

Submission

by

Business|NZ

to

Commerce Select Committee

on the

Fair Trading Amendment Bill (No.3)

14 June 2002

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FAIR TRADING AMENDMENT BILL (NO.3)
SUBMISSION BY BUSINESS NEW ZEALAND

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1. Introduction

- 1.1 This submission is made on behalf of Business New Zealand, incorporating regional employers' and manufacturers' organisations. The regional organisations consist of the Employers and Manufacturers Association (Northern), Employers and Manufacturers' Association (Central), Canterbury Manufacturers' Association, Canterbury Employers' Chambers of Commerce, and the Otago-Southland Employers' Association. Business New Zealand represents business and employer interests in all matters affecting those sectors.
- 1.2 One of Business New Zealand's key goals is the implementation of policies that would see New Zealand retain a first world national income and to regain a place in the top half of the OECD in per capita GDP terms. This is a goal that is shared by the Government. It is widely acknowledged that consistent, sustainable growth in real GDP per capita of well in excess of 4% per annum (and probably closer to 7-8%) would be required to achieve this goal in the medium term. Continued growth of around 2% (our long-run average) would only continue New Zealand's relative decline.
- 1.3 Confidence in the integrity and quality of business regulation, and in its consistent and equitable application, is critical for fostering trust in the business environment, and increasing the levels of business competitiveness and economic growth. The Fair Trading Act 1986 is one of several important pieces of legislation in this area, focussing largely on consumer protection.
- 1.5 Business New Zealand supports the Fair Trading Act in providing an adequate level of protection for consumers by prohibiting misleading and deceptive conduct and unfair trade practices. We also support the broad intent of this Amendment Bill, which seeks to improve enforcement and cracks down on pyramid selling schemes. However, we have concerns about some of the Bill's provisions, particularly those relating to:
- Increasing the levels of fines (clauses 8(1) and 8(2));
 - Amending the criminal limitation period (clause 8(3));
 - Exempting the Commission from giving undertakings to damages (clause 10); and
 - Extending the Commerce Commission's powers to require the production of information and documents (clause 15).
- 1.6 We discuss these issues in greater detail in section 3 below.

2. Provisions Supported

2.1 Repeal of Trading Stamps Prohibition (clause 4)

Trading stamp schemes have long disappeared and we agree that the antiquated prohibition of them under the Fair Trading Act is now needless. We understand that there are a number of other provisions in the Act, such as the catchall section 9 ('misleading and deceptive conduct generally') that could deal with schemes of this nature. Business New Zealand therefore supports the repeal of this specific prohibition.

2.2. Definition of Pyramid Selling Scheme (clause 5)

Business New Zealand supports the amendment to the definition of 'pyramid selling scheme'. We agree that pyramid selling schemes are unfair and unethical and that they impact particularly severely on vulnerable, low-income consumers. There appear, however, to be schemes that currently fall out of the Act's current definition due to a technicality¹, and we agree that this anomaly should be addressed.

We understand that the wording in clause 5 would align the New Zealand definition with that contained in the Australian Trade Practices Act, and that the Australian Competition and Consumer Commission (ACCC) has been able to close down illegal schemes that the New Zealand authorities have to date been unable to prosecute.

We also understand that the Direct Selling Association (DSA) is comfortable with the definition change, as it would not impact on legitimate multi-level marketers or network marketers. These legitimate marketers will usually be members of the DSA and adhere with its code of practice.

2.3 Corrective Advertising Orders (clauses 6,7, and 11)

Business New Zealand supports the proposal for applications for corrective advertising orders to be able to be heard in the District Court as well as the High Court. It should reduce the time and cost of such orders and would still allow an appeal process for those companies that feel they are genuinely aggrieved.

We also agree that the Commerce Commission should be able to make applications for corrective advertising orders in conjunction with criminal proceedings. This should reduce both time and cost involved for all concerned.

¹ We understand that these types of schemes involve the sale of 'Gold Coins' or Website investments and use the guise of purchasing the investment to give the pyramid scheme 'legitimacy'.

2.4 Maximum Penalty for Pyramid Selling Scheme to be Identical for Individuals and Bodies Corporate (clause 8(2))

We understand that it in most cases of pyramid selling there is no corporate body and that an individual is the only visible target for the Commission. Therefore we support in principal the proposal that there should be no distinction in the maximum penalty for individuals and bodies corporate.

That said, however, we note that there needs to be some understanding that those 'lower down the pyramid' may not be as culpable, even though the strict terms of the Act make no distinction (we believe this is a matter that should be left to the discretion of the Court).

2.5 Power to Search (clause 14)

Business New Zealand does not have any specific objection with the proposed change to section 47 of the Act², although we note that the Commission's powers to search are already substantial and that there is no argument that it already has the power to enter, seize, or demand documents that are in an organisation's possession. We are therefore unsure whether the proposed change is really necessary except to clarify matters.

3. **Provisions of Concern to Business New Zealand**

3.1 Increased Levels of Fines (clauses 8(1) and 8(2))

Business New Zealand agrees that there is probably a case for increasing the maximum penalties under the Fair Trading Act. We also accept that higher penalties might be needed for particularly undesirable activities, such as pyramid selling schemes.

With regard to clauses 8(1) and 8(2) of this Bill, we would not oppose an increase in the maximum penalties, but we do question whether the levels should be doubled, as proposed, especially considering that accumulated inflation since 1986 has been only half the proposed increase – 54%³.

Business New Zealand recommends that the proposed doubling of maximum penalties, set out in clauses 8(1) and 8(2) should be reconsidered.

We are also concerned more generally at what appear to be 'ad hoc' decisions to significantly increase maximum penalties when amending individual pieces of legislation and that penalties under a number of statutes have become particularly punitive over recent years. We consider that such a 'big stick' approach often fails to recognise that the most effective way to address a problem is through education programmes targeted at both of businesses and consumers.

² Extending the provision to allow the Commerce Commission to obtain a warrant for the purpose of investigating the nature or extent of any conduct that constitutes a contravention of the Act and to gather, obtain, or recover evidence of the nature or extent of that conduct.

³ The CPI has increased by 54% since December 1986 (when the Act entered into force).

We believe that the Government should institute a first principles review of maximum penalties to ensure that maximum penalties are set at an appropriate level and then amended according to consistent criteria across the whole of Government, including taking account of penalty levels for certain categories of offence. Less punitive approaches to compliance, such as more and better education programmes (targeted at both businesses and consumers) should also be investigated.

Business New Zealand recommends that the Government should institute a first principles review of maximum penalties across the statute book, including investigating less punitive approaches to compliance.

3.2 Amendment of Criminal Limitation Period (clause 8(3))

The Bill proposes that the time for which criminal proceedings may be commenced should be changed from 3 years after the breach of the Act arose to 3 years after the matter giving rise to the breach was discovered or ought to have been discovered.

We are concerned about this proposal, as we fear that an aggrieved consumer could raise an issue with old advertising that may have been in error at virtually any subsequent point in time. This could result in a significant contingent liability for many businesses.

With regard to pyramid selling schemes, we do not believe that changing the criminal limitation period would provide much tangible benefit, as such schemes usually become evident very quickly – early termination of these schemes would have the greatest benefit for consumers.

Business New Zealand therefore submits that the status quo should be maintained and we recommend that clause 8(3) should be deleted.

3.3 Exempting the Commerce Commission from Undertakings for Damages (clause 10)

Business New Zealand opposes this proposed exemption. We consider that it would be most unfair and deprive people of the important right to seek redress in the event of suffering damage as a result of another person's (in this case the Commission's) actions.

We are concerned that this exemption could allow overly zealous Commission staff to apply for interim injunctions without due consideration. We strongly consider that there must be recourse for errors of judgment made by the Commission and its staff, particularly if a law-abiding individual or company has its business disrupted and its reputation damaged as a result of an unjustified action.

Business New Zealand submits that the status quo should be maintained and we therefore recommend that clause 10 should be deleted.

3.4 New Power to Require Production of Information and Documents (clause 15)

Business New Zealand submits that the Commission's existing power to enter, seize, and demand information and documents is already substantial. We also consider that the power to require the production of information and documents should not extend to information or documents that do not exist within accounting systems or cannot be readily produced.

We have been made aware of a recent case where the Commission required a company it was investigating to produce reports that did not exist within that company's records. While it complied with the requirement, it cost the company significant time and IT costs to retrieve the information. We understand that the Commission in this instance found no case to answer yet the affected company suffered significant compliance costs.

Business New Zealand submits that this proposed new power is unnecessary and we recommend that clause 15 should therefore be deleted.

4. Recommendations

4.1 Business New Zealand recommends that the Fair Trading Amendment Bill (No3) should proceed, with the following amendments:

- (a) Clause 8(3) should be deleted;
- (b) Clause 10 should be deleted; and
- (c) Clause 15 should be deleted.

4.2 Business New Zealand recommends that the proposed doubling of maximum penalties, set out in clauses 8(1) and 8(2) should be reconsidered.

4.3 Business New Zealand also recommends that the Government should institute a first principles review of maximum penalties across the statute book, including investigating less punitive approaches to compliance.