

4 December 2019

Hon David Parker, Attorney-General

## **Consistency with the New Zealand Bill of Rights Act 1990: Fair Trading Amendment Bill**

1. We have considered whether the **Fair Trading Amendment Bill** ('the Bill') is consistent with the rights and freedoms affirmed in the New Zealand Bill of Rights Act 1990 ('the Bill of Rights Act').
2. We have concluded that the Bill appears to be consistent with the rights and freedoms affirmed in the Bill of Rights Act. In reaching that conclusion, we have considered the consistency of the Bill with section 14 (freedom of expression), section 18 (freedom of movement) and section 25(c) (presumption of innocence). Our analysis is set out below.

### **The Bill**

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3. The Bill amends the Fair Trading Act 1986 (the Fair Trading Act) to introduce new protections against unfair commercial practices:
  - a. The Bill prohibits unconscionable conduct in trade. 'Unconscionable conduct', to be determined by a court in each case, is serious misconduct that goes well beyond being commercially necessary or appropriate. This offence will be subject to penalties of \$600,000 for bodies corporate and \$200,000 for individuals.
  - b. The Bill extends the Fair Trading Act's existing protections against unfair contract terms in standard form consumer contracts so that these will also apply to small trade contracts. It is an offence to contravene these provisions.
4. The Bill amends the Fair Trading Act to strengthen the ability of consumers to direct 'uninvited direct sellers' to leave (or not enter) their property. The Bill provides the consumer with the ability to use a generally-worded written notice for this purpose. Contravention of these provisions will be subject to penalties of up to \$10,000 for individuals and \$30,000 for bodies corporate.
5. The Bill also extends the powers of the Commerce Commission (under the Commerce Act 1986) to prohibit the disclosure of information in the course of an investigation under the Fair Trading Act.
6. The Bill makes other minor amendments, to improve the functioning of the Fair Trading Act and for consistency with other legislation, in the following areas:
  - a. disclosure requirements relating to extended warranty agreements
  - b. enforceable undertakings, and
  - c. court processes for declaring that a contract term is unfair, so that the process extends to small trade contracts.

## Consistency of the Bill with the Bill of Rights Act

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### Section 14 – Freedom of expression

7. Section 14 of the Bill of Rights Act affirms that everyone has the right to freedom of expression, including the freedom to seek, receive, and impart information and opinions of any kind in any form. The right has been interpreted as including the right not to be compelled to say certain things or to provide certain information.
8. Under the Commerce Act 1986, the Commerce Commission (the Commission) has wide-ranging powers to require documents, evidence, or other written and oral information from any person. These powers can be exercised only if the Commission considers it necessary for the purposes of carrying out its functions and exercising its powers.
9. Section 100 of the Commerce Act gives the Commission the power to prohibit the publication of any information it acquires in connection with its functions. New section 48T of the Bill extends this existing power of the Commission to prohibit the disclosure of information in the course of an investigation or inquiry under the Fair Trading Act. This provision prima facie limits the right to freedom of expression of anyone who may wish to disclose such information.
10. However, under section 5 of the Bill of Rights Act, a limit on a right may be justifiable where the limit serves an important objective, and where the limits on the right are rationally connected to achieving that objective, limit the right no more than necessary, and are proportional to its importance.
11. The section 5 inquiry may be approached as follows<sup>1</sup>:
  - a. does the provision serve an objective sufficiently important to justify some limitation of the right or freedom?
  - b. if so, then:
    - i. is the limit rationally connected with the objective?
    - ii. does the limit impair the right or freedom no more than is reasonably necessary for sufficient achievement of the objective?
    - iii. is the limit in due proportion to the importance of the objective?
12. The objective of proposed section 48T is to ensure that the Commission's powers can be used consistently across investigations. Currently, the Commission cannot prohibit interviewees from sharing information provided to them under the Fair Trading Act, but it can if the information has been provided under the Commerce Act. This can cause issues with the integrity of investigations, which are an important mechanism for supporting the purpose of the Fair Trading Act in protecting the interests of consumers, and to enable businesses to compete effectively and consumers and businesses to participate confidently. This provision is therefore legitimately and rationally connected with the objective.

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<sup>1</sup> Hansen v R [2007] NZSC 7 at [123]

13. Section 48T of the Bill extends the existing power of the Commission under the Commerce Act to prohibit the disclosure of information in the course of an investigation or inquiry under the Fair Trading Act. The Commission may only make such an order about information obtained during the course of an investigation, and there are limitations on time periods.<sup>2</sup> This ensures the right of expression is not limited any further than necessary for the Commission to carry out its operations, and is in due proportion to the importance of the objective (to ensure that the Commission's powers can be used consistently across investigations).
14. For these reasons, we conclude that any limits to the freedom of expression imposed by the Bill are justified under section 5 of the Bill of Rights Act.

### **Section 18 – Freedom of movement**

15. We have briefly considered whether the Bill's provisions relating to uninvited direct sellers engages the freedom of movement. We have reached the view that they do not. This is because, although the provisions of section 36RA of the Bill apply to a person about to enter residential premises (eg standing outside on a public footpath), no offence is committed until a person has entered the residential premises.

### **Section 25(c) – Presumption of innocence**

16. Section 25(c) of the Bill of Rights Act provides that everyone charged with an offence has the right to be presumed innocent until proved guilty according to law. This right requires the prosecution to prove, beyond reasonable doubt, that the accused is guilty.
17. We have identified two strict liability offences in the Bill. Strict liability offences give rise to a *prima facie* issue of inconsistency with section 25(c) because the accused is required to prove a defence (on the balance of probabilities) to avoid liability (in other criminal proceedings an accused must merely *raise* a defence in an effort to create reasonable doubt). This means that where the accused is unable to prove a defence, they could be convicted even where reasonable doubt exists as to their guilt.
18. The Bill contains the following strict liability offences:
  - a. Offences relating to unfair contract terms in standard form small trade contracts (proposed new section 26B);
  - b. Offences relating to the failure to follow directions not to enter or leave premises, and re-entering the premises within a specified timeframe (proposed new section 36RU).
19. Both of these offences are subject to section 44 of the Fair Trading Act, meaning that a defendant can escape liability by proving any of the defences set out in section 44.
20. Clause 10 of the Bill proposes to amend section 44 of the Fair Trading Act by including additional defences to an offence under new section 36RU. The new defences require the defendant to prove that the person who gave the direction no longer resided at the premises at the time of the contravening conduct, or that the contravening conduct was

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<sup>2</sup> Commerce Act 1986, section 100(1) and (2)

with the permission of someone who resided at the premises or was acting with the authority of someone residing at the premises.

21. Proposed new section 26C provides a definition of small trade contract. This is an element of the offence under proposed section 26B. Proposed new section 26C(2) provides that if a party to a proceeding alleges that a contract is a small trade contract, it will be presumed to be so unless any other party proves otherwise. This also places a persuasive burden on the defendant.
22. Penalising non-compliance by way of a strict liability offence is rationally connected to the objectives of the amendments and the overall purposes of the Fair Trading Act. Strict liability offences have been considered more justifiable where, as is the case here:
  - a. the offence is in the nature of a public welfare regulatory offence in order to protect consumers;
  - b. the offender is in the best position to justify their apparent failure to comply with the law rather than requiring the Crown to prove the opposite; and
  - c. the penalty for the offence (here a fine) is proportionate to the importance of the Bill's objective.
23. The purpose of these new provisions is to address gaps in the prevention of unfair commercial practices including pressure tactics, deception, one-sided contracts terms or other behaviour that exploits consumers or small businesses. The objective is to deter behaviour that may lead to high levels of financial detriment to consumers. Strong deterrence is considered necessary to achieve these goals. We are therefore satisfied that the penalties are proportionate to both the commercial nature of the actors and the objectives of the amendments, as well as the overall purpose of the Fair Trading Act.
24. We further consider that the prima facie breach of section 25(c) is justified as it would be difficult for a prosecution to prove elements of mens rea with respect to these offences. We agree that the defendant is best placed to explain how the breach occurred and any steps that had been taken to avoid it. For these reasons, we consider it is justifiable that the burden of proof to establish those matters be on the defendant.
25. Strict liability offences are generally associated with penalties at the lower end of the scale. The penalties for contravention of section 26B are at the higher end, being a fine up to \$200,000 for individuals and \$600,000 for bodies corporate. In respect of offences under section 36RU, the penalty is a fine of up to \$10,000 for individuals and \$30,000 for bodies corporate. We note that the parties governed by the offence provisions are commercial actors and bodies corporate engaged in a regulated industry.
26. We have also considered whether proposed new section 26F relating to unconscionable conduct is a strict liability offence. Although the offence sits alongside other offences that may be considered strict liability, we have concluded that it is not likely to be interpreted as such by a court. Section 26G sets out matters that a court may consider in determining whether a person's conduct is unconscionable, and these matters suggest a level of intention is required for this offence.
27. Accordingly, we have concluded that the proposed new sections referred to above are justified under section 5 of the Bill of Rights Act.

## **Conclusion**

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28. We have concluded that the Bill appears to be consistent with the rights and freedoms affirmed in the Bill of Rights Act.

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