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8 August 2025

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ICNZ SUBMISSION ON CHAPTERS 1 & 2 OF THE TARGETED CONSULTATION ON PROPOSED AMENDMENTS TO THE FAIR TRADING ACT 1986

This submission is provided in response to the Ministry of Business, Innovation & Employment's (**MBIE**) targeted consultation paper on proposed amendments to the Fair Trading Act 1986 (**FTA**). In this submission we respond to Chapters 1 and 2 of the consultation paper. We will provide a second submission to respond to Chapter 3 by the adjusted due date for that chapter of 5 September 2025.

Te Kāhui Inihua o Aotearoa | The Insurance Council of New Zealand (**ICNZ**) represents general insurers. Our members accept the risks of over NZ$2 trillion of New Zealand's assets and liabilities. ICNZ's members provide insurance products ranging from those usually purchased by individuals (such as home and contents insurance, travel insurance, and motor vehicle insurance) to those purchased by small businesses and larger organisations (such as product and public liability insurance, professional indemnity insurance, cyber insurance, commercial property insurance, and directors and officers insurance).

Consultation Process

We appreciate being included in this targeted consultation and welcomed the opportunity to meet with officials on 6 August for a one hour discussion of the proposals in this consultation. This meeting was useful. However, the process and content of this consultation has nonetheless materially limited our ability to provide meaningful feedback on it. As we are providing comments within a short timeframe, our feedback is necessarily high-level. We would be happy to expand on any of the issues we have raised in our submission if officials or the Minister require further context.

Timeframes

We have not had sufficient time to fully analyse the consultation paper's proposals and their potential impact on the insurance industry and our customers.

We note the very short timeframe we were given to respond to this consultation – less than two weeks. The proposals are significant, complex and interconnected. Providing nine working days

for feedback does not allow for meaningful consultation. MBIE suggesting that they should be approached if more time was required and then taking three days to decline our request for an extension of time, has further limited ICNZ's ability to respond to the proposals in Chapters 1 and 2.

Although MBIE later provided an extension for the Unfair Contract Terms chapter of the consultation only, which is welcome, the short timeframe to respond to the other proposals in the consultation paper was insufficient for meaningful consultation, particularly as ICNZ is a representative organisation that must co-ordinate with its members to develop and agree an industry response to a consultation. It is important to recognise that our members are often required to consult internally and, in many cases, follow formal sign-off procedures before contributing to ICNZ submissions.

In addition to their core business of providing insurance, insurers are currently dealing with a significant number of new and proposed regulatory initiatives that the industry is either providing comment on or working to implement within their own businesses. In light of these and other competing calls on insurers' resources, it is not reasonable to ask our members to divert their resources to provide meaningful input into an unexpected consultation with a less than two week turnaround.

Targeted nature of the consultation

Conducting only a targeted consultation on the proposed amendments to the FTA is surprising and potentially inappropriate given the consultation's scope and far-reaching implications of many of the proposals. The FTA applies across the economy and has a consumer protection focus.

We do not consider it appropriate to take the view that a limited targeted consultation with a short timeframe is acceptable because there is an opportunity for stakeholder input during the Select Committee process. The changes being proposed are significant and early and effective engagement before the drafting of the Bill would be of great value in achieving a quality outcome.

As the consultation was provided to ICNZ in confidence, this has also restricted our ability to communicate with other industry bodies to test our views on the proposals and identify areas of consensus and mutual interest.

We note that many of the proposals are technical, have impacts on access to justice, and should be considered carefully by legal experts. We recommend that the New Zealand Law Society and law firms should be consulted, if they have not been already, in order to obtain their input on the proposals.

Limited analysis

The FTA is a cornerstone piece of legislation outlining how commerce and consumers interact. The interconnectedness of the proposals in the consultation paper and their compounding

impacts on entities and individuals requires very careful consideration to ensure confidence for parties involved in commerce transactions.

We appreciate the consultation paper has been formulated quickly and therefore is limited in its analysis. This makes providing feedback more difficult. We note that the consultation paper lacks an adequate problem definition and provides little evidence or analysis of any problems that need to be addressed under the existing legislation and why change is required. The consultation paper relies heavily on conceptual arguments or assertions.

The consultation paper also lacks sufficient context. It was only at our meeting with MBIE officials that it became apparent that one of the drivers for the proposals was feedback from the Commerce Commission around perceived gaps in their enforcement tools. This context is important and without it, it is difficult to provide informed submissions.

There is little analysis of the implications of the proposals, particularly given many of them are interconnected. For example, changes to the nature of offences combined with higher penalties in turn combined with much reduced access to insurance for defence costs would together represent a very significant change.

The consultation does not analyse the connections between the policy proposals or pose specific questions about the costs and benefits.

The consultation paper has no discussion of how and when the changes might be implemented. This issue will need to be addressed before the proposals are taken any further. We provide some comments on this below.

The consultation paper does not sufficiently analyse the proposals' potential interaction with the other legislation regulating the insurance industry, in particular the implementation of the Contracts of Insurance (Repeals and Amendments) Act 2024[1] which will also amend the FTA. We note that the current proposals were not flagged when the Contracts of Insurance Bill and that Bill's amendments to the FTA were consulted on.

Overall, ICNZ and its members believe this is a poorly designed policy development process with a limited consultation paper. Given these limitations, this consultation cannot be considered meaningful.

If the only chance for further input will be through the Select Committee process, then it will be critical that adequate time and opportunity is afforded to the public for submissions and adequate time is set aside for the Select Committee to consider them.

Implementation of the changes

Many of the proposed changes would have specific impacts on insurers. It is important that the immediate consequences of regulatory reforms and the need to manage the transition are

[1] Sections 8–12 of the Contracts of Insurance (Repeals and Amendments) Act 2024 will amend the FTA as it relates to unfair contract terms and insurance contracts. These amendments are not yet in force.

properly considered and not relegated to being an afterthought. This is particularly the case with proposals that have a quasi-retrospective effect, for example impacting enforcement action already underway or insurance contracts that have already been entered into.

Were Option F (Prohibit insurance and indemnification) to be progressed, in whole or in part, this would have material implications for liability insurers and their business customers, and it is critical that adequate time is provided for this transition to be managed in an orderly and equitable manner.

Insurers will potentially need to:

- Communicate the impact of this change to the effective scope of the insurers' statutory liability cover to customers and brokers.
- Communicate the impact of any changes to the ability to cover defence costs.
- Adjust internal manuals and train claims handlers on the changes, including to support existing policyholders who will likely expect that FTA fines will be covered by their policies.
- Review and likely revise their policy wordings (and supporting documentation) to ensure they do not contain any prohibited cover but that legal defence costs are still covered. This process involves multiple steps and legal review and can also require changes to IT systems.
- Review premiums for the future to reflect the reduced scope of cover.

We note that such liability policies renew annually meaning even once any required revised policy wordings have been developed and introduced it can take a further 12 months for new policy wordings to be rolled out to all customers.

There will be compliance costs associated with these activities.

To enable these activities to be undertaken effectively and efficiently and in a way that supports customers, it would be important that an adequate, certain and well-signalled time period is provided to allow for careful and effective implementation. Assuming that the FTA changes are finalised and communicated well-ahead of them coming into force and that the Contracts of Insurance Act comes into force in November 2027, it would make sense for any insurance specific changes to come into force at the same time so that insurers are able to accommodate any further changes within their planning processes. We would welcome the opportunity to engage with MBIE further on how commencement/implementation periods could be provided that appropriately balance the progression of regulatory reform without unduly impacting insurers or their customers.

Responses to specific questions

Chapter 1 questions: Proposed changes to the penalties regime

1. **Do you have any comments on the problem definition and what Chapter 1 is aiming to achieve?**

   It is important that regulatory regimes enable illegal conduct to be deterred and where necessary punished to protect customers and other businesses. The problem definition in the consultation paper is nonetheless very light and does not appear to include any evidence to support its position that the current penalties regime settings in the FTA are not as effective and efficient as they could be.

   The consultation paper also does not provide any evidence that there are current issues with non-compliance under the Act. Understanding the scale of non-compliance and the nature of it is important when considering what would be the appropriate changes, if any.

   The consultation paper lacks empirical grounding. For example, there is no data or evidence showing that the current regime fails to deter or that civil penalties would improve outcomes. The paper does not present evidence of enforcement outcomes, compliance rates, the nature of non-compliance (deliberate versus careless or negligent) or comparative effectiveness or civil versus criminal regimes to respond to these issues.

   The objectives of the reform are not outlined. It is not clear whether the goal is deterrence, fairness, efficiency or a combination of these. These objectives can conflict. For example, increasing penalties may deter but may also reduce fairness if applied rigidly.

   Very large increases in penalties are proposed (i.e. Option B) but the need for this is hardly referred to in the problem definition, aside from an implicit reference to the "right incentives".

   There is no recognition in the problem definition that the FTA applies to all sectors of the economy, from sole traders to the largest companies. This is highly material to assessing the impacts of the proposals in isolation or in combination. For example, large penalties may have a greater impact on small businesses which are likely to have fewer resources available to pay. The financial impact of potentially much larger penalties on smaller businesses, including their ability to continue in business, should be considered.

   We consider it will be challenging to produce a meaningful regulatory impact analysis or informed advice for Ministers following this consultation without undertaking further research and analysis to build up a clearer picture of the problem that is being addressed.

Options A and B

2. **Do you agree with the proposal as set out in Option A, which would replace the majority of criminal offences in the Fair Trading Act with pecuniary penalties subject to civil proceedings? Why or why not?**

We recognise that civil pecuniary penalties are used in a number of statutes, the question being whether applying these to various offences under the FTA would be more appropriate than the current offences. This is ultimately a policy choice and needs to consider the wide range of activities and entities subject to the FTA and other proposals being made.

The combination of replacing a majority of criminal offences in the FTA with pecuniary penalties subject to civil proceedings and much higher penalties would in combination represent a major change in the nature of the FTA regime. This change would be further compounded, particularly for smaller businesses and individuals (employees and directors), by prohibiting insurance and indemnification against penalties and imposing limitations and risks on the insurability of defence costs.

We have some feedback on the rationale outlined (primarily in paragraph 13) for the change to civil penalties.

Paragraph 13(d) states that for those entities able to mount a robust defence there is less need for *"them to have the higher procedural protections available in criminal proceedings."* There are two major problems with this argument:

- First, procedural protections matter. The idea that larger corporates do not need the safeguards afforded criminal defendants seems to ignore the principle that justice should be blind to wealth and power.

- Second, the proposed changes to the law would apply equally to smaller entities, and potentially individuals, which may lack the financial resources to undertake a robust defence, particularly if their ability to insure defence costs is limited or made more uncertain. Justice should not be contingent on the defendant's resources or sophistication.

It is unclear from the consultation paper which sorts of contraventions of the FTA are the primary concern, deliberate or unintentional contraventions. Paragraph 13(f) suggests that deliberate activity is the key issue with the idea that higher penalties, rather than criminal conviction, is the appropriate solution to this, even though in cases of deliberate activity means rea is clearly an issue.

The consultation paper assumes monetary penalties are sufficient deterrents for corporate actors and in turn assumes financial consequences alone will modify behaviour, ignoring non-financial motivations like reputation, ethics, or market dynamics. The consultation paper does not traverse the counterpoint that reputational damage, criminal stigma, and personal accountability can be stronger deterrents than fines.

The consultation paper assumes civil proceedings are more efficient and appropriate for corporate breaches. This assumes that procedural simplicity (for the regulator) and a lower burden of proof justify shifting enforcement from criminal to civil, without properly considering trade-offs in fairness or deterrence.

There is no question in the consultation paper on Option B (Increase maximum monetary penalties). However, we note there is limited specific analysis in the paper of why the current penalties need to change or evidence cited of why the current levels are inadequate to incentivise compliance. The focus is also very much on the conduct of entities and while the largest increases would pertain to these, there would also be a 2.5x increase in the potential penalties for individuals.

Options C, D and E

3. **Which options above relating to infringement offences (Options C, D and E) do you support (if any)? Why or why not?**

   No comments at this stage.

4. **What additional strict liability offences in the Fair Trading Act (if any) should be included to expand the range of the infringement offences scheme? Why or why not?**

   No comments at this stage.

Options F

5. **Do you agree that insurance and indemnification against breaches of the Fair Trading Act should be prohibited? Why or why not?**

   Before responding to the proposals embodied in Option F, it is important to outline the nature (and existing limitations) of the relevant insurance that would be impacted by a prohibition, which is commonly known as statutory liability insurance, although equivalent cover can sometimes be provided under different policy names. It is particularly notable that this cover applies only in relation to unintentional breaches of the law.

   Statutory liability cover is designed to protect businesses for an unintentional breach of most New Zealand Acts. It generally provides cover for insurable fines, defence and reparation costs should a business or its employees be prosecuted for unintentionally breaching New Zealand statutes such as the Health and Safety at Work Act, the Resource Management Act, the Consumer Guarantees Act, the Building Act, the Privacy Act and the Fair Trading Act among others. These policies do not in most cases provide cover for civil pecuniary penalties. It is also important to note that these policies do not generally provide cover for:

   - Criminal allegations or liability arising from deliberate, wilful or reckless acts or omissions.

- Health and Safety at Work Act fines and penalties as this is prohibited by statute, though reparations might be covered, with a similar change in relation to the Resource Management Act being progressed through the Resource Management (Consenting and Other System Changes) Amendment Bill currently before Parliament.
- Infringement fees.
- Additionally, Acts commonly excluded from most statutory liability policies entirely include the Commerce Act 1986 (at least for the entity), Land Transport Act 1998, Arms Act 1983, Crimes Act 1961 and Misuse of Drugs Act 1975, as well as tax-related proceedings.

Statutory liability cover can provide businesses, particularly small and medium-sized enterprises, with confidence that they will be able to access legal representation and support in dealing with a claim for unintentional breaches of the law.

Option F proposes that the four following specific changes related to insurability and indemnification:

- Entering into an insurance policy that indemnifies against penalties for breaches of the FTA would be prohibited, and any such policy would have no effect.

- Businesses would not be permitted to indemnify their directors, employees or agents against their liability to pay a penalty, and no person could be indemnified.

- Breaching the above prohibited conduct would be subject to a penalty.

- Insurance or indemnification against the cost of defending against proceedings would be prohibited in situations where a penalty was imposed, but not in situations where a penalty was not imposed.

The four elements are significant and, combined with the move to pecuniary penalties and increased penalties, would represent a material change in policy settings and for commercial entities and their employees and directors.

Option F could have potentially significant implications for business and access to justice.

If businesses cannot access insurance cover for penalties and legal representation, they may feel forced to retain working capital to fund any potential legal activity making that capital unavailable for growing the business.

Prohibiting insurance and indemnification for directors and employees may also have a chilling effect on business. A prohibition may significantly affect the willingness of individuals (particularly directors) to accept certain roles or make key decisions, with broader consequences for the wider economy.

Progressing Option F risks being a poor policy decision that unduly impacts access to justice. The rationale for this proposal is given very briefly at paragraphs 44 and 45:

> *"The rationale for prohibiting indemnification of individuals (rather than the businesses they are associated with) is that, in general, individuals are likely to be subject to direct enforcement action only in cases involving relatively serious breaches of the Act, where insurance or indemnification against penalties is unlikely to be appropriate.*
>
> *Furthermore, it is considered that even if a breach of the Act does not involve knowledge or intent, then the potential for indemnity reduces the incentive for individuals and businesses to have good systems and procedures in place to minimise the risk of inadvertent breaches."*

This is speculative rather than substantive and has not clearly identified a problem that needs to be fixed in relation to the FTA or recognised the cases where insurance cover would be unlikely to be available.

While the insurance of fines has been prohibited under health and safety law and potentially the Resource Management Act, a wider case for this approach has yet to be made out. It is concerning that the proposal to prohibit insurance for FTA penalties and restrict insurance for defence costs has been made without reference to the current changes being progressed under the Resource Management Act. It is important to consider the cumulative impact of similar restrictions on insurance against fines across multiple regimes on business activities and the wider economy.

This proposal to prohibit insurance for FTA penalties must also be considered in the context of other proposals set out in the consultation paper, namely a proposed move to civil pecuniary penalties and much higher penalties. If taken forward these proposals would impact the way that insurance responds, (i.e. they could impact the availability and affordability of statutory liability insurance policies) even in the absence of any insurance specific changes.

It appears that the aim of the proposed prohibition on insurance against fines is to increase the deterrent effect of the FTA regime. We question whether the prohibition against insurance for fines will achieve these aims. Statutory liability insurance generally already excludes cover for intentional behaviour meaning that businesses that deliberately set out to breach the FTA will not be covered the policy in any event. Those businesses that are protected by statutory liability insurance are not those that set out to breach their statutory obligations.

If the prohibition against insurance for fines is introduced, businesses will need to pay any fines for accidental or unintentional breaches from other sources. This is likely to have a greater impact on smaller businesses. The financial impact on smaller businesses of

exposure to potentially significant fines should be considered, including the effect on growth if businesses retain working capital for potential penalties and litigation.

Prohibiting insurance and indemnification against breaches of the FTA could have a chilling effect on smaller businesses, employees and directors, particularly if the prohibition is combined with the introduction of civil proceedings (which lack the same procedural protections as criminal proceedings) and much larger penalties. Individuals are likely to be less capable of defending themselves or paying any penalty. This may affect businesses' ability to attract individuals to take on certain roles, including directorships, and lead to overly conservative decision-making.

Defence costs

The consultation paper proposes that insurance for defence costs should also be prohibited unless the defendant is ultimately successful. We are not aware of any precedent for this proposal.[2] This approach risks limiting access to justice for smaller businesses and individuals in particular as they may lack the ability to fund their own defence.

The proposal also has potential implications for business growth. If businesses no longer have confidence that defence costs will be covered by insurance, businesses may need to retain working capital for litigation thereby restricting the opportunity to use this capital for investment and growth.

In the short time available to us members have posed a number of scenarios where we are unsure of the implications of this proposal. This includes when insurance cover could be utilised for legal services through to whether there would need to be refunds from customers to insurers in the event their defence is unsuccessful and whether the insurer would be in breach of the prohibition if no refund could be obtained.

If in future insurers were to cover reimbursement following a successful defence, this may increase the difficulty in controlling the quantum of defence claims. This may have implications for premiums if insurers seek to offset the greater uncertainty and additional administrative burden.

The availability of insurance for defence costs only if the defendant is successful is likely to have an impact on how litigation is conducted. Concerns about restrictions on insurance cover may prevent some defendants from funding a proper defence and this has implications for access to justice. Alternatively, defendants with adequate means may be further incentivised to avoid settlement and prolong litigation to recoup their defence costs, which will be covered by insurance, if no penalty is imposed. These matters are complex and

[2] Neither the Health and Safety at Work Act 2015 nor the Resource Management (Consenting and Other Systems Changes) Amendment Bill 2025 prohibit insurance for defence costs.

so the implications require careful consideration. We would urge that the consultation should be extended to include the New Zealand Law Society and law firms with relevant expertise on the impacts that such a provision might have on the conduct of litigation.

Although we have not had time to properly analyse the issue, we highlight here that the impact on the prohibition on insuring against defence costs on the defendant's right to consult and instruct a lawyer (s24(c) of the New Zealand Bill of Rights Act 1990) and to defend civil proceedings brought by the Crown (s27(3)) should be considered.

Removing access to funding for defence costs would represent an additional penalty/cost for an insured. Surely the fine is the intended punishment, rather than reduced access to legal resource. The proposals are clearly intended to tilt the scales in favour of regulators, but it is important that an appropriate balance is maintained, particularly for smaller businesses and individuals.

From the perspective of insurers, the proposal could result in a chilling effect on insurance. It could discourage insurers from offering innovative liability products that include defence cost cover. This could:

- Reduce the availability of tailored coverage for businesses operating in high-risk regulatory environments.
- Lead to overly cautious underwriting, overly costly cover or withdrawal of certain products from the market.

There may also be a competitive disadvantage for local insurers if New Zealand introduces stricter prohibitions than comparable jurisdictions (e.g., Australia, UK). It could encourage multinational clients to seek coverage offshore, undermining the local market.

If the prohibition proceeds, insurers will need to review and potentially revise their insurance policy wordings to ensure they do not contain any prohibited cover and make consequential amendments to marketing material and other documentation. There will be compliance costs associated with these activities. If the proposal, which we do not support proceeds, it will be particularly important that sufficient time is allowed for careful implementation. (See our comments under the heading 'Implementation of the changes' above.)

6. **If indemnification is prohibited, should this prohibition extend to all provisions of the Act, or only certain ones? Please indicate which provisions you consider should be covered and outline why?**

We do not consider that insurance or indemnification should be prohibited.

Option G

7. **Should harassment and coercion be defined in the Fair Trading Act? If so, how?**

   No comment at this stage.

8. **Should harassment and coercion that is prohibited conduct be subject to a civil pecuniary penalty or strict liability offence, with Tier 1 penalties (see Option B, Table 1)? If so, should the penalties relate to harassment and coercion outright, undue harassment and coercion (as in Australia), or only harassment and coercion that meets certain other conditions?**

   No comment at this stage.

Chapter 2 questions: Product Safety Standards: allowing automatic updates

Although we have not had time to consider the issues raised in this chapter in detail, our initial view is that it would be sensible to allow automatic updates to product safety standards under the FTA and to allow the Chief Executive of MBIE to adopt international standards by notice.

This would allow standards to be kept up to date in an efficient manner and would provide greater clarity for business as to which is the appropriate standard to follow.

Chapter 3 questions: Unfair Contract Terms: making the rules easier to use and enforce

On Tuesday 5 August 2025, MBIE granted respondents an extension to 5 September to provide comments on the proposals related to the Unfair Contract Terms regime contained in Chapter 3 of the consultation paper. We will therefore provide you with our comments on questions 15 to 20 separately.

Official Information Act requests

Finally, the consultation paper asks whether in the event that this submission is subject to an Official Information Act (**OIA**) request any part of this submission should be withheld. ICNZ is comfortable with this submission being released under the OIA but asks to be notified before any release.

Ngā mihi,

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