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16 July 2026

Committee Secretariat
Finance and Expenditure Committee
Parliament Buildings
Wellington

Delivered via Parliamentary website

ICNZ SUBMISSION ON THE FAIR TRADING AMENDMENT BILL

Thank you for the opportunity to comment on the Fair Trading Amendment Bill.

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 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, forestry and horticulture insurance, livestock insurance, commercial property insurance, and directors and officers insurance).

ICNZ's submission focuses primarily on the implications of the proposed amendments for statutory liability insurance. However, the proposed shift to a civil pecuniary penalty regime may also have implications for other liability policies, including directors and officers liability and professional indemnity insurance. We wish to draw these implications to the Select Committee's attention as they may not be well understood and could create uncertainty for insurers and businesses.

Executive summary

The Bill introduces a significant shift from a primarily criminal enforcement model to a civil liability model. That shift has material implications for businesses that hold statutory liability insurance, which has traditionally been structured around offence-based regulatory frameworks.

Under the Bill, many Fair Trading Act breaches that would previously have resulted in criminal fines — potentially covered, along with associated defence costs, under statutory liability policies — would instead be subject to civil pecuniary penalties. These penalties are not typically covered by statutory liability policies. At the same time, the Bill would lower the standard of proof and substantially increase potential monetary penalties.

The combined effect is that businesses may face increased liability while having reduced access to insurance cover for that liability. This may be particularly important for small and medium-sized businesses that rely on statutory liability insurance as part of their broader regulatory risk management arrangements.

ICNZ recommends that the Bill's commencement period be extended from six to 12 months after Royal Assent, to provide businesses with sufficient time to assess the implications of the new regime and make any necessary adjustments to their insurance arrangements. Insurers will also need time to assess the implications of the regime for relevant liability policies. ICNZ does not intend to suggest that insurers would change their policies to provide cover for civil pecuniary penalties or associated defence costs. Any changes to the scope of cover would be a matter for individual insurers.

Statutory liability insurance implications

Statutory liability insurance exists because businesses operate under a wide range of regulatory obligations and may face investigations, proceedings and court-ordered remedies even where there was no intention to contravene the law.

These policies commonly provide cover for organisations and, in many cases, directors, officers, managers, employees and contractors. Cover can include defence and investigation costs and certain reparation or compensation costs arising from unintentional breaches of legislation.

Statutory liability insurance is generally designed to respond to unintentional breaches, not deliberate wrongdoing or wilful or reckless acts or omissions.

The Bill shifts key Fair Trading Act contraventions from a criminal enforcement model to a civil liability model. This has significant implications for statutory liability insurance, which has traditionally been structured around offence-based regulatory regimes and provides cover for criminal fines (where permitted by law) and associated defence costs. Under the proposed framework, many breaches that might previously have resulted in criminal fines would instead be subject to civil pecuniary penalties, which are not typically covered under statutory liability policies.

The Bill would also materially increase maximum penalties for breaches such as false or misleading representations. The proposed maximum penalty would be the greater of NZ$5 million for companies or NZ$1 million for individuals, three times the gain made or loss avoided, or the value of the consideration for the relevant transaction or transactions. This would be a substantial increase from the Fair Trading Act's current caps of NZ$600,000 for companies and NZ$200,000 for individuals.

The practical result for businesses is that statutory liability insurance cover may not be widely available while businesses' exposure to potential penalties will increase. The key insurance implications are discussed below.

Defence cost exposure

Statutory liability policies commonly provide cover for defence and investigation costs where proceedings may result in a criminal fine or other covered statutory liability. If Fair Trading Act contraventions are moved into a civil pecuniary penalty regime, existing statutory liability policies may not respond either to the civil penalty itself or to associated defence costs, depending on their wording. This is because the coverage trigger is often tied to proceedings that may result in a fine, rather than to civil penalty proceedings.

The proposed civil liability framework may increase businesses' defence cost exposure through civil proceedings, a lower standard of proof and expanded enforcement pathways, including private actions.

If the Fair Trading Act civil liability regime is introduced, insurers will need to consider whether they are willing and able to provide cover for defence costs associated with civil pecuniary penalty proceedings. Different insurers may take different approaches.

It is not yet clear whether insurers would be willing or able to take on these exposures. Insurers will need time to assess the implications of the proposed regime, including through engagement with their reinsurance partners where relevant.

ICNZ therefore recommends a minimum lead time of 12 months before commencement, to allow insurers and businesses to understand the implications of the new regime and manage the transition appropriately.

Interaction with other liability policies

The proposed regime may also have implications for directors and officers liability insurance and professional indemnity insurance. Unlike statutory liability policies, some D&O policies provide affirmative cover for civil penalties, although that cover is typically for individual directors and officers rather than the company. This means a D&O policy may respond where proceedings are brought against an individual director or officer, while statutory liability or other liability policies may be relevant in relation to the entity.

Professional indemnity policies may also be relevant where they include a Fair Trading Act extension or otherwise respond to civil liability arising from misleading or deceptive conduct. Those extensions are generally intended to address Fair Trading Act liability as an additional basis for civil liability, alongside tort or contract claims. They may not have been designed to respond to regulatory proceedings seeking civil pecuniary penalties or declarations that facilitate follow-on claims.

These interactions create uncertainty for insurers and businesses about where cover should sit, whether cover should be available at all, and whether multiple policies may be triggered by the same underlying conduct.

Litigation risk and extended exposure

Clauses 17, 19 and 20 of the Bill introduce a civil proceedings and remedies framework, including new sections 41A–41E and 41J–41N. These provisions may significantly increase both the scope and duration of businesses' exposure to civil proceedings, follow-on claims and associated defence costs.

Any person may apply to the High Court for a declaration of contravention (new s41C). Once made, the declaration may be relied on in subsequent proceedings for civil liability remedies, including compensation (new s41J), without the need to re-establish the underlying contravention. Proceedings may also be brought up to three years from discovery, with a long stop of 10 years from the conduct.

The ability for any person to seek a declaration may also increase the risk of litigation being used strategically. A declaration could be sought as a pathway to subsequent civil claims, including claims supported by litigation funding. This may increase the risk of proceedings being brought for tactical or commercial reasons.

The extended period for bringing proceedings may also affect insurability. A three-year period from discovery, with a 10-year long stop, creates significant uncertainty about the nature and duration of the risk being underwritten, particularly for claims-made insurance policies. Over time, this could make the exposure difficult to price or, in some cases, impractical to insure.

Attribution and governance exposure

Clauses 23 and 25 amend the management banning order framework and introduce attribution provisions for bodies corporate. These provisions may expand corporate and personal exposure by attributing employee or agent conduct to a company and allowing management banning orders to follow a pecuniary penalty order.

In particular, the availability of management banning orders following a single pecuniary penalty order, rather than requiring repeated offending, may materially increase personal exposure for directors and managers, including the possibility of career-impacting restrictions on participation in corporate management, even where the underlying contravention is addressed through a civil rather than criminal process. This could increase the significance of D&O cover for individual directors and officers.

The Bill lowers the practical threshold for management banning orders compared with both the existing Fair Trading Act regime and the Companies Act disqualification regime. This is because it links bans to a civil penalty framework and does not appear to require the same level of persistent misconduct or demonstrated unfitness that is central to Companies Act disqualification.

Proportionality could be supported by statutory guidance on the factors a court should consider before making a management banning order, including whether the conduct reflects a pattern of serious contraventions or an isolated incident, and whether reasonable steps or due diligence were taken.

Conclusion

Taken together, the proposed amendments are likely to narrow the availability of insurance cover for Fair Trading Act penalties, while increasing businesses' exposure to litigation, defence costs and substantially higher monetary penalties. We recognise that increased penalties are an intended feature of the Bill. However, the shift from criminal fines to civil pecuniary penalties also changes the insurance context and may leave businesses with less protection than they have historically had under statutory liability policies.

ICNZ therefore encourages the Committee to consider whether the Bill's insurance implications are sufficiently understood. and recommends that commencement be extended from six to 12 months. The additional time would allow insurers and businesses to assess the Bill's impacts and manage the transition.

Thank you again for the opportunity to provide a submission.

Ngā mihi,

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