New Zealand Banking Association
Te Rangapū Pēke

Submission

to the

Ministry of Business, Innovation and Employment

on the

Consultation: *Amendments to the Fair Trading Act 1986*

8 August 2025

NEW ZEALAND BANKING ASSOCIATION – TE RANGAPŪ PĒKE
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About NZBA

1. The New Zealand Banking Association – Te Rangapū Pēke (**NZBA**) is the voice of the banking industry. We work with our member banks on non-competitive issues to tell the industry's story and develop and promote policy outcomes that deliver for New Zealanders.

2. The following seventeen registered banks in New Zealand are members of NZBA:

- ANZ Bank New Zealand Limited
- ASB Bank Limited
- Bank of China (NZ) Limited
- Bank of New Zealand
- China Construction Bank (New Zealand) Limited
- Citibank N.A.
- The Co-operative Bank Limited
- Heartland Bank Limited
- The Hongkong and Shanghai Banking Corporation Limited
- Industrial and Commercial Bank of China (New Zealand) Limited
- JPMorgan Chase Bank N.A.
- KB Kookmin Bank Auckland Branch
- Kiwibank Limited
- Rabobank New Zealand Limited
- SBS Bank
- TSB Bank Limited
- Westpac New Zealand Limited

Contact details

3. If you would like to discuss any aspect of this submission, please contact:

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Introduction

4. NZBA welcomes the opportunity to provide feedback to the Ministry of Business, Innovation and Employment (**MBIE**) on the Consultation: *Amendments to the Fair Trading Act 1986* (**Consultation**). NZBA commends the work that has gone into developing the Consultation.

5. We support modernising the Fair Trading Act 1986 (**FTA**) where there are issues that need to be addressed, such as the balance between criminal and civil penalties for breaches of the FTA.

6. However, we are concerned that MBIE has not allowed a sufficient consultation period for amendments that could have significant impacts on the relevant provisions of the FTA. As we expand on below, the Consultation does not contain sufficient analysis to assess whether the proposed levels of penalties are appropriate and the Consultation period is not long enough for respondents to carry out their own analysis. It would be helpful to understand what has driven these timeframes and the departure from standard consultation process.

7. This submission addresses Chapter 1 (Proposed changes to the penalties regime) of the Consultation. We will provide our submission on Chapter 3 (Unfair contract terms) in due course.

8. In brief, we submit that before making any decisions on shifting certain breaches from criminal to civil liability or increasing pecuniary penalties, MBIE should gather additional information and undertake considered analysis to identify whether current penalties do or do not sufficiently incentivise compliance.

Proposed changes to the penalties regime

Option A: Replace the majority of criminal offences with civil pecuniary penalties

9. NZBA considers that it may be sensible to shift certain breaches of the FTA from criminal to civil law, but that caution should be exercised in determining which breaches are moved.

10. A pecuniary penalty is a punishment in the same way a fine is under criminal law, but the standard of proof is to the civil law standard only. While it can be difficult to apply criminal law to business misconduct as the burden of proof is very high to obtain a conviction, evidence suggests that:

> "*… judicial discomfort about the imposition of State sanctions through normal civil processes has led courts to introduce protections and procedures in civil pecuniary penalty*

cases in a way that reduces the benefits that civil pecuniary penalties were designed to deliver." [1]

11. The application of civil pecuniary penalties needs a considered and consistent approach to determine whether or not they should be included in legislation. For example, penalties for similar conduct matters across different pieces of legislation (for example, the FTA, Credit Contracts and Consumer Finance Act 2003, and the Financial Markets Conduct Act 2013) should be consistent.

12. Further, a shift to civil proceedings may reduce reputational risk for breaches of the FTA, but could affect compliance obligations and enforcement risk due to increased pecuniary penalties.

13. Subject to the above, some breaches of the FTA may benefit from being treated as civil pecuniary penalties. The absence of civil penalties is a notable gap in the FTA, and for organisations with a US presence and / or access to global funding markets, criminal sanctions can be severe and wholly disproportionate; a viable alternative would be welcome, if properly considered and applied. Other breaches (such as those relating to pyramid schemes) should in our view remain subject to criminal law, due to the harm they can cause.

Option B: Tiered increases in maximum monetary penalties

14. NZBA submits that further information should be gathered before any decisions are made on whether existing penalties are providing sufficient incentive to comply with the FTA.

15. The Consultation does not include any evidence for its problem statement that current penalties are not providing adequate deterrence. The 2018 / 2019 Review of Consumer Law suggested that further testing should be undertaken to confirm whether penalties are treated as a cost of doing business. Based on the consultation materials provided, it does not appear that any testing has been carried out.

16. It is, in our view, critical that penalties are proportionate to the seriousness of the conduct, and reflect the value of any potential gain. In this respect:

    16.1. There is no evidence that potential gain for FTA breaches is the same as for breaches under the Commerce Act 1986.

    16.2. The proposal would put maximum liability for breaches under the FTA higher than those set under the Financial Markets Conduct Act 2013. This would create differing penalties for the same conduct based on whether or not the product or service is a financial product or service.

[1] Civil Pecuniary Penalties: NZLC IP33, 2012, at [1.20].

17. The Consultation suggests that penalties awarded by the courts to date are not close to the maximum. This might reflect that the issues subject to enforcement are not particularly serious, rather than highlighting an issue with the current maximum penalties. Again, we consider this is an area that would benefit from further information-gathering and considered analysis before any decisions are made. The analysis should focus on determining whether the penalties actually imposed provide sufficient deterrence and ensure penalties are not treated as a cost of doing business.

18. The Commerce Commission (**Commission**) frequently lays representative charges that significantly increase the maximum penalty available. For example:

    18.1. *CC v Two Degrees Mobile Limited:* The Commission laid five charges with a maximum penalty of $600,000 each, with a total maximum penalty of $3M. The Commission considered that the starting points should be $800,000 - $900,000.

    18.2. *CC v Bed Bath and Beyond:* The Commission laid three charges with a maximum penalty of $600,000 each. The Commission argued for a starting point of $292,500 to $331,500.

    18.3. *CC v Vodafone:* Vodafone was sentenced in relation to 18 charges. The High Court found that the total maximum penalty was $10.8m.

Options C-E: Infringement Offences

19. We support expanding infringement offences and increasing fees to enhance enforcement flexibility. We recommend a review of which strict liability offences should be included to ensure proportionality.

Option G: Harassment and coercion

20. In respect of the proposed definition of “coercion” at paragraph 51 of the Consultation, we consider this is too subjective and more expansive than the ordinary meaning of the word. We submit that “coercion” should not be defined.