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*

5 September 2025

NEW ZEALAND BANKING ASSOCIATION – TE RANGAPŪ PĒKE
PO Box 3043, Wellington 6140, New Zealand
www.nzba.org.nz

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:

Antony Buick-Constable
Deputy Chief Executive & General Counsel
antony.buick-constable@nzba.org.nz

Sam Schuyt
Policy Director & Legal Counsel
sam.schuyt@nzba.org.nz

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. However, the Consultation does not clearly evidence those issues. Where there are issues, we do not believe that the proposed amendments under Chapter 3 of the Consultation address them in any meaningful way, and risk adversely impacting the existing unfair contract terms regime.

6. In brief, we submit that the proposed amendments to the unfair contract terms regime will increase legal uncertainty, which may lead to conservative practices and increased costs for businesses and consumers.

7. Further detail on these aspects of the Consultation are set out below.

Unfair contract terms

8. The combination of reforms considered in the Consultation (increasing penalties for breaches, removing the need for a declaration before penalties apply, and creating an option for private enforcement including at a Disputes Tribunal level) is, in our view, likely to create significant uncertainty about the enforceability of contract terms and lead to increased litigation. As a result:

    8.1. Businesses may adopt a more conservative approach to assessing unfair contract terms. This may in turn reduce access to credit because banks have fewer contractual tools available to address lending risks.

    8.2. The proposed changes would significantly and disproportionately increase costs for businesses and consumers while providing minimal appreciable benefit to consumers.

9. If the Government and the Commission consider that lack of enforcement is a meaningful issue, they should instead consider better enabling the Commission to investigate unfair contract claims made under the current regime. In our view, the current regime enables high-impact responses to unfair contract terms with lower cost and effort for consumers. We expand on this below.

10. The definition of an unfair contract term is highly subjective. The nature of banks' products is different to those which have been subject to "unfair contract terms" actions to date, and there is little in the way of case law or other guidance on what amounts to "unfair contract terms" in the financial services space.

11. These issues will likely be exacerbated by enforcement by the Disputes Tribunal, which we do not consider is an appropriate forum to consider such claims. We are not in favour of this proposal for the following reasons:

    11.1. The Disputes Tribunal is a quick, inexpensive forum for resolving fact-based individual disputes rather than establishing legal rules. In contrast, unfair contract term claims may involve complex and nuanced legal issues, and the outcomes may have wide reaching consequences for businesses.

    11.2. Given the test for what constitutes an unfair contract term is subjective, and the decisions of the Disputes Tribunal do not set legal precedents, there is a high risk of inconsistent application, where particular standard form contract terms could be challenged with different results.

    11.3. This risk of inconsistent application could be exacerbated due to the complex and subjective assessment of unfair contract terms, given the nature of the Disputes Tribunal: legal representation is not permitted, and referees may not have legal training.

    11.4. The fact that the Dispute Tribunal is not part of the formal court hierarchy that follows the doctrine of precedent, and that rights of appeal are very limited also means that businesses will face considerable uncertainty about how to amend their standard form contract terms in the face of an adverse Disputes Tribunal decision.

    11.5. Despite these issues, a Disputes Tribunal determination that a standard form contract term is unfair could lead to Commission enforcement under the FTA, which could include penalties if a business continues to use the term.

    11.6. Because the definition of an unfair contract term is so subjective, allowing private parties to challenge allegedly unfair contract terms directly could lead to a large number of unmeritorious or vexatious claims. This would lead to increased, inefficient costs for businesses, consumers and the Disputes Tribunal.

12. As a result of the factors set out above, businesses may adopt cautious practices. This could mean banks have fewer contractual tools available to address credit risk, which could in turn reduce access to credit. We submit that MBIE should gather more data about the potential long-term risks of private enforcement actions before making a decision on this point.

13. Additionally, contract drafting will become riskier and more expensive due to the need for legal advice and constant updates. There is an increased risk of class action in circumstances where there is little precedent or guidance about what constitutes an unfair contract term. This may impact smaller businesses disproportionately.

14. We do not support the proposal to remove the requirement for an unfair contract term declaration to be made before penalties apply. What is "unfair" in any particular case is contextual and open to interpretation. The current statutory scheme appropriately allows businesses the opportunity to assess the risk of using particular terms and to obtain legal certainty about whether terms are unfair (through, for example, an appeals process). We consider that making it an offence to use a term – and making it void – without any formal warning raises procedural fairness issues and places a significant burden on businesses to determine whether a term might be unfair without the benefit of a formal ruling or safe harbour provision.

15. We accordingly oppose the proposals to allow third parties to challenge unfair contract terms and remove the requirement for an unfair contract term declaration to be made before penalties apply. If the proposals do go ahead (noting the issues this may cause), we agree that the mitigations set out in paragraphs 98(a) to (c) of the Consultation should be put in place.

16. The current centralised enforcement model provides certainty, ensures a consistent interpretation and application of the unfair contract term provisions, reduces the risk of fragmented or conflicting court decisions and allows for the strategic enforcement of systemic issues that cause consumer harm. Making a complaint to the Commission requires lower cost and effort from consumers than bringing a claim to the Disputes Tribunal.

17. If the Government and the Commission consider that lack of enforcement is a meaningful issue, they should consider better enabling the Commission to investigate unfair contract claims.

Additional comments on Chapter 1

18. Further to our previous submission on Chapter 1 of the Consultation, we additionally submit that Option F (Prohibit insurance and indemnification) appears to be inconsistent with the existing prohibitions on indemnification and insurance under other legislation.

19. Option F proposes to prohibit insurance that indemnifies against penalties for breaches of the FTA, as well as the costs for defending proceedings where a penalty is imposed.

20. The relevant paragraphs of the Consultation – paras 42 – 45 – do not expressly state whether the proposal is intended to apply against both civil and criminal penalties. In the absence of an explicit carve-out, we assume the intention is for the prohibition to cover both.

21. If this is in fact the intent, we note that this prohibition goes beyond the position set out under s 162(5) of the Companies Act 1993 and s 528 of the Financial Markets Conduct Act 2013.

22. Both of the above provisions generally allow insurance for directors covering:

    22.1. non-criminal liability for acts / omissions in the person's capacity as a director;

    22.2. defence costs relating to that non-criminal liability; and

    22.3. defence costs in relation to criminal proceedings if the director is acquitted.

23. We submit that if the proposal in Option F is brought in as part of any amendments to the FTA, prohibitions on indemnification and insurance should align with the existing approach as set out above.