these agreements had sections that compared the protections consumers have under the CGA with the extended warranty on offer. However, there were significant formatting differences.
157. None of the extended warranty agreements we looked at contained the required information on the front of the document – it is usually preceded by a cover page and a brief description of the warranty. This may not be consistent with the requirements in the FTA. The Commerce Commission states on their website that “the front page containing the key information should not be preceded by a cover page”.¹⁵

Extended warranties mystery shop – Consumer NZ

158. In 2015, Consumer NZ undertook a “mystery shop” exercise to see how businesses were responding to the new extended warranties laws.¹⁶ The report expressed a number of concerns around retailers’ practices.
159. Some of these concerns do not appear to have been addressed. For instance, one warranty we looked at still makes it appear as if it provides protection above what the CGA offers. This guarantee provides for a replacement with a “comparable product”. Consumer NZ believes that the CGA offers more protection because “if a product can’t be repaired, you have the right to reject it and request a full refund or replacement”. This is not stated in the warranty.

Assessment

160. While the extended warranty reforms have gone some way to achieving the outcomes sought, the survey results indicate that consumer understanding in this area remains low.
161. Our sample of extended warranties demonstrates that businesses have extended warranty agreement documents that meet some of the requirements in the FTA. However, there is room for improvement to ensure that language and formatting is consistent across extended warranties. Introducing regulations, as already provided for in the FTA, could create a level playing field for businesses, make it easier for business to comply with the law, and provide consumers with clear and consistent information on their rights.
162. In some cases, extended warranties are not providing enough information for consumers to recognise if extended warranties provide benefits beyond the CGA. We remain concerned that many extended warranties are being sold that do not provide protection over and above

¹⁵ See: <https://comcom.govt.nz/business/dealing-with-typical-situations/selling-extended-warranties>.

¹⁶ See: <https://www.consumer.org.nz/articles/extended-warranties-mystery-shop>

the CGA. This can lead to consumers spending money for no added benefit. There may be scope for additional reform to ensure that the original objectives of the provisions are achieved.

Potential areas for further work

163. In addition to the technical change being made to the extended warranty provisions (see Chapter 1), there may be merit in further consideration of:
- a. Whether there would be benefit in making regulations prescribing specifically what information is required to be displayed for an extended warranty agreement and what format this could take.
 - b. Other ways of improving the extended warranty regime, including whether this is an area that would benefit from further education and enforcement or whether further law change is required to achieve the outcomes sought.

4.6 Unsubstantiated representations

Description of reform

164. The unsubstantiated representations amendments to the FTA made it illegal for a person in trade to make an unsubstantiated representation about goods, services or land. An unsubstantiated representation is one where the business, at the time the representation is made, does not have reasonable grounds for the representation.
165. In determining if a representation is unreasonable, it does not matter whether the representation is false or misleading. In other words, it is possible for the representation to be true and not misleading but not based on reasonable grounds at the time it was made.
166. The reasonable grounds requirement does not apply to representations that a reasonable person would not expect to be substantiated. For example, general hyperbole or 'puffery' in advertising is not required to be substantiated, as there is little likelihood that this would mislead consumers.
167. Private parties are not able to take action in respect of unsubstantiated representations.¹⁷
168. The unsubstantiated representation provisions were introduced in reflection of the fact that it can be difficult and expensive for the Commerce Commission to prove that a claim made about a product is false or misleading, especially in criminal cases. The unsubstantiated claims provisions were introduced to put the onus on businesses to be able to back up their statements.

Outcomes

169. Key outcomes that this reform hoped to contribute towards were:
- a. Reduced consumer harm from the number of false statements made by businesses. The reform aims to do this by effectively shifting the burden onto suppliers to demonstrate that their statements are true and based on reasonable grounds.
 - b. Reduced enforcement costs in relation to misleading and deceptive conduct for the Commerce Commission.

¹⁷ It should be noted that the Advertising Standards Authority also plays an important role in policing and dealing with complaints, under the Authority's Codes, about unsubstantiated representations in advertisements.

Evidence

MBIE consumer surveys

170. While not providing evidence specifically related to the substantiation reforms, the 2018 New Zealand Consumer Survey identified that consumers are generally confident that they will not be misled when buying goods or services. In particular, 74 per cent of consumers are confident that they can buy goods or services and not be misled, and 52 per cent of consumers trust that the information given to them by sales people is fair or accurate always or most of the time.

Complaints data and enforcement

171. At the time of writing, since 2014, the Commerce Commission has received 595 complaints related to unsubstantiated representations. This is high compared to the number of complaints received on other specific reform aspects, however perhaps not unexpected considering given the frequent and unavoidable nature of 'representations'.
172. To date, the Commission has taken court action four times in relation to unsubstantiated representations. It has also issued a range of warning letters to businesses.

Stakeholder views

173. In carrying out our review, we have not received any information from stakeholders which indicates that the unsubstantiated representation provisions are unwarranted, have not been effective, or need amending to make them more effective.
174. All stakeholders that we spoke to about this reform considered it positive and a success. In particular, some stakeholders noted that the Commerce Commission's 'If you can't back it up, do not say it' education campaign was well received and contributed to the effectiveness of this reform. One stakeholder noted that businesses have responded well to the unsubstantiated representation provisions.

Assessment

175. Based on our review, we consider that the reform has been largely successful at achieving the outcomes sought.

Potential areas for further work

176. We do not propose any further work in respect of the unsubstantiated representation provisions at this time.

4.7 Layby sales

Description of reform

177. Broadly speaking, layby sales are sales in which a consumer will not take possession of the goods until all or a specified portion of the total price has been paid. The layby sales reforms to the FTA replaced the Layby Sales Act 1971. The Layby Sales Act provided for sellers to disclose certain information about the layby sale in writing to the buyer at the buyer's request. It also allowed buyers to cancel the sale at any point before the purchase price has been paid. The reforms:

- a. amended the scope of agreements that are deemed to be layby sales (including by raising coverage from goods with a value below \$7,500 to those with a value below \$15,000¹⁸);
- b. mandated up-front written disclosure of key information about the agreement (rather than just at the consumer's request);
- c. provided that suppliers may also cancel layby sales in certain situations; and
- d. made certain other technical changes.

Outcomes

178. This reform hoped to contribute towards empowering consumers to make informed decisions on layby sales by strengthening, modernising and simplifying the relevant legislation.

Evidence

MBIE consumer surveys

179. The 2018 New Zealand Consumer Survey indicated that consumer purchases through layby sale agreements are less frequent than other forms of transactions, and are declining in popularity. Only 14 per cent of consumers said they purchased something through layby in the last two years¹⁹, down from 17 per cent in 2009. In comparison, 42 per cent of respondents in 2018 had entered into a credit contract in the last two years.

Complaints data and enforcement

180. At the time of writing, since 2014, the Commerce Commission had received 68 complaints related to layby sales. This appears to be a relatively low number of complaints, given the number of consumers who reported purchasing a product via layby in the past two years.
181. The Commission has issued two infringement notices for breaches of the layby disclosure provisions since the reforms took effect.

Stakeholder views

182. Stakeholders made limited comments on the layby sales reforms, other than noting that retail layby sales may increasingly become an outmoded way of consumers purchasing goods (apart from layby sales via mobile traders).

Assessment

183. The reason for the decline of layby sales appears to be the recent emergence of the 'buy now pay later' sales approach offered by businesses such as Laybuy and Afterpay, and perhaps more generally, more extensive access to, and acceptance of, credit.
184. 'Buy now pay later' businesses operate a payment platform that allows consumers to purchase goods from merchants and take immediate possession of the goods, without paying for the good in full (or at all) at the time of purchase. The businesses pay merchants in full for the goods (less a fee for the service), and are then reimbursed by the consumer, who pays the normal price of the goods through instalments. There is no interest charged to consumers, although late fees may be charged for missed payments. These services can differ

¹⁸ Or higher, if provided for in the Disputes Tribunal Act 1988. The limit increased to \$30,000 from 29 October 2019.

¹⁹ It is possible that some respondents to the 2018 survey also conflated layby sales with 'buy now pay later' services, which are not always layby sales as defined by the FTA.

from layby sales as defined under the FTA, under which goods are not collected until at least part of the sale price has been paid.

185. During the recent review of credit contract law, consumer advocates and some lenders raised concerns about new credit products, including the ‘buy now pay later’ payment platforms, being unregulated by the CCCFA. The review determined there is very limited evidence of harm from such payment platforms to date. As a result, Cabinet agreed that the payment platforms should not be brought within scope of the CCCFA at this time. However, in light of the rate of innovation in credit markets, Cabinet also agreed to create regulation-making powers to bring such products in scope of the CCCFA if necessary at a later date.
186. Separate to the review of the CCCFA, we have also identified that there are currently overlapping, and potentially conflicting, legal obligations for suppliers selling goods on deferred payment terms (where payments are made by instalments and not upfront at the time of purchase). In particular, some types of deferred payment sales are subject to the FTA’s layby sales provisions as well as the CCCFA’s credit contract provisions, which have different disclosure requirements and cancellation rights. As a result, the Credit Contracts Legislation Amendment Bill is amending the FTA and CCCFA so that any agreement that is a layby sale under the FTA and also a consumer credit contract under the CCCFA will be subject to the provisions of the latter Act (and will not have layby disclosure) but will have layby cancellation rights (and not CCCFA cancellation rights).

Potential areas for further work

187. Beyond the technical changes detailed above, in light of the likely declining appeal to consumers and businesses of layby sales, we do not propose any further work in respect of the layby sales provisions in the FTA at this time.

4.8 Online selling

Description of reform

188. The ‘disclosure of trader status on internet’ reform amended the FTA to provide that, when goods or services are offered for sale online, and the seller is in trade, the seller must identify itself as being in trade. This applies to all traders who advertise or sell to New Zealand consumers online, even if the trader is based overseas.
189. To support this obligation, any intermediary that provides a platform for online selling (like an auction or daily deal website) must take reasonable steps to ensure that traders using their platform disclose their trader status.
190. The FTA’s definition of “trade” is broad. It defines trade as “any trade, industry, profession, occupation, activity of commerce or undertaking relating to the supply or acquisition of goods or services.”
191. Many factors can be relevant to whether a person is in trade, including whether they:
 - a. regularly or habitually offer to sell goods or services;
 - b. make, buy or obtain goods with the intention of selling them;
 - c. are GST registered;
 - d. have staff or assistants to help manage their sales; or
 - e. have incorporated a company or set up another type of trading vehicle.
192. A person selling goods that they bought or acquired for their own personal use is unlikely to be in trade.

193. This reform recognised that a seller’s status as to whether they are in trade substantially affects the extent of their obligations under the FTA, and, in turn, consumers’ rights as buyers. The importance of this distinction has grown alongside the rise of online platforms such as Trade Me, on which many sellers are unlikely to be in trade.

Outcomes

194. The key outcome sought by this reform was to support consumers to transact with confidence by helping them to understand where their consumer rights under the FTA and CGA do and do not apply.

Evidence

Complaints data and enforcement action

195. Soon after the reform came into effect, the Commerce Commission started receiving complaints concerning whether people selling things online were ‘in trade’. In its 2016/17 Consumer Issues report, the Commerce Commission observed an increase in FTA complaints related to purchases considered or made online. The Commerce Commission noted that “there is a degree of trust required on the part of the consumer when making purchases online. Consumers’ ‘trust in trade’ online may decrease if more consumers are ‘burned’ by negative experiences.”²⁰
196. From 1 April 2017 to 31 March 2018, the Commission received 1,629 complaints related to online selling generally (not specifically related to a trader not declaring themselves as being ‘in trade’)²¹. The Commission’s 2017/18 Consumer Issues report noted that online retail generates roughly 24 per cent of fair trading complaints to the Commission.²²
197. In 2018, the Commerce Commission took court action against a business for failing to disclose ‘in trade’ status as part of a product safety case. Three other businesses have received infringement notices for failing to disclose ‘in trade’ status.

Stakeholder views

198. There were mixed comments from stakeholders about this reform.
199. One stakeholder told us that this reform has worked well and that the ‘in-trade’ status formed the basis for discussing consumer protection issues with traders.
200. Another stakeholder told us that enforcement has been difficult. Some traders are unaware that being ‘in trade’ under the FTA is separate from needing to register for GST. Many sellers are ‘in trade’ but are under the GST threshold, but persons purchasing from them expect to receive a GST receipt. Some traders do not want to be listed as ‘in trade’ because they believe that it means they will have to register for GST.²³ This stakeholder checks whether users are complying with this reform using software that searches for sellers who should be in trade.
201. One stakeholder argued that the phrase ‘professional seller’ might work better for the above stakeholder than ‘in trade’. This stakeholder told us that this term is not as intimidating as ‘in trade’. They noted that, whilst the reform does not specifically require the words ‘in trade’

²⁰ Commerce Commission. *Consumer Issues 2016/17*. Retrieved from:

https://comcom.govt.nz/data/assets/pdf_file/0028/89092/Consumer-Issues-Report-2016-17.pdf

²¹ This was the period for which complaints were properly categorised and available

²² Commerce Commission. *Consumer Issues 2017/18*. Retrieved from:

https://comcom.govt.nz/data/assets/pdf_file/0017/108161/Consumer-Issues-Report-2017-18.pdf

²³ You must register for GST if you carry out a taxable activity and your turnover was \$60,000 or more in the last 12 months (or will be \$60,000 or more in the next 12 months), or if GST is included in your prices.

(only that it is made clear that the vendor is a person in trade), when they requested to use the term 'professional seller' as a mark of 'in trade' status the enforcement agency said they preferred the words 'in trade'.

Sample of websites

202. We also looked at the websites Trade Me, Ebay, Amazon and Allgoods to see if traders on these websites were complying with the need to display their status as being 'in trade':
- a. Trade Me has created an option for the seller to include an 'in trade' label next to their name. It also has information on the 'in trade disclosure' available on their website to help sellers comply with the law.
 - b. Allgoods has labelling next to the seller's name that states whether they are a store.
 - c. Ebay allows sellers to register as a business on their website. This label appears next to the seller's information when viewing the product. However, it appears as if many of the sellers have not included their seller status despite regularly selling goods online.
 - d. Amazon does not appear to have a disclosure of trade status on their website.

Assessment

203. There do not appear to be substantial issues with the reform itself. Few of the stakeholders we interviewed identified any issues with the reform, and those that did expressed only minor concerns. However, the online retail sector and consumers could benefit from more education and clearer guidance when selling and buying online. This may support consumers to feel just as confident transacting on the internet with traders as they do in person and feel comfortable relying on their FTA and CGA rights in an online setting.

Potential areas for further work

204. Outside of education and advocacy, we do not propose any further work in relation to the online selling provisions at this time.

4.9 Unsolicited selling

Description of reform

205. As part of the consumer law reforms, the FTA was amended to insert provisions that deal with the rights, obligations, and liability of persons receiving unsolicited goods or services. These replaced the Unsolicited Goods and Services Act 1975 (UGSA), which was repealed.
206. The UGSA was a response to suppliers sending unsolicited goods to consumers and other businesses, and relying on the provisions in section 20 of the then Sale of Goods Act 1908,²⁴ which provided that not returning the goods indicates an intention to accept them, even if the recipient did not actually demonstrate acceptance. This could result in recipients being liable to pay for unsolicited goods simply on the basis that they did not return them.
207. The UGSA sought to remedy this by providing that:
- a. recipients of unsolicited goods are not liable for them;
 - b. that the goods become the property of the recipient if they are not collected after a period of time; and

²⁴ Now part of the Contract and Commercial Law Act 2017

- c. that making threats or demands for payment for unsolicited goods, or sending invoices for unsolicited goods or services is an offence.
208. The unsolicited goods amendments to the FTA as part of the consumer law reforms retained the general approach from the UGSA, while updating the provisions in a number of ways. This included broadening the protections for unsolicited services, shortening the period before which unsolicited goods become the property of the recipient, and significantly increasing penalties for non-compliance.
209. Both the UGSA and the FTA's provisions sought to balance two principles in relation to unsolicited goods and services. Firstly, that unsolicited goods or services are not inherently an illegitimate form of marketing. Secondly, that recipients of unsolicited goods or services should not be required to pay for them.
210. The provisions relating to unsolicited goods and services differ from those relating to uninvited direct sales. The former relates to goods and services received by a consumer without either the request of the consumer or an initial payment or agreement. An uninvited direct sale is also initiated without the request of the consumer, but involves an initial agreement.

Outcomes

211. This reform hoped to contribute towards the following outcomes:
- a. Better protect consumers and businesses from unsolicited selling by consolidating, simplifying, and expanding the law relating to unsolicited goods and services.
 - b. Encouraging better compliance with the provisions by increasing the potential penalties for breaching these laws.

Evidence

Complaints data and enforcement

212. At the time of writing, since 2014, the Commerce Commission has received 163 complaints related to unsolicited goods and services. It is difficult to assess the significance of this number of complaints, as it is unclear how many consumers or businesses receive unsolicited goods or services overall. However, Commission staff advised that unsolicited goods and services have not presented a significant problem in the last few years.
213. Since the reforms took effect, the Commission has issued two warning letters and taken one court case in relation to the unsolicited selling provisions.

Stakeholder views

214. There were few comments from stakeholders on this aspect of the consumer law reforms. We did not receive any information to indicate that the unsolicited goods and services provisions added to the FTA are unwarranted, have not been effective or need amending to make them more effective.

Assessment

215. Based on the (limited) information available to us, we consider that the unsolicited selling reforms are likely to be achieved at least some of the intended outcomes, and there are no apparent areas where further work is needed.

Potential areas for further work

216. We do not propose any further work on the unsolicited selling provisions at this time.

4.10 Contracting out of the FTA

Description of reform

217. In general, businesses are bound by the FTA regardless of any agreement to the contrary. Even if a consumer signs or agrees that they have no rights under the FTA or their rights are limited, businesses will not be able to hold them to it. A term of a contract stating that a consumer has no rights under the FTA is likely to mislead the consumer and breach the FTA.
218. Before the reforms came into effect, case law was clear that businesses could not contract out of their obligations to consumers under the FTA and that parties could not excuse themselves from committing offences under the FTA by contract. However, there was nothing in the FTA that made this obligation explicit, which may have made the obligation poorly understood by consumers and small businesses.
219. As part of the consumer law reforms, the FTA was amended to provide a general rule that contracting out was prohibited. However, a limited exception was provided for parties in trade. This exception applies where both parties to the agreement are in trade, the agreement is in writing, and it is fair and reasonable for them to do so. If these conditions are met, businesses can contract out of the following sections of the FTA:
 - a. section 9, which prohibits misleading and deceptive conduct generally;
 - b. section 12A, which prohibits unsubstantiated representations;
 - c. section 13, which prohibits false or misleading representations; and
 - d. section 14(1), which prohibits false or misleading representations in connection with the sale or grant of land.

Outcomes

220. The intended outcomes of this reform were:
 - a. To clarify the common law principle of contracting out of the FTA being prohibited by default.
 - b. To allow businesses to conduct trade without having to ensure they were compliant with provisions that are unnecessary in their situation (such as where each party understands the terms of the contract). This was intended to provide greater contractual certainty for businesses.

Evidence

221. The stakeholders we spoke to had little awareness of how this reform was working in practice. This can be partially attributed to the nature of business-to-business contracts, which are often not publically accessible. Additionally, the ability for businesses to take private action against each other, instead of contacting the Commerce Commission, further reduces visibility of the impact of this exception.
222. There is some case law to indicate that the protective clauses in the FTA are working to prevent imbalances between parties that are subject to an agreement with a contracting out clause. For example, in a recent case on the impact of an “entire agreement” clause in the deed of settlement, the court found that it was not fair and reasonable for obligations under the FTA to be excluded²⁵.

²⁵ Philip Moore & Co Ltd v Surridge [2018] NZHC 562

223. Some businesses (such as Vodafone) include general contracting out clauses from both the FTA and CGA in their standard form business contracts that are available to view online. Some contracts that we have viewed also include 'entire agreement' clauses that may have the same effect as contracting out of the FTA.
224. Some Motor Vehicle Disputes Tribunal decisions²⁶ highlight that, where contracting out provisions have been used in standard form contracts, they often will not have effect for small businesses, as they have not been negotiated or are not fair and reasonable.

Assessment

225. The lack of visibility on the impacts of this reform due to the general lack of publicly available information means that we do not know for sure whether the intended outcomes have been met. However, in the absence of evidence to the contrary, our assumption is that this reform has at least partially achieved the outcomes sought.

Potential areas for further work

226. We do not propose any further work in relation to business-to-business contracting out of the FTA at this time.

²⁶ Generally the cases reference CGA rather than FTA contracting out provisions, but given that the CGA provision is the same, the same limitations and reasoning applies.

5 Specific evaluation results: Enforcement and penalties

5.1 Introduction

227. This chapter discusses the amendments to the FTA which increased the Commerce Commission's enforcement powers in the following areas:
- a. enforceable undertakings;
 - b. management banning orders;
 - c. interview powers;
 - d. authorising employees for monitoring and enforcement; and
 - e. infringement offences, notices and fees.
228. This chapter then discusses the increases to penalties made as part of the reforms. Finally, additional matters, relating to pecuniary penalties and indemnification, are also briefly discussed.
229. This chapter does not discuss the enforcement provisions in the FTA related to unfair contract terms. Enforcement in relation to unfair contract terms is discussed in Chapter 4.

5.2 Enforceable undertakings

Description of reform

230. The enforceable undertakings provisions enable the Commerce Commission to accept a written undertaking given by, or on behalf of, a person in connection with any matter relating to the enforcement of the FTA. If the Commission considers that a person has breached a term of an undertaking, it can apply to the court for a range of orders, including an order directing the person to comply with the undertaking.
231. Before enforceable undertakings were introduced in the FTA, one of the key alternatives to enforcement via criminal or civil proceedings under the Act was settlement agreements. Under a settlement agreement, the trader usually would agree to change their behaviour in order to comply with the FTA. The trader might also agree, amongst other things, to compensate any person that has incurred a loss from the trader's transgression. In return, the Commerce Commission will generally agree not to take any further enforcement action.
232. However, settlement agreements did not have legislative backing under the Act, and are not easily enforceable by a court. If a trader did not comply with the settlement, the Commerce Commission could face a difficult or lengthy process in seeking to enforce the agreement, or otherwise taking the trader to court in respect of the original contravention. Court action may or may not be possible depending on whether or not the Commerce Commission was still within the limitation period.

Outcomes

233. The enforceable undertakings provisions sought to:
- a. Promote the use of appropriate and cost-effect enforcement tools by the Commerce Commission by providing additional certainty that undertakings agreed with traders would be complied with.
 - b. Reduce the risk of breaches of undertakings, and where this does occur, allowing for easier resolution of these breaches, with benefits for consumers and other businesses.

Evidence

234. At the time of writing, enforceable undertakings have been used 14 times under the FTA since the power was brought into effect.
235. Stakeholders noted that the ability to enforce undertakings entered into with traders in the courts provides greater assurance that the terms of an undertaking will be honoured, compared to the Commerce Commission's use of settlement agreements. As a result, the Commerce Commission can be more certain now about the effectiveness of resorting to using undertakings as a method of enforcing the FTA. It was argued that this benefits businesses, the Commission and ultimately, consumers.

Assessment

236. The addition of the ability for the Commerce Commission to enforce undertakings has been an important enhancement to the FTA. It appears to be superior to the settlement agreement alternative and has improved the capability of the Commerce Commission to enforce the Act. There were concerns at the time the reforms were implemented that the Commerce Commission might not use these powers responsibly. However, these concerns do not appear to have been realised.

Potential areas for further work

237. Beyond the minor changes being made through the forthcoming Fair Trading (Amendment Bill (see Chapter 1), we do not propose any further work in relation to enforceable undertakings.

5.3 Management banning orders

Description of reform

238. Under this reform, the Commerce Commission may apply to the District Court for a management banning order against an individual. This prohibits the individual from being a director of, or being in any way (directly or indirectly) concerned in or taking part in the management of, an incorporated or unincorporated body that carries on business in New Zealand. A District Court may make a management banning order against an individual who:
- a. has, on at least two separate occasions within a 10-year period, committed an offence under the FTA; or
 - b. is, or was at the time the offence was committed, a director of, or concerned in the management of, a business that has, on at least two separate occasions within a 10 year period, committed an offence under the FTA; or
 - c. has been subject to a management banning order overseas in connection with the contravention of any law relating to fair trading.

239. The court may make a management banning order only if it is satisfied that the order is necessary to protect the public from the risk that the person, or any business that the person is a director or manager of, will commit further offences under the FTA.
240. Management banning orders were introduced in recognition of the fact that a small number of individuals, and the businesses they are connected with, may repeatedly breach the FTA and regard any penalties imposed as a 'cost of doing business'. This reform sought to provide an additional tool for addressing repeat breaches.

Outcomes

241. The outcome sought by this reform was to reduce the risk of particular individuals and their associated businesses from repeatedly breaching the Act repeatedly.

Evidence

242. No management banning orders have been made, although the Commerce Commission has applied for management banning orders in one ongoing case.
243. There was little comment from stakeholders on this aspect of the reform, although Commerce Commission staff noted that while there is a high bar for seeking a management banning order, it remains a useful enforcement tool for them to have on hand.

Assessment

244. Given the preconditions before management banning orders can be imposed, and the severity of the consequence from imposition, it is not surprising that no management banning order have been made. This means that it is difficult to assess the effectiveness of this reform. However, we generally consider that the power plays a useful role as both a potential deterrent and useful backstop in respect of repeat offending.

Potential areas for further work

245. As noted in Chapter 1, we have identified some small extensions to the scope of the management banning orders provisions that are desirable. These changes are being made through the forthcoming Fair Trading Amendment Bill. Beyond this, we do not propose any further reform relating to management banning orders.

5.4 Interview powers

Description of reform

246. Prior to the consumer law reforms, under the FTA the Commerce Commission had the ability to obtain information by requiring persons to supply documents or any other information in writing. The consumer law reforms expanded the Commerce Commission's information gathering powers by also giving it the power to require individuals to appear before the Commission in person to give evidence.

Outcomes

247. The aim of giving the Commerce Commission compulsory interview powers was to make its investigations more efficient, and therefore to save time and money. The amendment was a response to the Commerce Commission often being unsuccessful when seeking persons to agree to voluntary interviews as part of its investigations into possible breaches of the FTA.

Evidence

248. The Commerce Commission advises that the power to compel persons to appear before it to give evidence has proven to be an important aid in its work in enforcing the FTA, and has been used 35 times at the time of writing.
249. However, we have previously been advised by the Commerce Commission that minor differences between the FTA interview power and the Commerce Act power have caused some difficulties. The inconsistency makes it more difficult for it to apply its powers. For example, under the Commerce Act, the interviewee may be interviewed under oath, but there is no equivalent provision under the FTA.

Assessment

250. The ability of the Commerce Commission to require persons to appear before it to give evidence appears to be an important enhancement to the FTA and has improved the capability of the Commission to enforce the Act.

Potential areas for further work

251. Beside the technical change proposed to allow the Commerce Commission to prohibit disclosure of information provided to it in the course of a FTA investigation (see Chapter 1), we do not propose any further substantive work in relation to the Commission's information gathering powers under the FTA. However, we do propose to consider technical amendments to these powers in the future, to promote consistency with other Acts enforced by the Commission.

5.5 Authorising employees for monitoring and enforcement

Description of reform

252. As part of the consumer law reforms, authorised employees of the Commerce Commission and MBIE product safety officers were given the power to enter and inspect places (with the exception of residential dwellings), without the need for a warrant, in connection with enforcing the law in relation to product safety and consumer information standards. These built on existing search powers for the Commission under the FTA, under which a search warrant was required.
253. The reforms recognised that it is important for enforcement officers to be able to proactively monitor safety and compliance with the Act, and that reliance on voluntary permission from businesses to enter a location, or complying with the processes required for obtaining a search warrant, could be ineffective or time consuming in some instances.

Outcomes

254. The key outcome sought by the reform was to allow MBIE and the Commerce Commission staff to proactively act on suspected issues before they were acquired by consumers and thus reduce the risk of consumers being harmed or suffering detriment in relation to unsafe or otherwise non-compliant products.

Evidence

255. There was little comment on this reform from stakeholders. However, Commerce Commission staff noted that authorised officers of the Commission are not permitted to

enter locations to inspect consumer goods for enforcement purposes, if consumers do not have access to the location to acquire the goods, or if goods are not dispatched to consumers from the location. This effectively limits the ability of Commission staff to inspect warehouses or other upstream distribution points. They considered that it would be useful for the purposes of achieving the policy objective if authorised staff could enter places from which relevant goods are dispatched to retailers.

Assessment

256. We consider that the reforms are likely to have usefully contributed towards their intended outcome. However, as noted by the Commerce Commission, authorised Commission employees are limited in their ability to inspect upstream premises. Similarly, MBIE product safety officers cannot inspect, photograph, or purchase goods if the goods are not directly available to consumers for supply or dispatched for supply to consumers from that place.²⁷
257. As a result, authorised staff at the Commerce Commission and MBIE product safety officers are prevented from taking proactive measures to ensure that consumer goods (and services) are safe and otherwise comply with the FTA. We consider that it could be useful for both authorised Commission employees and MBIE product safety officers to be able to enter and inspect upstream locations.

Potential areas for further work

258. There may be merit in further consideration of whether the ability of Commerce Commission staff and MBIE product safety officers to undertake inspections of goods and services for product safety and other purposes should be expanded.

5.6 Infringement offences

Description of reform

259. The consumer law reform established a new regime of “infringement offences” for certain straightforward, low-level offences under the FTA. These are:
- a. failing to comply with a suspension of supply notice issued by a product safety officer;
 - b. failing to comply with a consumer information standard;
 - c. failing to disclose a person’s trader status on the Internet; and
 - d. failing to comply with the layby sale disclosure requirements, uninvited direct sale disclosure requirements and extended warranty disclosure requirements.
260. The new regime has given the Commerce Commission the discretion to issue an infringement notice imposing an infringement fee to a person where it believes on reasonable grounds that the person is committing, or has committed, an infringement offence.
261. A person who is issued with the infringement notice does not receive a criminal record in relation to the offence. In addition, the recipient has the right to challenge the notice in court. The burden is on the defendant to challenge the notice and fee.
262. The fee in respect of an infringement offence cannot exceed \$2,000. The fee currently set under regulations for infringement offences is generally \$1,000, or \$1,500 in the case of failing to comply with a suspension of supply notice.

²⁷ This is not necessarily a significant barrier to enforcement for MBIE product safety officers, with most monitoring and enforcement being desk-based. Nevertheless, there are plausible instances in which the current wording of the Act could present barriers to effective monitoring of product safety.

263. The introduction of an infringement offence regime in the FTA recognised that certain breaches of the Act are relatively minor in nature, and that prosecuting them through the court system would be disproportionate to the harm caused by the offence, as well as being a potentially slow and costly process. These reforms were also a response to the fact that other enforcement tools, such as warnings, compliance advice letters and settlements were not always successful in deterring breaches.

Outcomes

264. The overall outcomes sought by this reform were to:
- a. Efficiently and effectively deter low-level FTA breaches by providing a quicker and more proportionate enforcement option.
 - b. Provide an additional mechanism to educate traders about unacceptable conduct and its inherent social harm, and deter the same behaviours in other traders.

Evidence

265. The Commerce Commission has used infringement notices 101 times at the time of writing.
266. Several of the stakeholders we spoke to acknowledged the benefits of the infringement offence regime in dealing with low-level FTA contraventions, where the facts of the offending are readily identifiable and unambiguous.
267. A number of stakeholders thought that the Commerce Commission should be making greater use of infringement notices, and that infringement notices should be able to be issued in relation to a wider range of offending.
268. One stakeholder highlighted the existence of some procedural barriers to enforcement of infringement notices. Currently, under the Summary Proceedings Act 1957, the Commerce Commission effectively only has four months after the date of a potential FTA breach to issue an infringement notice.²⁸ We understand that there have been several instances in which the Commission has not been able to an infringement notice, as a result of this timeframe.

Assessment

269. While the current infringement offence regime is set up reasonably well to achieve the outcomes sought for the provisions it currently applies to, there are potential opportunities to extend the scope and enhance the impact of the regime.

Potential areas for further work

270. There may be merit in further consideration of:
- a. Whether additional contraventions of the FTA should be made an infringement offence.
 - b. Whether there is any scope to increase the level of infringement fees.
 - c. Whether the period under which infringement notices are enforceable should be extended.

²⁸ This is because, after issuing an infringement notice, the Commerce Commission is bound to wait 28 days for a notice to be paid or challenged. If this notice is not paid within 28 days, the Commerce Commission must issue a reminder notice, triggering an additional 28 days within which the recipient can pay. An unpaid notice is only enforceable if it is provided to the Ministry of Justice within six months of the alleged offending.

5.7 Penalties

Description of reform

271. The consumer law reforms resulted in substantial increases in fines for contraventions of most provisions of the FTA. The penalties were increased as follows:
- a. For contravening most provisions of Part 1 (relating to unfair conduct, such as false or misleading representations), Part 3 (product safety) or Part 4 (service safety), the maximum fine increased from \$60,000 to \$200,000 in the case of an individual, and from \$200,000 to \$600,000 in the case of a body corporate.
 - b. For contravening section 24 (related to pyramid selling schemes), the maximum fine increased from \$200,000 to \$600,000. This fine is in addition to the ability of the court to impose a civil penalty not exceeding the value of the commercial gain from the contravention.
272. In the case of Part 2 (related to consumer information standards), penalties were reduced on 17 June 2014 to a maximum fine of \$10,000 for individuals and \$30,000 for body corporates. Previously, penalties for breaching Part 2 were equivalent to other provisions of the FTA, i.e. \$60,000 for individuals and \$200,000 for body corporates. This change reflected the view that breaches of Part 2 were generally less serious than breaches of other provisions of the FTA.
273. Penalties for the new Part 4A (related to layby sale agreements, uninvited direct sale agreements, extended warranty agreements, and auctions) were set in line with the new penalties for Part 2. In the case of layby sales and uninvited direct sales, these penalties significantly exceeded those contained in the repealed Door to Door Sales Act 1967 and Layby Sales Act 1971.
274. The general increase in penalties reflected the fact that the penalties imposed for breaches of the FTA did not always match the (potentially substantial) gains to businesses associated with contravening the FTA, and that increases were needed to increase the deterrence effect of penalties. The increases also brought the penalty regime closer to that of comparable laws, such as the Financial Markets Conduct Act 2013 and the Australian Consumer Law (Schedule 2 to the Competition and Consumer Act 2010).

Outcomes

275. Key outcomes sought by the increase in penalties were:
- a. Increasing maximum penalties so that they act as a sufficient deterrent, to reduce the risk of penalties being seen as a 'cost of doing business'.
 - b. Ensuring that maximum penalties are proportionate to the seriousness of the offence, by reducing penalties for breaches of the FTA that are generally less serious than other breaches.

Evidence

Stakeholder views

276. A number of stakeholders made comments to the effect that, whilst the increase in penalties for most provisions was generally seen as an improvement on the status quo, overall penalty levels were still too low to deter offending by some businesses.
277. The Commerce Commission has previously advocated for a number of reforms around penalties, and advised us that they are keen to see higher penalties for breaches of the FTA. Staff noted that cases taken by the Commerce Commission often involve widespread

advertising directed at the public, with profits often accruing from misleading conduct. The Commerce Commission considers that higher penalties are required for general and specific deterrence and to ensure that companies do not merely treat penalties as a cost of doing business.

278. The Commerce Commission has also previously advocated for the introduction of pecuniary penalties for breaches of consumer law. There are a range of differences between offences and pecuniary penalties, including the standard of proof required. At present, in taking cases under the FTA, the Commerce Commission must prove to a criminal standard – that is, beyond reasonable doubt – that a breach of the law took place. In contrast, pecuniary penalties only require a breach of the law to be proven to a civil standard – that is, on the balance of probabilities.
279. Another matter raised by one stakeholder was the practice of insurers to provide statutory liability insurance against penalties imposed on a business or individual for a contravention of legislation (including the FTA). In addition, we understand that some businesses directly indemnify their directors, employees, and agents against penalties (instead of, or in addition to, liability insurance). This has the potential to lessen the deterrence effect of penalties for non-compliance with the Act.

Penalties to date

280. To date, while there has been an increase in the overall level of penalties imposed following the changes to the FTA, few cases have resulted in fines being imposed that approach the new maximums within the FTA. For example, the highest fine to date under the FTA has been \$2,009,280, which was the fine given to Steel & Tube for 24 representative charges under the FTA for false representations in relation to steel mesh. This total fine, while significant, is significantly below the maximum theoretical fine of \$9.2 million²⁹, or the estimated revenue of \$24 million associated with the contravention.
281. That there have been few cases approaching the maximum penalty levels reflects the principles set out in the Sentencing Act 2002, which effectively state that only the most serious offending should be subject to the maximum penalties set out in an Act. As such, the maximum penalties set out in the FTA are not reflective of the typical penalty that will be imposed for a breach of the provisions. Given this, the adequacy of the deterrence factor of any penalties should be considered in light of the actual penalties imposed rather than the potential maximums.

Assessment

282. Overall, the increase in the maximum penalties for most breaches of the FTA as part of the consumer law reforms is likely to have improved their deterrence effect. Nevertheless, we think it would be worth testing whether or not the maximum penalties should be increased further to ensure that there are not situations – such as for large businesses with high turnover – where penalties may be seen as a cost of doing business.
283. It is also not clear to us that there is a good justification for the maximum penalties for breaches of Parts 1, 3, and 4 of the FTA being much lower than those in the Commerce Act. It can be argued, for example, that widespread misleading and deceptive conduct could, in some instances, have just as significant negative impact on consumers as price fixing or other anti-competitive conduct.

²⁹ 13 of the 24 charges related to conduct from before the reforms which were therefore liable to a lower maximum fine of \$200,000 per charge. The other 11 charges related to conduct after the consumer law reforms, with an associated maximum penalty of \$600,000 per charge. The Commerce Commission is appealing the fine.

284. We note that maximum penalties for breaches of core provisions of the Australian Consumer Law have recently been increased to align with the penalties for breaching competition law.³⁰ This was on the basis that the maximum financial penalties available for a breach of the Australian Consumer Law were considered to be insufficient to deter highly profitable non-compliant conduct. The apparent lack of rationale for imposing different maximum penalties for breaching consumer, as opposed to competition, law was also questioned.
285. Breaches of Part 2 and Part 4A of the FTA arguably have the potential to be less serious than other parts of the Act, which likely justifies the lower maximum penalties at present. Nevertheless, if the maximum penalties for breaches of the other sections of the Act are reviewed, then these maximums should also be reconsidered at the same time to ensure that penalties for different sections remain proportionate to each other.
286. In parallel to reviewing the maximum level of penalties, we think there is merit in exploring whether the FTA should be amended to provide for pecuniary penalties in addition to, or instead of, offences. There are advantages and disadvantages to pecuniary penalties instead of offences. For example, for some forms of conduct, it may be appropriate for a criminal standard of proof to apply. Similarly, while in certain cases it may be appropriate for a criminal conviction to be imposed, in other instances this may not be necessary to achieve appropriate deterrence.
287. We also think there is merit in exploring prohibiting indemnification and insurance against breaches of the FTA. Our initial view is that indemnification and insurance against fines for breaching the FTA may weaken the incentives for firms and their agents to comply with the law.
288. Finally, we note that there is an apparent anomaly in the FTA where it is not an offence to engage in harassment or coercion. This means that the only the FTA's civil regime is available for these provisions and that the Commission is unable to seek penalties against businesses engage in harassment or coercion. We consider that there may be a good case to make harassment or coercion an offence or subject to a pecuniary penalty and this should be explored further.

Potential areas for further work include

289. There may be merit in further consideration of:
- a. Whether or not the maximum penalties set out in section 40 of the FTA should be further increased.
 - b. Whether pecuniary penalties should be provided instead of, or in addition to, offences for breaching the FTA.
 - c. Whether indemnification and insurance against penalties for breaches of the FTA should be prohibited.
 - d. Whether harassment and coercion should be an offence or subject to pecuniary penalties.

³⁰ Following a review by Consumer Affairs Australia and New Zealand (CAANZ), the penalties for breaches of the Australian Consumer Law have been raised from \$1.1 million for companies to the greater of \$10 million, three times the value of the benefit received, or where the benefit cannot be calculated, 10 per cent of annual turnover in the preceding 12 months. Penalties against individuals have increased from \$220,000 to \$500,000.

6 Other potential gaps

290. In addition to the evaluation of the 2010-2015 reforms to the FTA, we also looked at the evidence around some other potential gaps. These matters have been raised with us by stakeholders, or identified internally, since the reforms took effect.

6.1 Drip pricing

Overview

291. 'Drip pricing' refers to the technique used by firms to split out some of the total cost of a product into various components as customers go through the purchasing process. The technique is used by a range of industries, particularly online, with one effect being that the cost of a product may appear to be less than it really is.
292. Examples of 'drip pricing' include:
- a. mandatory additional charges that the buyer of a product or service has to incur if they wish to purchase the product, and which may only become apparent after the purchase process has begun, such as a booking fee for a ticket or shipping charges;
 - b. stating 'GST excluded' when GST needs to be paid in order to purchase the product (in a consumer context); and
 - c. pre-selected options that a buyer would have to "opt out" of to avoid costs, such as pre-selected insurance for flights
293. Drip pricing does not include:
- a. genuine optional extras, such as a sporting event that advertises a headline price for participation in their event then has additional charges for post-event massages or event merchandise; or
 - b. upgrading component parts, such as different prices shown for computer parts when upgrading a customised laptop.
294. Drip pricing can distort competition by creating an uneven playing field between competitors. Price is the key factor consumers look at and drip pricing can artificially make a firm's price seem lower than it actually is. This can encourage other businesses to also engage in the practice. Drip pricing can increase search costs for consumers and influences initial and final choices by consumers.
295. Drip pricing is currently prohibited in New Zealand to the extent that it falls within the FTA's prohibition against false or misleading representations. Advertising a headline price with no disclosure of the presence of other mandatory fees is likely to breach this prohibition. On the other hand, advertising a headline price and noting that there will be additional fees, without disclosing the magnitude of these fees, is less likely to breach this prohibition, despite the fact that it can still distort competition and consumer decision-making.

Approaches overseas

296. The approaches taken in Australia and the United Kingdom to the issue of drip pricing are worth noting:
- a. The United Kingdom’s legislation prohibits giving insufficient information to consumers, including misleading omissions, which would cause the average consumer to make a different decision as a result. Exclusion of compulsory charges is one example of conduct that may breach this prohibition. There are also sector-specific regulations for air services that state that all unavoidable, foreseeable charges must be included in the headline price.
 - b. Australia’s legislation requires sellers to advertise the total price of the good or service as a single figure, known as an all-inclusive pricing rule. This must represent the minimum total cost. It must include the price of all aspects of the final item, plus all taxes, duties and extra fees. It does not need to include delivery charges or optional extras, although a recent law change means that the total price must include any optional components that have been pre-selected for the buyer. If only part of the total price is advertised, the total price must be displayed at least as prominently as the partial price.

Evidence

297. MBIE’s Consumer Protection call centre reported that of the 3,184 calls received in the three months from July to September 2017, 9 per cent related to potential drip pricing behaviour.
298. According to the 2018 New Zealand Consumer Survey, 21 per cent of respondents cited a problem with “the cost of the product (e.g. hidden fees or unexpected charges)” as their most recent consumer problem following purchase of a good or service. This made it the fifth most common problem.
299. Consumer NZ conducted a survey in 2016 of a nationally representative sample of 1024 New Zealanders aged 18 years and older. The results showed that 68 per cent of New Zealanders had encountered drip pricing, with 78 per cent experiencing it at least twice in the last 12 months. Most paid less than \$10 in additional fees on an average transaction.
300. One stakeholder noted that the most common complaints they receive are related to car dealers selling cars with mandatory on-road costs being separated from the headline price, and GST-exclusive quotes. This stakeholder estimated that out of approximately 1,500 pricing complaints per year, around 50 are related to drip pricing.
301. Some stakeholders we spoke to supported adopting a version of Australia’s all-inclusive pricing rule, as this would make it easier for traders to be on a level playing field, and for costumers to discern the true cost of goods and services and make comparisons.
302. One stakeholder thought that this could be an ‘easy fix’, especially if the rule comes with infringement notice powers. This stakeholder said that they have heard significant industry support for this approach, as it seems that many reputable companies want the rule in place in order to level the playing field.

Assessment

303. There is some evidence that drip pricing is a relatively pervasive issue which makes it harder for consumers to make good purchasing decisions. It also appears that this is an issue that is not entirely addressed by current consumer laws. The rise of digital purchases and the resulting increase in the scale of drip pricing has likely increased the amount of harm

associated with drip pricing causes. This may necessitate regulatory intervention, although further assessment of the costs and benefits is required.

Potential areas for further work

304. There may be merit in further consideration of whether an all-inclusive pricing provision, or a prohibition against misleading pricing omissions, should be provided for in the FTA.

6.2 Role of intermediaries in consumer protection

Overview

305. Intermediaries can be defined as a person, business or platform that operates as a link between parties in a transaction. For example, a bank acts as an intermediary when one person transfers money to another person and a telecommunications operator acts as an intermediary when one person sends a text message to another person, an auction site serves as an intermediary between buyers and sellers, and a food delivery app acts as an intermediary when it connects consumers with restaurants.
306. Intermediaries can be characterised by a triangular contractual relationship between the intermediary, a business and a consumer. The consumer enters a contractual relationship with the intermediary when they agree to its terms and conditions. The business may similarly agree to a contract to participate using the intermediary. The consumer and business enter a second contractual relationship with each other for the sale of goods or services.
307. Intermediaries are a critical element of many business models, and have delivered many benefits for consumers and businesses, including increased competition across a more open market, increased consumer choice and connectivity, and increased access to consumers for small businesses. However, particularly in the digital age, unscrupulous individuals and businesses have also been able to conduct scams, deceitful practices and generally flout consumer protection laws with greater ease through the use of intermediaries. Further, there are additional difficulties and complications when enforcing consumer law against scams conducted online and across borders.
308. There is scope for action to be taken against intermediaries under the FTA for breaches by users of their services. For example, section 43 already provides that a range of civil remedies may be imposed against a person that is 'in any way directly or indirectly knowingly concerned in, or a party to, a contravention of a relevant provision'. However, section 44 provides defences for contraventions which were due to a reasonable reliance on information supplied by another person, or acts of another person where the defendant took reasonable precautions and exercised due diligence to avoid the contravention. This means that intermediaries' exact obligations and liability under the FTA are unclear, but likely limited.

Evidence

Stakeholder views

309. Several stakeholders considered that consumer law may not be flexible enough or set up adequately to deal with changes in technology, new scams or digital interactions. The sophistication of scams is increasing, and the pre-emptive role of intermediaries in the consumer protection system is unclear.
310. One stakeholder considered that the law should be changed to make clear that intermediaries have a duty to act to prevent further illegal activity from occurring via their

systems once they have been put on notice of likely contraventions of consumer law. This stakeholder felt that section 43 of the FTA should be amended to include 'knowingly facilitating' as a trigger for civil enforcement actions.

311. One stakeholder noted that, even in situations where intermediaries want to promote compliance with consumer laws, they can find it difficult to require overseas sellers to adhere to New Zealand consumer laws and obligations. This ties into larger cross-border enforcement issues that are beyond the scope of this report.
312. It was also argued that placing obligations on intermediaries in relation to the activities of their users can have potentially negative impacts, such as players exiting the market.
313. One stakeholder thought that additional resourcing was needed for agencies to respond to digital scams.

Court action

314. Various court action has been taken internationally in relation to the role of intermediaries. In one instance in 2013, The Australian Competition and Consumer Commission took a case against Google, claiming that Google's display of certain sponsored links via its AdWords program, which contained misleading representations, contravened the Australian Consumer Law. On appeal, the High Court of Australia found that Google was not liable for the way Google's advertisements for other businesses were displayed as a result of search terms entered by a user. It found that the search engine was merely a means of communication between the advertisers and consumers – in other words, a 'mere conduit'.

OECD work

315. The Organisation for Economic Cooperation and Development (**OECD**) has held workshops to consider the role of internet intermediaries in advancing public policy objectives³¹.
316. Key findings from its work included that:
 - a. Online intermediaries are increasingly important service delivery mechanisms, can empower end-users, and can influence and determine access to and choice between online information, services and goods.
 - b. Limitations on the liability of intermediaries have been instrumental in enabling the growth of the internet but there are an increasing number of efforts to hold internet intermediaries to a duty of care as well as increasing pressure for intermediaries to be proactive rather than reactive.
 - c. Unpredictability in the application of law regarding intermediaries impedes private sector confidence, highlighting the need for clarification and guiding principles.
 - d. While internet intermediaries may have the technical capacity to prevent some of the harms that can arise, the consequences of delegating enforcement responsibilities to intermediaries were not clear, with potential unintended consequences.
 - e. Depending on the issues, the incentives of intermediaries may or may not be aligned with public policy goals, and intermediaries may or may not be in a good position to detect and address wrong-doing. However, the incentives can be aligned in areas such as safety and security, as intermediaries have an incentive to induce continued use of the services by consumers.

³¹ OECD. (2010). *Workshop Summary: The role of internet intermediaries in advancing public policy objectives*. Retrieved from <https://www.oecd.org/internet/ieconomy/45997042.pdf>. See also Douglass. (2009) cited in OECD. (2011). *The role of internet intermediaries in advancing public policy objectives*. Retrieved from https://read.oecd-ilibrary.org/science-and-technology/the-role-of-internet-intermediaries-in-advancing-public-policy-objectives_9789264115644-en#page182

Voluntary actions

317. There are many voluntary (either proactive or reactive) actions that intermediaries are taking to enhance consumer protection, including in New Zealand. These actions tend to occur most frequently when the goals of consumer protection align with the goals of the intermediary.
318. Some examples of intermediaries taking voluntary consumer actions include:
- a. ticket sale websites investing in technology and screening for ticket-buying bots;
 - b. banks sometimes reverse transactions in the case of fraud;
 - c. providing information and advice, or linking to a non-profit or government service that provides information and advice, such as Netsafe;
 - d. providing a money-back guarantee or other protection programmes, in some cases over and above basic consumer guarantees, for fraudulent purchases that either do not arrive or do not meet the standards of quality advertised; and
 - e. search providers requiring advertisers to be certified and meet a range of information disclosure requirements³².

Assessment

319. While intermediaries can face commercial incentives to engage in monitoring and promote compliance with the law (such as to ensure consumer confidence and to mitigate reputational risks) by the users of their services, these incentives are not always sufficient for them to take action against users to avoid consumer harm.
320. There is significant scope for debate about the appropriate role of intermediaries in consumer protection, and the extent to which quasi-regulatory functions and obligations should be imposed on private entities. While it can be argued that it would be inappropriate for intermediaries to be required to engage in extensive proactive monitoring of compliance with consumer law, it is arguable that they should have greater responsibilities once they become (or are made) aware of contraventions of the law occurring via their systems. Intermediaries also have the unique ability to quickly and effectively deal with businesses who do not uphold minimal standards of consumer protection by removing non-compliant businesses or their advertisements from their systems.
321. The issues are complex, particularly for online intermediaries where the environment is emerging and changing rapidly, and there is the potential for unintended consequences from inappropriate regulatory intervention. Nevertheless, we consider that the role of intermediaries in consumer protection warrants further investigation and consideration.
322. One option would be to explore adding further provisions to section 43 of the FTA to give intermediaries a duty to act to prevent further illegal activity from occurring via their systems once they have been made aware of it. There could also be scope for broader, cross-regulatory system, reform.

³² See <https://www.blog.google/products/ads/update-ticket-reseller-policy/>

Potential areas for further work

323. There may be merit in further consideration of:
- a. Whether or not there is a case to explicitly give intermediaries a duty to act to prevent further illegal activity from occurring via their systems, once they have been made aware of it.
 - b. Cross-government consideration of the roles and responsibilities of intermediaries more broadly.

6.3 Search and switching costs

Overview

324. Two determinants of the intensity of competition in a market are search and switching costs.
- a. **Search costs** refer to how easy it is for customers to find information about different sellers in a market and the prices and qualities of the goods or services they provide. Low search costs can drive competition by making it easier for consumers to discover cheaper, higher quality, or more innovative goods and services, and make an assessment about which goods and services are appropriate for them.
 - b. **Switching costs** refer to costs that are incurred when changing supplier and which are not incurred by remaining with the current supplier. Low switching costs make it easier for consumers to act upon information they gather as part of the search process. The threat of switching also provides a strong incentive for providers to improve their services and maintain competitive prices. Switching costs can include:
 - i. **financial transaction costs** – such as early termination fees;
 - ii. **procedural costs** – such as paperwork to arrange a transfer between service providers, or the difficulties associated with cancelling a contract and
 - iii. **relational costs** – ‘emotional’ costs relating to ending a personal relationship with a service provider.
325. In respect of search costs, the growth of online retail has reduced search costs by significantly increasing the ease of finding information about the price of some goods and services. This has been aided by a range of privately-run price comparison websites, as well as some sites with government involvement, such as *What’s My Number* and *Consumer PowerSwitch* for electricity in New Zealand.
326. Nevertheless, there remain many areas of the economy, in particular many services sectors, where it is much more difficult to examine prices online, leading to higher search costs for consumers. Much of this is a result of some businesses choosing not to publish information about their prices online. In addition, there can be greater variation in the quality of services between different providers – while a cell phone sold by one retailer may be exactly the same as one sold by another, there can be considerable differences in the qualities of, for example, legal services provided by two different law firms. These factors can, in turn, make it difficult for price comparison websites to aggregate and make available easily-comparable information about the price and quality of different services.
327. Even if businesses do display information about their pricing online, in some cases they may seek to prohibit the use of this information for inclusion as part of a comparison website. For

example, in response to MBIE's 2018 Issues Paper on the Review of Insurance Contract Law, we were told about a large insurer which challenged the usage of its information and quotation model on a price comparison website on the basis that it breached the terms of use of the insurer's website. The usage was also challenged as a breach of the FTA, and for infringing the insurer's trademarks and copyright. As a result of this action, the comparison site no longer offers comparison services for general insurance.

328. Outside of insurance, we are not aware of specific examples of businesses prohibiting the use of their pricing information by comparisons sites. However, we think it could be plausible that this could be occurring in industries other than insurance.
329. There are a number of indicators which suggest that, overall, competition is likely lacking in many New Zealand markets. While traditional supply-side measures to promote competition such as generic competition law and sector-specific regulation remain important, barriers to search and switching may be contributing to this problem.

Evidence

Search and switching costs literature review

330. In 2016, MBIE undertook desk-based research into the issue of search and switching costs. We found that access to information that is presented and framed in a structured and easily comprehensible format is important for reducing search costs. However, due to behavioural limitations of consumers, more information does not always reduce search costs. Instead, better quality information is often as important as greater quantities of information, as high volumes of information can often lead to 'choice overload'.
331. Overall, the literature review supported the notion that search and switching costs have the potential to impose barriers to consumers transacting with confidence and making decisions that are consistent with their long-term interests.
332. The research also looked into the prevalence of online information about the price and quality of a range of services in New Zealand.³³ We found that the overall availability of pricing information was mixed, with 'routine' service providers (such as movie theatres and restaurants) and 'ongoing' service providers (such as electricity and telecommunications providers) often displaying pricing information, but with much less information displayed by 'professional' service providers (such as dentists or lawyers). In terms of price comparison websites, many sites provided static information as a result of ad-hoc surveys or research, rather than providing 'live' information.

International literature on price disclosure

333. Multiple studies have found that price disclosure and the availability of comparison tools such as websites can lead to benefits for consumers. For example, a study into the effects of mandatory online disclosure of supermarket prices in Israel found that products subject to the price disclosure regime decreased in price by 4 to 5 per cent relative to products outside of the disclosure regime.³⁴ Similarly, a study into the price of laboratory test services found

³³ Ministry of Business, Innovation and Employment. (2017). *Search and Switching Costs in the Services Sector: Literature Review*. Retrieved from: <https://www.mbie.govt.nz/assets/9eb051c727/literature-review-search-and-switching-costs-in-services.pdf>

³⁴ Ater, I., & Rigbi, O. (2017). *The Effects of Mandatory Disclosure of Supermarket Prices*. Retrieved from: <http://dx.doi.org/10.2139/ssrn.3046703>

that consumer access to price transparency platforms led to a reduction in prices of 3.4 per cent, despite only a small share of the population using the platform.³⁵

334. However, greater availability of pricing information can also have negative effects, in particular by facilitating price coordination between businesses. For example, a study into the retail petrol market in Perth found that a fuel price disclosure scheme facilitated price coordination between the petrol companies and an increase in margins.³⁶
335. The impact of price disclosure requirements can depend on the structure of the market. Whaley³⁷ argues that price disclosure may be relatively ineffective in instances where there is substantial product differentiation, and that there is greater potential for price coordination in instances where demand is inelastic. Similarly, the OECD notes that disclosure in concentrated, oligopolistic markets with homogenous products carries much greater likelihood of anticompetitive effects than announcements made in markets with a competitive supply structure and with heterogeneous products.³⁸
336. The relative benefits of price disclosure will depend on the relative impact it has on search costs and price monitoring for consumers and businesses. For example, without price disclosure, businesses may still be able to monitor their competitors' prices, albeit in a more time-consuming way. In contrast, the effort required for every consumer to compare prices absent a disclosure regime may make such comparisons infeasible. As such, even if price disclosure does increase the potential for coordination, there may nevertheless be a net benefit to consumers. In line with this, the OECD notes that the positive effects of price advertising are generally considered to outweigh the collusive effects of the announcements.

Stakeholder views

337. Stakeholders' views were mixed regarding the importance of search and switching costs as an issue. Some thought they were important to address, whilst others considered that consumer apathy was a greater barrier to switching than any particular search or switching cost. For example, stakeholders viewed electricity and telecommunications as industries where consumers are not switching to get the best deals. This view is backed up, for electricity at least, by the findings of the first report of the Government's Electricity Price Review³⁹, which found that there is a 'sizeable core' of consumers that have never switched and miss out on around \$200 a year on average as a result.
338. One stakeholder noted that consumers can struggle to find the best deals as a result of the complexity associated with different offers and bundles. Another stakeholder argued that the New Zealand system is structured towards firms providing more information, but that more information does not always lead to better consumer outcomes. Some suggested that regulatory responses to search and switching costs need to be tailored to address behavioural bias in consumers. One stakeholder suggested that government policy should make more use of techniques such as 'nudging' (in short, influencing behaviour without the use of coercion).

³⁵ Whaley, C. (2015). *Provider Responses to Online Price Transparency*. Retrieved from <https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&cad=rja&uact=8&ved=2ahUKewiwmPqW0u7fAhUDFHIKHVDwAYcQFjAAegQIABAC&url=https%3A%2F%2Fwww.kellogg.northwestern.edu%2F%2Fmedia%2Ffiles%2FDepartments%2Fhema%2Fconferences%2F2016%2FWhaley-Provider-responses-NW.ashx&usg=AOvVaw2j1eFvQo9vvG69O-CaPNuh>

³⁶ Byrne, D., & De Roos, N. (2018). *Learning to Coordinate: A Study in Retail Gasoline*. Retrieved from <https://dx.doi.org/10.2139/ssrn.2570637>

³⁷ Whaley, C. (2015). *Ibid.*

³⁸ OECD. (2012). *Policy Roundtables: Unilateral Disclosure of Information with Anticompetitive Effects*. Retrieved from <http://www.oecd.org/daf/competition/Unilateraldisclosureofinformation2012.pdf>

³⁹ Electricity Price Review. (2018). *First Report for Discussion*. Retrieved from <https://www.mbie.govt.nz/assets/5ba1054036/first-report-electricity-price-review.pdf>

Assessment

339. Overall, we think that search and switching costs may be negatively affecting competition in New Zealand and negatively impacting on consumers' ability to transact with confidence.
340. Overseas interventions to reduce search and switching costs have included:
- a. providing consumers with access to their data, such as 'open banking' or a 'consumer data right';
 - b. requiring price disclosure for various goods or services;
 - c. prohibiting terms in contracts or practices by firms that impose barriers to switching; and
 - d. implementing unbiased and efficient comparison sites to make searching easier and increase switching rates.
341. We think there could be merit in further investigating the costs and benefits of mandating price disclosure in certain sectors. We also think that there should be consideration of whether there are business terms or practices that impose unjustified search or switching costs that should be addressed.

Potential areas for further work

342. There may be merit in further consideration of:
- a. What business practices and contract terms, if any, may impose unjustified search or switching costs.
 - b. The costs and benefits of mandating price disclosure in certain sectors.

6.4 Education and advocacy

Overview

343. Well-functioning markets require consumers to be informed about their rights and be able to exercise those rights effectively. Likewise, it is important that businesses are aware of their obligations towards consumers under consumer laws. Where consumer laws are not well understood, consumers and businesses may be less confident about participating in markets. In addition, less-principled businesses may take advantage of vulnerable consumers and competition can be harmed (with detrimental effects on growth, productivity and innovation).
344. Both the Commerce Commission and MBIE use educational and advocacy initiatives to make consumers and businesses aware of their rights and obligations under the FTA, CCCFA, and CGA.
345. In addition to these government agencies, consumer advocacy groups like the Citizens Advice Bureau and Community Law Centres play an important role to provide consumers with information about their rights and direct them on how to enforce their rights.

Evidence

Current initiatives

346. A range of government educational and advocacy initiatives have been introduced or significantly expanded since the consumer law reforms. For example:
- a. A successful educational tool to help consumers understand their consumer rights is an animated series called *'It's All Good'*, which was launched by the Commerce Commission in 2016. According to the Commission, these videos have been well received, with episodes viewed more than one million times online.
 - b. The Commerce Commission has continued to investigate ways to broaden the reach of the animations. In November 2017, it released a series of *'It's All Good'* teaching resources, which were developed with the assistance of a practising teacher. The teaching resources focus on common situations like buying a car, getting a loan, being visited by a door-to-door salesperson, and making a decision about whether to buy an extended warranty. They include a student workbook, interactive quizzes, and a board game, and have been distributed to more than 600 schools throughout New Zealand. Teachers have provided positive feedback on the resources.
 - c. Like the Commerce Commission, MBIE's Consumer Protection team develops and delivers targeted information and programmes aimed at increasing the ability of consumers to transact with confidence. Use of the *consumerprotection.govt.nz* website, which provides pan-government information to support consumers to transact with confidence, has grown significantly, from 442,000 in 2014/15 to 984,000 in 2018/19. Consumer Protection also provides funding for Citizen Advice Bureau New Zealand to operate face-to-face community support for consumers across New Zealand.
 - d. One of the Consumer Protection team's recent innovative educational initiatives was to develop a teaching resource for Years 4-10, along with NCEA level 1 and 2 resources.⁴⁰ The purpose of this resource is to equip students with the knowledge, skills, attitudes, and values to enable them to be informed and confident consumers. This includes learning about their rights and responsibilities as consumers and the laws and regulations that protect consumers.

Stakeholder views

347. Despite these initiatives, a pervasive theme that came through in our meetings with stakeholders was that knowledge or understanding of New Zealand's consumer laws by consumers and businesses is low, even though the laws are considered to be reasonably well-designed in principle to protect consumers and ensure that both consumers and businesses are confident market participants.
348. Stakeholders saw information as a critical first step to support consumers to make informed decisions. Some stakeholders wanted to see additional information about consumer laws provided in retail premises. They also wanted government agencies, and others, to continue to inform consumers and businesses and run campaigns. The Commerce Commission's *'If you can't back it up, don't say it'* campaign was well received.
349. Stakeholders considered the issue of consumer understanding to be particularly significant for 'vulnerable' consumers. Relative to other consumers, vulnerable consumers are those who have a lack of knowledge, trust and/or confidence in consumer laws. Often these

⁴⁰ Information about this resource is available at <https://www.consumerprotection.govt.nz/news-and-media/school-resources/>.

influences are exacerbated by other factors, such as a lack of literacy skills. These disadvantages mean that vulnerable consumers are generally less aware than other consumers of consumer laws and less able to enforce their rights under the laws.

350. Similarly, MBIE's Consumer and Commercial Regulatory System Assessment⁴¹ found that:
- There is a general acceptance by most [stakeholders that contributed to the assessment] that the system does not serve consumers who are vulnerable by reason of a lack of financial capability and/ or economic deprivation well. These factors are a barrier to the uptake of information that is available to consumers, affects the choices available to them, as well as their willingness and ability to pursue remedies in the event of something going wrong with a transaction.*
351. Stakeholders also argued that additional information needs to be provided to businesses too, as not all of them have a good understanding of their obligations to consumers. Several stakeholders noted that 'front line' staff tended to be the people in the business that have the least knowledge of consumer laws, despite being the ones in direct contact with consumers. One stakeholder thought that businesses need to take more of a 'guardianship' role.
352. Stakeholders also noted that whilst having information available was an important first step, just having access to information wasn't sufficient – consumers also need to be able to understand the information they are presented with. Some stakeholders noted that New Zealand tends towards providing for additional information disclosure in response to many consumer issues. However, increasing amounts of information provided to consumers doesn't necessarily lead to a better result by itself. They noted that some other jurisdictions focus more on behavioural interventions such as 'nudging' consumers. This approach can be more effective than providing consumers with an overflow of information.
353. Some stakeholders argued that agencies promoting consumer law should make sure they take into account cultural factors, and that there needs to be greater communication to vulnerable people about other services, such as social services provided through the Ministry of Social Development. Having people who can direct vulnerable consumers to the best source of aid for them could be a helpful way forward.

Assessment

354. A lack of knowledge or understanding of consumer law is problematic, especially for vulnerable consumers.
355. Businesses are also less likely to comply with consumer laws if they have poor awareness of these laws, or lack the ability to properly understand and interpret them. Contravention can lead to consumers being harmed and places an increased dependence on enforcement resources. Furthermore, non-compliance in a market by some businesses may result in an unfair competitive advantage for those businesses over businesses that invest resources to militate against the risk of breaching consumer laws. This can be detrimental to the effective performance of the market overall.
356. Further, the less informed consumers are about consumer laws, the higher the probability that non-compliance with the laws by businesses will go undetected, and action to protect consumer rights will not be pursued. This means the primary objectives underpinning consumer laws – preventing harm to consumers in their dealings with businesses and promoting the effective functioning of markets – are less likely to be achieved.

⁴¹ MBIE. (2018). *Consumer and Commercial Regulatory System Assessment*. Retrieved from: <https://www.mbie.govt.nz/assets/9f6871846f/consumer-and-commercial-regulatory-system-assessment.pdf>

357. This is particularly problematic for vulnerable consumers who are more likely to be exploited by unscrupulous businesses, are less able to protect themselves through consumer laws or other means, and are therefore likely to experience more harm than the average consumer.
358. The current focus of agencies on informing consumers and businesses about consumer laws is undoubtedly an important initial step. Education and advocacy is an integral component of the Commerce Commission's strategic framework. Similarly, MBIE is continuing to work to improve the availability of helpful information to consumers. In addition, non-governmental organisations continue to provide an invaluable service to consumers to ensure that consumers know their rights and how to enforce them. A co-ordinated approach has been developed through the MBIE-led Consumer Protection Partnership Forum to bring together both government and non-government actors and create a cohesive platform to deliver education and advocacy outcomes.
359. Nevertheless, stakeholders were united in seeing more and better education and advocacy as a way forward for achieving the outcomes of consumer law. Whilst a lot of work has been done, and more is planned, there may be better ways forward for education and advocacy.
360. We may need to go beyond simply providing information to consumers and businesses if we want them to understand and be empowered by consumer law reforms, particularly when it comes to delivering on the reforms' intended outcomes for vulnerable consumers.
361. One option that could be explored further is the idea of 'consumer navigators'. The idea is that when a consumer experiences an issue, they talk to a navigator who provides advice and steers the consumer through the multiple steps needed to resolve a particular issue. For example, if a consumer becomes concerned that they are paying too much for electricity, they could call up a navigator, who would then search for a better deal on their behalf and take care of the switching process. Such services could be provided in-person, via telephone or digitally. They could be provided by government, the private sector or through funding non-government organisations. This is not a wholly new idea. Navigator-type approaches are already reflected to an extent in services provided by organisations such as Citizen's Advice Bureau.

Potential areas for further work

362. Potential areas for further work include:
- a. Continuing to build on the existing development and delivery of educational and advocacy initiatives to consumers and businesses.
 - b. Investigation into ways of better engaging with 'vulnerable consumers'.
 - c. Considering ways of going beyond merely informing consumers and businesses of consumer laws in order to deepen their understanding and empower consumers to enforce their consumer rights.

7 Next steps

363. This report has outlined a number of areas where further work may be warranted.
364. Some – but not all – of these areas are likely to be included in a future discussion paper on potential further amendments to the FTA. The discussion paper is likely to be released in the first half of 2020, and will focus on areas where the case for change is strongest.
365. There are some matters identified in this report that are unlikely to be substantively addressed in the initial discussion paper. These may be considered as part of a future policy process, depending on Government priorities and as resourcing permits. However, MBIE generally welcomes feedback, submissions and proposals for reform from stakeholders on any aspect of consumer law.
366. Some of the areas where further work was proposed in this document are non-legislative in nature, such as in relation to advice, information and education. These issues are being considered as part of relevant agencies' day-to-day work, and through the response to the 2018 Consumer and Commercial Regulatory System Assessment.
367. MBIE also intends to review other consumer legislation – including the CGA and Auctioneers Act – in the future as resourcing permits. Like this document, it is expected that these reviews will evaluate the effectiveness of the changes that took effect as a result of the 2010-2015 review of consumer law, and identify further areas where reform may be warranted (if any).

Annex 1: Summary of potential areas for further work

Potential areas for further work

Unfair Contract terms	<ol style="list-style-type: none"> 1. Whether private parties should be able to take action in respect of UCTs, whether the FTA’s full civil regime should apply to UCTs, and whether there should be penalties for including UCTs in standard form contracts, without the need for terms to have been previously declared to be unfair. 2. Whether the definition of upfront price should be changed to better reflect what a reasonable consumer would define as being an ‘upfront’ price, and so that fees and charges for ancillary matters may be challenged as UCTs. 3. Whether some ‘grey list’ or other terms should be prohibited in all circumstances, or in certain easily definable circumstances.
Product safety requirements	<ol style="list-style-type: none"> 4. Ways to achieve greater visibility of voluntary product safety recalls and improve the effectiveness and oversight of the recalls regime in general. 5. Whether the enforcement powers of MBIE product safety officers should be expanded, such as in relation to the issuance of suspension of supply notices and the ability to require the provision of information. 6. Whether the current system should move to being more proactive than reactive and, if so, how to do so. 7. Whether improvements can be made in how product safety regulators work together to promote and achieve good product safety outcomes.
Uninvited direct sales	<ol style="list-style-type: none"> 8. Whether places other than a consumer’s home, workplace, or over the phone (such as shopping mall concourses) should be covered by the uninvited direct sales provisions.
Extended warranties	<ol style="list-style-type: none"> 9. Whether there would be benefit in making regulations prescribing specifically what information is required to be displayed for an extended warranty agreement and what format this could take. 10. Other ways of improving the extended warranty regime, including whether this is an area that would benefit from further education and enforcement or whether further law change is required to achieve the outcomes sought.

Enforcement and remedies	<ul style="list-style-type: none"> 11. Whether the ability of Commerce Commission and MBIE staff to undertake inspections of goods and services for product safety and other purposes should be expanded. 12. Whether additional contraventions of the FTA should be made an infringement offence, whether there is any scope to increase the level of infringement fees, and whether the period under which infringement notices are enforceable should be extended. 13. Whether or not the maximum penalties set out in section 40 of the FTA should be further increased. 14. Whether pecuniary penalties should be provided instead of, or in addition to, offences for breaching the FTA. 15. Whether indemnification and insurance against penalties for breaches of the FTA should be prohibited. 16. Whether harassment and coercion should be an offence or subject to pecuniary penalties.
Drip Pricing	<ul style="list-style-type: none"> 17. Whether an all-inclusive pricing provision, or a prohibition against misleading pricing omissions, should be provided for in the FTA.
Role of intermediaries	<ul style="list-style-type: none"> 18. Whether or not there is a case to explicitly give intermediaries a duty to act to prevent further illegal activity from occurring via their systems, once they have been made aware of it. 19. Cross-government consideration of the roles and responsibilities of intermediaries more broadly.
Search and Switching costs	<ul style="list-style-type: none"> 20. Consideration of what business practices and contract terms, if any, may impose unjustified search or switching costs. 21. Further investigation into the costs and benefits of mandating price disclosure in certain sectors.
Education and Advocacy	<ul style="list-style-type: none"> 22. Continuing to build on the existing development and delivery of educational and advocacy initiatives to consumers and businesses. 23. Investigation into ways of better engaging with 'vulnerable consumers'. 24. Considering ways of going beyond merely informing consumers and businesses of consumer laws in order to deepen their understanding and empower consumers to enforce their consumer rights.