New Zealand Law Society
Te Kāhui Ture o Aotearoa

Fair Trading Amendment Bill

Submission of the New Zealand Law Society Te Kāhui Ture o Aotearoa

16 July 2026

1 Introduction

1.1 The New Zealand Law Society Te Kāhui Ture o Aotearoa (**Law Society**) welcomes the opportunity to submit on the Fair Trading Amendment Bill (**Bill**). The Bill seeks to ensure the Fair Trading Act 1986 (**the Act**) remains fit for purpose in the modern and evolving digital business environment by:

(a) Strengthening deterrence of unfair trading conduct;

(b) Supporting appropriate consequences for breaches;

(c) Enabling efficient and effective enforcement;

(d) Supporting proactive scam disruption; and

(e) Keeping product safety settings up to date.

1.2 This submission, prepared with input from the Law Society's Commercial and Business Law Committee,[1] raises some drafting and practical workability concerns that we consider should be addressed before the Bill is progressed.

1.3 The Law Society does not wish to be heard in relation to this submission.

2 Penalties and enforcement reform

2.1 In principle, the Law Society considers that the proposed reform from criminal enforcement to a primarily civil liability regime (in the context of the Fair Trading scheme) is sensible and more aligned to the nature of offending under the Act. In our view, this change combined with the increase in penalties is likely to create a more effective regime.

2.2 There are however, some drafting issues that we consider should be addressed to improve the Bill's clarity and effective workability. We address these below.

Jurisdiction

2.3 Clause 14 sets out the jurisdiction of the Disputes Tribunal, District Court, and High Court. As drafted, new sections 37 and 38, which relate to the High Court and District Court respectively, appear to give parties a choice of jurisdiction. The choice only appears to be limited by the monetary limit the District Court's jurisdiction is restricted to, and subject to declarations and pecuniary penalties which must be sought in the High Court.

2.4 We consider it would be useful to clarify whether it is intended that the High Court would be able to hear any proceeding under the Act, whether civil or criminal, and that all other matters may proceed in the District Court by consent, except matters under new sections 41C and 41F.

[1] For more information about the Law Society's Commercial and Business Law Committee, please see: https://www.lawsociety.org.nz/professional-practice/law-reform-and-advocacy/law-reform-committees/commercial-li/

What are civil liability provisions

2.5 Clause 17 inserts new sections 41A – N which set out the civil liability framework. New section 41B lists the provisions that are civil liability provisions. We note that new section 41B appears to be missing section 9, which prohibits misleading and deceptive conduct generally. Section 9 is currently enforceable by civil proceedings. It is also not included in the list of criminal provisions set out at new section 40.

2.6 As drafted, this would mean that section 9 sits outside of the new enforcement framework. This appears to be an oversight, and we recommend that section 9 is added to the list of civil liability provisions in new section 41B.

2.7 We also note that the section 9 specific carve-out in new section 41F(3) suggests that section 9 is intended to remain operative as a civil provision albeit without exposure to pecuniary penalty.

2.8 If section 9 is not added to the list of civil liability provisions in new section 41B, then consequential issues may arise as a result of that exclusion. The amendments in the Bill as they stand would mean that application of section 9 to new sections 41L (the injunction power), 41J (the compensatory order power), 41C (the declaration power), and the other orders power in new section 43 would not be possible (given section 9 is not included as either a civil liability provision under new section 41B, or a criminal provision under new section 40). Contravention of section 9 would then sit outside of the regime, and these remedies may not be available.

2.9 The Law Society recommends amending new sections 41B, 41C, 41J, 41L, and 43 to expressly preserve their application to section 9.

When a court or tribunal may make compensatory orders

2.10 New section 41J sets out when a court or the Disputes Tribunal may make compensatory orders in relation to a contravention of a civil liability or criminal provision. Subsection (4) states that if reparation is ordered under the Sentencing Act 2002 following conviction for a contravention of a criminal provision, then a compensatory order may not be made using section 41J in respect of the same loss or damage. Subsection (4) appears to intend that a compensatory order may be made in criminal proceedings at sentencing, but this is unclear.

2.11 We recommend making it explicit whether a separate civil proceeding is required to obtain a compensatory order under subsection (4) where there has been a criminal conviction for contravention of a provision. This would provide clarity and certainty of how the compensatory order provision will work in practice in such cases.

Court may grant injunctions

2.12 As with new section 41J, we consider that new section 41L, which sets out when a court may grant an injunction, requires clarification of whether a separate civil proceeding is required to seek an injunction where a criminal proceeding is underway, or whether an injunction can be sought as an order at sentencing for the criminal conviction.

Other orders

2.13 Clause 19 amends the heading to section 43 to read 'Other *civil liability* orders.' Given this demonstrates an intent that section 43 orders are to be civil liability orders only, we recommend amending section 43(1) to clarify that it applies to civil proceedings only, rather than 'all proceedings under this Part', which otherwise includes section 40 criminal proceedings.

General defences

2.14 Clause 20 replaces sections 43A and 43B with new sections 43A – 43N. New section 43A sets out the general defences for contravention of a civil liability provision. We note that the new section 40AB(1)(a), which sets out the general defences for a criminal liability provision, includes a reasonable mistake defence which new section 43A does not.

2.15 Given that civil liability provisions impose a strict liability standard and are determined on the balance of probabilities, and that a reasonable mistake defence is currently available for civil liability provisions, we recommend that the Select Committee consider inserting a reasonable mistake defence for the civil regime as well.

2.16 We also note that a reasonable mistake defence in the Act is generally accepted to be a mistake of fact, rather than a mistake of law but this distinction is not made in the legislation either currently or in the Bill. We recommend that this distinction is made explicit in the Bill in order to avoid settlement of the term by litigation, as has occurred until now.[2]

Conduct still contravenes even if defence is available

2.17 New section 43F provides that conduct must still be treated as contravening a civil liability provision even if the conduct does not lead to any liability because of the availability of a defence.

2.18 As drafted, it may mean that a defendant who successfully establishes a defence is still treated as having contravened the Act for the purpose of other orders. We query whether this consequence is intended and recommend the provision is clarified.

Rules of civil procedure and civil standard of proof apply to civil liability

2.19 New section 43N states that a proceeding under this subpart is a civil proceeding and the usual rules of evidence and procedure for civil proceedings apply (including the standard of proof).

2.20 Currently, proceedings relating to pecuniary penalty proceedings are often treated as quasi-criminal in nature. It is unclear whether this provision is intended to displace or modify the existing approach to these proceedings. If it is not, we recommend amending the section to expressly preserve that approach.

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[2] *Fastlane Autos Ltd v Commerce Commission* [2004] BCL 457 at [29] – [36].

Management banning orders

2.21 Clause 23 amends section 46C primarily to align the referenced sections to the changes to the enforcement and penalty regime. However, there also appears to be a reduction in the requirements for a management banning order where a pecuniary penalty order has been made.

2.22 Currently, a management banning order may only be made where there has been two separate occasions of conviction for an offence under the Act. With new subsection (1)(b) being added to cover scenarios where a pecuniary penalty order has been made, the requirement for two separate occasions within a 10-year period is missing, and as such a management banning order could be made after only a single civil finding. We query whether this was intended, and if not, recommend that repeat conduct is added as a requirement for a management banning order relating to pecuniary penalty orders. This would improve consistency and proportionality of the regime.

3 Safe harbour defence to support proactive scam disruption

3.1 The Bill introduces a statutory safe harbour for online service providers when acting in good faith to proactively disrupt suspected scam activity (at clause 33, new section 48U). However, it is unclear whether there is an established need for the defence, or whether it is likely to be effective in practice.

3.2 The Regulatory Impact Statement on the safe harbour provision to support online service providers to disrupt online scams (**the scam RIS**) does not identify clear evidence that service providers are delaying action because of concerns about potential liability if legitimate content is mistakenly removed.[3] Many online platforms already have terms and conditions that allow them to remove content, suspend activity, or restrict access relatively quickly and with broad discretion, suggesting that legal risk may not be a primary factor influencing their response times.

3.3 We note that this proposal was developed without public consultation and workshop feedback from online service providers indicated support for a legislative response similar to the new Australian Scams Prevention Framework.[4] The feedback also noted concerns about:[5]

(a) The lack of data sharing that is preventing the swift disruption of scam material;

(b) The need for a central point of contact across government to ensure efficient communication of anti-scam activities and initiatives;

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3 Ministry of Business, Innovation and Employment *Regulatory Impact Statement on the safe harbour provision to support online service providers to disrupt online scams* (22 May 2025) (**Scam RIS**).

4 Scams Prevention Framework Act 2025 (Cth) – this new regime amends the Competition and Consumer Act 2010 to impose legally binding rules on banks, telecommunications providers and digital platforms to remove scams with failure to do so resulting in potential civil penalty of up to $50 million per breach; Scam RIS at Annex 1.

5 Scam RIS, Annex 1.

(c) Better industry-led commitments and voluntary codes, particularly from online service providers to ensure all participants are contributing equally to anti-scam activities; and

(d) Barriers both perceived and real that are preventing industry from disrupting scams.

3.4 It is not clear that the inclusion of a safe harbour provision will have a material impact on scam disruption, and it may, as drafted, cause considerable concern for legitimate business activity. We consider delays in responding to scams may be more closely related to the practical costs and challenges of monitoring platform activity, the lack of coordinated information sharing across organisations, and commercial considerations such as the resources required to investigate reports and the potential revenue or reputational consequences of taking action before a provider is satisfied that the activity is actually fraudulent.

3.5 The Law Society recommends that clause 33 is removed, or if it is not, that it be referred back to officials for further policy work and public consultation.

Drafting issues new section 48U

3.6 Aside from the necessity and effectiveness issues raised above, new section 48U raises several drafting concerns which will need to be addressed if this section remains. These are set out below.

'Reasonably proportionate' and 'good faith'

3.7 The terms 'reasonably proportionate' and 'good faith' are not defined in the Bill and may create uncertainty as to the scope and operation of the proposed defence. In the absence of statutory definitions, the meaning of these terms would ultimately need to be developed through litigation and judicial interpretation. This would result in potentially lengthy uncertainty for both online service providers seeking to rely on the defence and individuals affected by its use. Clear legislative guidance on the intended meaning of these concepts would assist. Given that the defence introduces a novel legal mechanism, it would be particularly desirable to define the key thresholds and standards that determine when the defence applies, rather than leaving these matters to be clarified through the courts over time.

3.8 The Law Society recommends inserting definitions of what both 'reasonably proportionate' and 'good faith' mean in this context.

'Scam'

3.9 New section 48U(4) provides that 'scam' means:

> a scheme to deceive or threaten a person for the purpose of obtaining a financial or other benefit, such as money or personal information, from that person or a person associated with that person.

3.10 This definition is broad and may result in the defence applying to a wider range of conduct than is intended. This is concerning because the protection could extend to actions that might otherwise constitute a contravention of the Act, potentially limiting accountability in circumstances where regulatory scrutiny would ordinarily be appropriate. Given the potential consequences for both competition and consumer interests in New Zealand, greater clarity is needed to ensure the immunity is appropriately targeted and does not inadvertently shield conduct beyond that necessary to facilitate effective scam disruption.

'Not liable in civil proceedings for any action that they take to disrupt the activity'

3.11 New section 48U(2) states that 'the provider of the online service is not liable in civil proceedings for any action that they take to disrupt the activity.' The defence is intended to extend beyond the confines of the Act and would provide a defence to civil proceedings generally.[6] Given the Act is a codified consumer protection statute, such a broad defence risks overreach where it would include all civil claims in tort or contract as long as a service provider has acted in accordance with the defined safe harbour provisions.

3.12 This departs from the settled New Zealand approach whereby statutory defences to civil liability are anchored to conduct that the host statute regulates, authorises, or requires. For example:

(a) The Harmful Digital Communications Act 2015 section 24 immunity applies to hosting third-party content and is available only where the online content host follows the process set out.

(b) The Anti-Money Laundering and Countering Financing of Terrorism Act 2009 section 44 immunity attaches to the making of a suspicious activity report under that Act.

(c) The defences in the Defamation Act 1992 (truth and honest opinion) apply to publications giving rise to the tort of defamation that the Act itself codifies and are codifications of common law defences.

3.13 New section 48U is not limited in any similar way, creating the potential for the immunity to apply in circumstances that go well beyond the intended purpose of the defence. This raises similar concerns to those discussed above at 3.10, particularly given the potential impacts on competition and consumers.

3.14 The breadth of the immunity is compounded by the breadth of the definition of 'scam'. If new section 48U is to remain, the scope of the immunity should be narrowed to ensure that it applies only to actions that are reasonably necessary and within the scope of the Act. Greater limits on the kinds of actions that may be protected would help ensure the defence remains appropriately targeted, particularly given that certainty that a scam is occurring is not required before the defence can be relied upon.

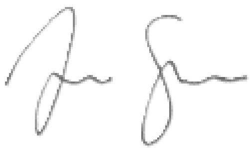
[6] Scam RIS at 6.

4 Other

Private Security Personnel and Private Investigators Act 2010

4.1 Clause 60 amends section 62 of the Private Security Personnel and Private Investigators Act 2010 by inserting a new section 62(ea) in the list of individual disqualification grounds. As drafted, it omits section 12 (misleading conduct in relation to employment), where the new section 63(aa) includes section 12.

4.2 Given the two lists otherwise mirror each other, this appears to be an oversight. We recommend adding section 12 to the list in the new section 62(ea).



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