

Fair Trading Amendment Bill

Government Bill

As reported from the committee of the whole House

Key to symbols used in reprinted bill

As reported from the committee of the whole House

text inserted

~~text deleted~~

Hon Dr David Clark

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Schedule

New Schedule 1AA inserted

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The Parliament of New Zealand enacts as follows:

1 Title

This Act is the Fair Trading Amendment Act **2019**.

2 Commencement

(1) **Sections 10, 11, 13, 14, and 20** come into force on the day after the date on which this Act receives the Royal assent. 5

(2) The rest of this Act comes into force on the day that is the first anniversary of the date on which it receives the Royal assent.

3 Principal Act

This Act amends the Fair Trading Act 1986 (the **principal Act**).

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Part 1

Main amendments to principal Act

- 4 Section 2 amended (Interpretation)**
- (1) In section 2(1), insert in their appropriate alphabetical order:
- residential premises** means a building, or part of a building, that is a house, flat, town house, home unit, or similar dwelling erected, or currently used, mainly as a residence, and any land, improvements, or appurtenances belonging to the dwelling or usually enjoyed with it
- small trade contract** has the meaning given in **section 26C**
- standard form small trade contract** means a small trade contract that a court, in the course of proceedings for a declaration under section 46I, and in accordance with section 46J, determines is a standard form contract
- (2) In section 2(1), definition of **unfair contract term**, after “consumer contract”, insert “or small trade contract”.
- 5 New section 2A inserted (Transitional, savings, and related provisions)**
- After section 2, insert:
- 2A Transitional, savings, and related provisions**
- The transitional, savings, and related provisions set out in **Schedule 1AA** have effect according to their terms.
- 6 New sections 7 and 8 and cross-heading inserted**
- After the Part 1 heading, insert:
- Unconscionable conduct*
- 7 Unconscionable conduct**
- (1) A person must not, in trade, engage in conduct that is unconscionable.
- (2) This section applies whether or not—
- (a) there is a system or pattern of unconscionable conduct; or
- (b) a particular individual is identified as disadvantaged, or likely to be disadvantaged, by the conduct; or
- (c) a contract is entered into.
- (3) This section is not limited by any rule of law or equity relating to unconscionable conduct.
- 8 Court may have regard to certain matters**
- (1) When assessing under **section 7** whether a person’s conduct is unconscionable, a court may have regard to 1 or more of the following:

- (a) the relative bargaining power of the person engaging in the conduct (the **trader**) and any person (whether or not an identified individual) who is disadvantaged, or likely to be disadvantaged, by the conduct (an **affected person**):
- (b) the extent to which the trader and an affected person acted in good faith: 5
- (c) whether, taking account of the particular characteristics and circumstances of an affected person, the affected person or the affected person's representative was reasonably able to protect the affected person's interests:
- (d) whether an affected person was able to understand any documents provided by the trader: 10
- (e) whether the trader subjected an affected person to unfair pressure or tactics or otherwise unduly influenced an affected person:
- (f) whether the trader unreasonably failed to disclose to an affected person— 15
- (i) any intended conduct of the trader that might adversely affect the affected person's interests:
- (ii) any risk to the affected person's interests arising from the trader's intended conduct, if the trader should have foreseen that the risk would not be apparent to the affected person: 20
- (g) if there is a contract to which the conduct relates, anything listed in **subsection (2)**:
- (h) any other circumstance that the court considers relevant.
- (2) If the conduct involves a contract between the trader and an affected person, the court may also have regard to— 25
- (a) the circumstances in which the contract was entered into, including—
- (i) any inducement to enter into it:
- (ii) the extent to which the affected person had an effective opportunity to negotiate the terms:
- (b) whether the affected person obtained independent legal advice, or other independent professional advice, about the contract before entering into it: 30
- (c) the terms of the contract:
- (d) the form of the contract, including, in the case of a written contract, whether its terms are transparent: 35
- (e) whether the terms of the contract allow the affected person to be reasonably able to meet their obligations under it:
- (f) whether the affected person's obligations under the contract are reasonably necessary for the protection of the trader's legitimate interests:

- (g) the conduct of the trader and affected person in complying with the terms of the contract:
- (h) the length of time the affected person has to remedy any breach:
- (i) whether any action by the trader in relation to enforcement of the contract was lawful: 5
- (j) any other conduct of the trader or affected person, after the contract was entered into, in connection with their relationship.
- (3) To the extent (if any) that no particular individual is identified as disadvantaged or likely to be disadvantaged by the conduct, this section applies with all necessary modifications as if— 10
- (a) references to an affected person were references to the type of person likely to be disadvantaged by the conduct; and
- (b) references to the existence of a particular circumstance were references to the likely existence of that circumstance in relation to that type of person. 15

7 New sections 26B to 26E inserted

After section 26A, insert:

26B Unfair contract terms in standard form small trade contracts

If a court has declared, under section 46I, that a term in a standard form small trade contract is an unfair contract term, a person must not— 20

- (a) include the unfair contract term in a standard form contract (unless the term is included in a way that complies with the terms (if any) of the decision of the court); or
- (b) apply, enforce, or rely on the unfair contract term in a standard form contract. 25

26C Definition of small trade contract

(1) In this Act, unless the context otherwise requires, a contract is a **small trade contract** if—

- (a) each party to it is engaged in trade; and
- (b) it is not a consumer contract; and 30
- (c) it does not comprise or form part of a trading relationship that exceeds the annual value threshold ~~when it~~ when the relationship first arises.

(2) If a party to a proceeding alleges that a contract is a small trade contract, the contract is presumed to be a small trade contract unless any other party to the proceeding proves otherwise. 35

(3) This section is subject to **section 26E**.

26D Small trade contracts: trading relationship, annual value threshold, and other definitions

- (1) This section applies for the purposes of **section 26C(1)(c)**.
- (2) ~~Trading relationship~~, in relation to a contract, means a relationship consisting of that contract and any other contract that is—
- (a) ~~between the same or related parties; and~~
- (b) ~~on the same or substantially similar terms.~~
- (2) Trading relationship, in relation to a contract, means a relationship consisting of—
- (a) that contract; and
- (b) any other contract (whether current or prospective) between the same parties on the same or substantially similar terms.
- (3) A trading relationship—
- (a) **first arises** when the first or only contract of the relationship is entered into; and
- (b) **exceeds the annual value threshold when it ~~when the relationship first arises~~ if, at that time,—**
- (i) it includes a transparent term or transparent terms providing for consideration (including GST, if applicable) of \$250,000 or more to be paid under it, in relation to any annual period, for the goods, services, or interest in land concerned; or
- (ii) consideration (including GST, if applicable) worth \$250,000 or more is more likely than not to become payable under the relationship, in relation to any annual period, for the goods, services, or interest in land concerned.
- (4) In this section,—
- (a) ~~contracts are **between the same or related parties** if each party to each of the contracts is, or is related to, a party to the other contract; and~~
- (b) **related** has the meaning given in section 12(2) of the Financial Markets Conduct Act 2013; and
- (c) the following must be disregarded when determining whether contracts are on the same or substantially similar terms:
- (i) the main subject matter of the contracts; and
- (ii) any upfront price (within the meaning of section 46K(2)) payable under the contracts; and
- (d) **annual period**, in relation to a trading relationship, means a period—
- (i) beginning with the date on which the relationship first arises or an anniversary of that date; and

- (ii) ending 12 months ~~later~~; and
- (e) GST means goods and services tax payable under the Goods and Services Tax Act 1985.

Example 1

A and B enter into a contract on 1 December 2022. The contract includes a transparent term under which A is to pay B ~~\$400,000~~ \$253,000 (\$220,000 plus GST) for services to be provided before 1 December 2023. On 1 November 2023, ~~A's holding company and B's subsidiary~~ A and B enter into a contract on substantially similar terms. The second contract includes a transparent term for ~~A's holding company to pay B's subsidiary~~ \$50,000 A to pay B \$57,500 (\$50,000 plus GST) for services to be provided in 2024.

Neither contract is a small trade contract because the annual value threshold is exceeded when the trading relationship first arises.

Example 2

C and D are both engaged in trade. They enter into 2 contracts for C to buy fruit from D. The contracts are on the same terms except that the first contract relates to grapes and is entered into on 1 January 2023, and the second contract relates to apples and is entered into a year later, on 1 January 2024. Neither contract is a consumer contract and there are no other contracts in the trading relationship.

The parties' expectation when entering into the first contract is that C will spend approximately \$120,000 per year under it and that from 2024 it will also spend \$180,000 per year under the second contract.

Neither contract is a small trade contract because, despite the different subject matter, they form part of the same trading relationship and the annual value threshold is exceeded when the trading relationship first arises.

Example 3

On 1 May 2024, E and F, who are both engaged in trade, enter into an open-ended contract for E to supply stationery to F. The contract is not a consumer contract and the trading relationship contains no other contracts.

The contract does not include transparent terms setting out the consideration to be paid, but based on their previous interactions the parties expect that F will spend \$100,000 under it each year. However, after several years F is purchasing significantly more stationery than originally anticipated. E is now supplying \$300,000 worth of stationery to F each year. There has been no variation of the contract.

The contract starts as and remains a small trade contract because the annual value threshold is not exceeded when the trading relationship first arises.

26E Regulations relating to definition of small trade contract

- (1) The Governor-General may, by Order in Council made on the recommendation of the Minister, make regulations for the following purposes:
- (a) providing for any class of contract that is not a consumer contract and that is between parties engaged in trade to be treated as a small trade contract under **section 26C**; or

- (b) excluding any class of contract from being a small trade contract under **section 26C**, and prescribing the terms and conditions (if any) applying to the exclusion.
- (2) The Minister must not make a recommendation unless—
- (a) the Minister has consulted the persons, or representatives of the persons, that the Minister considers will be substantially affected by any Order in Council made in accordance with the recommendation, and those persons have had the opportunity to comment to the Minister; and 5
- (b) the Minister has considered those comments; and
- (c) in the case of regulations under **subsection (1)(a)**, the Minister is satisfied that the regulations are necessary or desirable in order to promote the purpose of this Act; and 10
- (d) in the case of regulations under **subsection (1)(b)**, the Minister has had regard to the purpose of the Act and is satisfied that the requirements of **section 26B** would be unduly onerous in relation to the excluded class of contract. 15
- (3) A failure to comply with **subsection (2)(a) or (b)** does not affect the validity of any regulations made under this section.
- (4) Regulations made under this section are secondary legislation (see Part 3 of the Legislation Act 2019 for publication requirements). 20
- 8 Section 36L amended (Disclosure requirements relating to uninvited direct sale agreements)**
- (1) In section 36L(4)(a), replace “this subpart” with “subsections (1) to (3) and sections 36M to 36R”.
- (2) In section 36L(6), replace “this subpart continues” with “subsections (1) to (3) and sections 36M to 36R continue”. 25
- 9 New section 36RA inserted (Directions to leave premises or not enter premises)**
- After section 36R, insert:
- 36RA Directions to leave premises or not enter premises** 30
- (1) This section applies to a person who, for the purpose of negotiating an uninvited direct sale agreement,—
- (a) is about to enter residential premises; or
- (b) has entered residential premises.
- (2) The person must not enter the premises if directed not to enter by anyone who— 35
- (a) resides at the premises; or

- (b) is acting with the actual or apparent authority of someone residing at the premises.
- (3) The person must leave the premises as soon as possible if directed to leave by anyone who—
- (a) resides at the premises; or 5
- (b) is acting with the actual or apparent authority of someone residing at the premises.
- (4) A direction under **subsection (2) or (3)**—
- (a) may be verbal or in written or other visual form; and
- (b) must be audible or visible; and 10
- (c) may be a general standing direction (for example, a notice on a gate or front door directing salespeople not to call) or a specific direction (for example, a face-to-face spoken direction).
- (5) If the direction is a specific one, the person must not, for the purpose of negotiating an uninvited direct sale agreement, enter or re-enter the premises within 2 years after the direction is given. 15

10 Section 36U amended (Disclosure requirements relating to extended warranty agreements)

- (1) Replace section 36U(1)(b) with:
- (b) a copy of the agreement is given to the consumer— 20
- (i) at the time the agreement is entered into; or
- (ii) in the case of an agreement entered into over the telephone, within 5 working days after the date on which the agreement was entered into.
- (2) In section 36U(3)(a), after “5 working days”, insert “after the date on which the consumer receives a copy of the agreement”. 25

11 Section 37 amended (Jurisdiction of High Court)

In section 37, insert as subsection (2):

- (2) *See also* section 100A of the Commerce Act 1986, under which the Commission may state a case for the opinion of the High Court on any question of law arising in any matter before it under this Act. 30

12 Section 44 amended (Defences)

After section 44(6), insert:

- (7) It is a defence to a prosecution of an offence under section 40, or to any other proceedings under this Part, in relation to a contravention of **section 36RA**, if the defendant proves that— 35

- (a) the person who gave the direction under **section 36RA(2) or (3)**, or with whose actual or apparent authority it was given, no longer resided at the premises at the time of the contravening conduct; or
- (b) the contravening conduct was with the permission (given after the direction under **section 36RA(2) or (3)** but before the conduct) of someone who—
 - (i) resided at the premises; or
 - (ii) was acting with the actual or apparent authority of someone residing at the premises.

13 New section 46AA inserted (Matters included in undertakings) 10

After section 46A, insert:

46AA Matters included in undertakings

- (1) An undertaking under section 46A may, without limitation, include either or both of the following:
 - (a) an undertaking to pay compensation to any person or otherwise take action to avoid, remedy, or mitigate any actual or likely adverse effects arising from a contravention, or possible contravention, of this Act: 15
 - (b) an undertaking to pay to the Commission all or part of the Commission's costs incurred in investigating, or bringing proceedings in relation to, a contravention, or possible contravention, of this Act. 20
- (2) If the Commission accepts an undertaking that involves payment of compensation to any person, or payment of the Commission's costs, the Commission must make the following information publicly available:
 - (a) the amount of the compensation, or of the Commission's costs, that has been undertaken to be paid; and 25
 - (b) a brief description of the circumstances and nature of the contravention or possible contravention of this Act to which the undertaking relates.
- (3) In this section, **contravention** means any of the following:
 - (a) an actual contravention:
 - (b) aiding, abetting, counselling, or procuring a contravention: 30
 - (c) inducing a contravention, whether by threats, promises, or otherwise:
 - (d) being in any way, directly or indirectly, knowingly concerned in, or party to, a contravention:
 - (e) conspiring with any other person in a contravention.

14 Section 46C amended (Management banning orders) 35

Replace section 46C(1)(a) and (b) with:

- (a) has, on at least 2 separate occasions within a 10-year period (whether before or after this section comes into force or is amended), done either or both of the following:
- (i) committed an offence against section 40(1) or (1A):
 - (ii) been a director of, or concerned in the management of, an incorporated or unincorporated body when it committed an offence against section 40(1) or (1A); or
- 15 Section 46H amended (Application by Commission for declaration of unfair contract term)**
- In section 46H(1), after “standard form consumer contract”, insert “or standard form small trade contract”. 10
- 16 Section 46I amended (Declaration of unfair contract terms)**
- (1) In section 46I(1), after “standard form consumer contract”, insert “or standard form small trade contract”.
 - (2) In section 46I(2)(a), after “consumer contract”, insert “or small trade contract”. 15
 - (3) In section 46I(2)(b), after “consumer contract”, insert “or small trade contract”.
- 17 Section 46K amended (Terms that may not be declared to be unfair contract terms)**
- In section 46K(1), after “standard form consumer contract”, insert “or standard form small trade contract”. 20
- 18 Section 46L amended (When term in consumer contract is unfair)**
- (1) In the heading to section 46L, after “consumer contract”, insert “or small trade contract”.
 - (2) In section 46L(1), after “consumer contract”, insert “or small trade contract”.
 - (3) In section 46L(2), after “consumer contract”, insert “or small trade contract”. 25
 - (4) In section 46L(3), after “consumer contract”, insert “or small trade contract”.
- 19 Section 46M amended (Examples of unfair contract terms)**
- In section 46M, after “consumer contract”, insert “or small trade contract”.
- 20 New section 48T inserted (Powers of Commission to prohibit disclosure of information, documents, and evidence)** 30
- After section 48S, insert:
- 48T Powers of Commission to prohibit disclosure of information, documents, and evidence**
- Section 100 of the Commerce Act 1986 (powers of Commission to prohibit disclosure of information, documents, and evidence) applies, with all necessary 35

modifications, in relation to an investigation or inquiry by the Commission under this Act as it applies in relation to an investigation or inquiry under the Commerce Act 1986.

Part 2

Transitional, savings, and related provisions

5

21 New Schedule 1AA inserted

Insert the **Schedule 1AA** set out in the **Schedule** of this Act as the first schedule to appear after the last section of the principal Act.

**Schedule
New Schedule 1AA inserted**

s 21

**Schedule 1AA
Transitional, savings, and related provisions**

5

s 2A

**Part 1
Provision relating to Fair Trading Amendment Act 2019**

- 1 Unfair contract terms in standard form small trade contracts**
- (1) **Sections 26B to 26E** do not apply to the following contracts (which, accordingly, are not small trade contracts and must be disregarded when determining which contracts form part of a trading relationship for the purposes of those sections):
- (a) a contract entered into before the commencement date and not varied or renewed on or after that date: 15
- (b) a relevant insurance agreement.
- (2) If a contract entered into before the commencement date is varied or renewed on or after that date and is not a relevant insurance agreement, the contract (as varied or renewed) must be treated for the purposes of **sections 26B to 26E** as a new contract entered into on the date of the variation or renewal. 20
- (3) In this clause,—
- commencement date** means the date on which **sections 26B to 26E** come into force
- relevant insurance agreement** means—
- (a) a contract of insurance (as defined in section 7 of the Insurance (Prudential Supervision) Act 2010) entered into before ~~the commencement date~~ the specified date, including as varied or renewed at any time; or 25
- (b) a new contract that has the effect of operating as a renewal of a contract described in **paragraph (a)** or this paragraph, including as varied or renewed at any time-time 30
- specified date** means—
- (a) 1 April 2025; or
- (b) if an earlier date is specified under **subclause (4)**, that date.
- (4) The Governor-General may, by Order in Council, specify a date for the purposes of **paragraph (b)** of the definition of **specified date** in **subclause (3)**. 35

(5) An Order in Council made under **subclause (4)** is secondary legislation (*see* Part 3 of the Legislation Act 2019 for publication requirements).

Legislative history

17 December 2019

Introduction (Bill 213–1)

12 February 2020

First reading and referral to Economic Development, Science and Innovation Committee

12 August 2020

Discharged from Economic Development, Science and Innovation Committee

2 June 2021

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22 June 2021

Committee of the whole House (Bill 213–2)