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Committee Secretariat
Finance and Expenditure Committee
Parliament Buildings
Wellington
fe@parliament.govt.nz

Retail NZ submission: Fair Trading Amendment Bill

Overview

1. Retail NZ is a membership organisation that represents the views and interests of New Zealand's retail sector. We are the peak body representing retailers across Aotearoa, with our membership accounting for nearly 70% of all domestic retail turnover. New Zealand's retail sector comprises approximately 30,000 businesses and employs around 222,000 Kiwis.
2. Retail NZ consulted our membership in the preparation of this submission.
3. Retail NZ members take their obligations under the Fair Trading Act (FTA) seriously. We support a legal framework that deters deliberate misconduct and maintains consumer confidence. We understand efforts to modernise the Fair Trading Act and strengthen consumer protection.
4. However, that legal framework must be balanced and proportionate. This Bill, as drafted, applies the same high-end penalties to deliberate acts as it does to unintended mistakes. Several of the proposed reforms around the penalty framework appear to be disproportionate with no evidence base for change. Retail NZ does not support the penalty and enforcement reform proposed in this Bill.
5. Retail NZ supports safe harbour provisions for scam disruption, and, with some amendments, we also generally support the proposed changes to streamline product safety standards.

Penalties and enforcement reform

6. Retail NZ does not support moving from a criminal penalty framework to a civil liability regime.
7. Retailers take their FTA compliance obligations seriously. While occasional errors may occur, members actively cooperate with the Commerce Commission and strive to meet their obligations to consumers.
8. We don't believe sufficient evidence was presented during consultation to justify the move from a criminal to civil litigation regime, nor that the current criminal penalty framework is not acting as a sufficient deterrent. Non-compliance with the Act is rare

and typically results in significant financial and reputational consequences, even when the penalty is at the lower level of a warning or enforceable undertaking.

9. The conduct of a small minority of businesses breaching the FTA is better addressed by further prosecutions, rather than a penalty regime change. We would support the Commerce Commission being adequately resourced to take more prosecutions where appropriate.
10. A move to a civil litigation framework would shift the burden of proof onto retailers. Many of our members expressed a preference for maintaining the higher threshold of proving breaches beyond reasonable doubt, rather than on the balance of probabilities. In the absence of evidence demonstrating that the current criminal offence regime is ineffective in deterring breaches, the proposal appears primarily aimed at lowering the standard of proof and removing key protections afforded under the criminal justice system.
11. Rather than escalating the current enforcement framework, we recommend that clear, practical, evidence-based guidance is provided by the Commerce Commission to help businesses comply; there must be balanced enforcement, predictability and clarity for businesses.
12. While we disagree with the change to a civil liability framework, if it was to proceed, our members would like to see the 10-year longstop in clause 43M shortened to within three years of discovery. If the 10-year longstop is retained, retailers will need clear guidance on what records they are expected to keep, and for how long, before the changes come into force.
13. Retail NZ does not support the increase in maximum monetary penalties.
14. Penalties under the Act have increased substantially in recent years, with some large businesses receiving a 25% uplift to ensure penalties are sufficiently punitive.
15. There is not sufficient evidence that existing penalty levels are inadequate, or that a substantial increase is necessary to achieve deterrence. Many breaches of the FTA involve limited consumer harm and minimal commercial gain. While significant penalties may be appropriate for serious, systemic, or deliberate misconduct, the proposed approach risks creating penalties that are disproportionate to the conduct involved.
16. Additionally, the majority of businesses operating in New Zealand are small and medium-sized enterprises (SMEs). Significant increases in the maximum penalties could have severe consequences for those businesses and could threaten their ongoing viability. We recommend penalty thresholds be set that relate to the size of the business. Financial penalties are supposed to act as a deterrent and punishment; they should not be so excessive that it could put a firm out of business. Retail NZ would be willing to work with the committee to help set appropriate thresholds.
17. There is also no demonstration or guidance within the Bill to ensure the proposed penalties would be proportionate across the wide range of conduct captured by the Act. For example, there is no consideration as to whether a breach was deliberate or a genuine error. Retail NZ agrees with Business NZ's recommendation that the penalties framework should distinguish between deliberate misconduct and inadvertent system-generated errors, rather than applying the same high-end exposure to both. Businesses that deliberately mislead consumers should sustain strong consequences, such as false advertising, misleading promotional claims and anything designed to deceive customers.

18. However, the Bill applies the same high-end penalty exposure to other inadvertent mistakes, such as errors that arise from billing, pricing and other automated systems, which can affect consumers without any intention to mislead customers. That is not fair nor balanced – the penalty should be proportionate to the harm caused.

19. If higher penalties were deemed to be appropriate, it is unclear why they could not coexist with the criminal standard of proof, which would be more appropriate given the severity of the penalties outlined in the BIll.

20. Retail NZ recommends greater emphasis be placed on promoting compliance through education and guidance, rather than relying primarily on punitive enforcement measures.

Enabling scam disruption

21. Retail NZ supports the creation of the new safe harbour section 48U, which gives online service providers a defence against civil liability when they take action to disrupt a suspected scam in good faith.

22. If a scam is suspected, it is to the benefit of both the consumer and business to take swift, decisive action. However, the way this section has been drafted means that the safe harbour will not enable some service providers to act quickly and at scale.

23. Currently, the requirement in 48U(1)(b) states that "the provider of the online service has reasonable grounds to believe that the activity is a scam". That makes online service providers responsible for determining what is a scam and puts the onus on them to prove that blocking was "reasonably proportionate to the nature of scale of the activity". However, many online service providers, such as telecommunications providers and online payment providers, subscribe to services maintained by specialist third-party providers that will automatically block malicious domains.

24. This Bill, as drafted, would not provide safe harbour for online service providers, nor these third-party services, as it is unclear whether reliance on a specialist third party's validated classification constitutes "reasonable grounds".

25. If the intent of including this new provision within the Bill is to "encourage timely action to reduce consumer harm from scams" as outlined in the explanatory note, then we recommend that the safe harbour protection be extended to these specialist third-party services and/or that a domain's inclusion on one of these trusted 'block list' constitutes "reasonable grounds". Without these changes, online service providers would be unable to act at the speed and scale required to best protect consumers.

Streamlining product safety settings

26. Retail NZ supports the intent of the Bill to enable faster adoption of globally recognised product safety standards. We see this as a change that could simplify compliance for retailers sourcing from overseas.

27. However, there must be appropriate safeguards in place to ensure any changes to product safety standards are adequately communicated, transparent, and consistent.

28. Any automatic adoption of product standards, if not clearly communicated or without enough lead-in time, could be easily missed or overlooked, leaving retailers

unintentionally non-compliant or holding stock that no longer meets the safety standard.

29. Additionally, without a clear explanation of the reason behind the adoption of different product safety standards, it could create confusion or misunderstandings both at the business level and consumer level. A strong communication framework around product safety changes is key to the successful implementation this provision.

30. To ensure both clarity and compliance, we recommend that any framework for automatic product safety adoption include:

    a. clear communication of any proposed changes
    b. reasonable implementation and transition periods
    c. sufficient notice before standards take effect

31. Where the updates are significant enough to potentially impact or disrupt business operations or strategy, then sufficient industry consultation may also be appropriate.

32. We also encourage the committee consider the ongoing compliance costs faced by businesses, including the costs of purchasing standards and obtaining testing through accredited laboratories. Any cost increases in this space would also lead to higher product prices for consumers. Any product safety changes should take into account the amount of time and money the change might impose on businesses, and ensure there is sufficient communication of and time allowed for the new standard to come into force. Guidance may be appropriate in this space.

33. Subject to these safeguards, Retail NZ supports MBIE's Chief Executive being able to adopt internationally recognised standards by notice.

Conclusion

34. Thank you for the opportunity to make a submission.
35. Retail NZ does not support the FTA moving from a criminal penalty framework to a mostly civil litigation regime. Most New Zealand businesses take their obligations under the Act seriously and there are already strong deterrents in force to encourage compliance. There is not sufficient evidence to suggest the change in penalty framework is warranted.
36. Retail NZ also does not support the increase in penalties in this Bill, especially if the standard of proof is lowered as a result of any change to a civil litigation regime. There has also been recent increases in penalties and we argue there would be more efficient and effective enforcement of the Act if the Commerce Commission took more prosecutions, rather than a change to the penalty regime.
37. We would support a more balanced enforcement approach that places greater emphasis on education, guidance, and consistent enforcement, with penalties that are proportionate to the harm caused.
38. Retail NZ is in support of the new safe harbour provision for enabling online service providers to protect against scams, and we also support the streamlining of product safety settings on the condition that appropriate safeguards are in place.
39. Retail NZ is happy to discuss any aspect of this submission further and would like the opportunity to make an oral submission to the committee.

40. No part of this submission should be withheld under the OIA.

Sincerely,

Carolyn Young
CHIEF EXECUTIVE
carolyn.young@retail.kiwi