

Fair Trading (Oppressive Contracts) Amendment Bill

Member's Bill

Explanatory note

General policy statement

There has been an increasing awareness that many consumer contracts are not based on genuine agreement but rather on an assumption of fairness both in relation to the terms and how those terms will be enforced. This is particularly the case in respect of standard form contracts, whether they be widespread (such as telecommunication and electricity suppliers), or only a few hundred examples (such as a gym membership or storage contract).

Most consumer contracting is done on the basis of terms which the consumer never sees, has no opportunity to negotiate, and are similar across all suppliers.

Many such contracts have onerous and unexpected terms (such as hefty and unjustified cancellation fees) or extreme powers (such as the ability to sell goods in storage without notice). Further, consumers are often unaware of the importance of limitation periods and business in trade can rely on them unexpectedly and in an oppressive manner.

This Bill proposes to redress the power imbalance in contract terms, contract performance, and contract enforcement by prohibiting unfair contract terms, performance and enforcement, and requiring fair warning of the intention to rely on a limitation period or unless 10 years have passed.

Clause by clause analysis

Clause 1 is the Title clause.

Clause 2 is the commencement clause and provides for the Bill to come into force on the day after it receives the Royal assent.

Clause 3 states that the Bill amends the Fair Trading Act 1986 (the **principal Act**).

Part 1

Amendments to principal Act

Clause 4 amends section 2, which relates to interpretation.

Clause 5 inserts *new section 3A* into the principal Act, providing for transitional, savings, or related provisions relating to the Bill or to further bills that may amend the principal Act.

Clause 6 replaces section 26A (which relates to contract terms in standard form consumer contracts that a court has declared under section 46I to be unfair) with *new sections 26A and 26B*, which relate to oppressive contract terms and oppressive enforcement respectively.

Clause 7 inserts *new section 44A*, which limits and modifies the application of the Limitation Act 2010 in civil proceedings that relate to consumer contracts.

Clause 8 repeals sections 46H to 46M, which relate to declarations by the High Court or the District Court that a term in a standard form consumer contract is an unfair contract term.

Clause 9 inserts *new Schedule 1AA* into the Act to contain transitional, savings, or related provisions required by this Bill or other Bills that may amend the principal Act.

Part 2

Consequential amendment

Part 2 makes a consequential amendment to the Credit Contracts and Consumer Finance Act 2003.

Clause 10 amends section 9C of the Credit Contracts and Consumer Finance Act 2003 to reflect the amendments made by *Part 1* of the Bill.

Dr Duncan Webb

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Schedule
New Schedule 1AA inserted

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The Parliament of New Zealand enacts as follows:

1 Title

This Act is the Fair Trading (Oppressive Contracts) Amendment Act **2018**.

2 Commencement

This Act comes into force on the day after the date on which it receives the Royal assent. 5

3 Principal Act

This Act amends the Fair Trading Act 1986 (the **principal Act**).

Part 1

Amendments to principal Act

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4 Section 2 amended (Interpretation)

(1) In section 2(1), insert in their appropriate alphabetical order:

questionable, in relation to a contract term, does not include a term to the extent that it—

(a) defines the main subject matter of the contract; or 15

(b) clearly sets out the consideration payable; or

(c) is required or expressly permitted by an enactment

oppressive means oppressive, harsh, unjustly burdensome, unconscionable, or in breach of reasonable standards of commercial practice

standard form contract is one in which the questionable terms have not been subject to effective negotiation between the parties 20

(2) In section 2(1), repeal the definition of **unfair contract term**.

5 New section 3A inserted (Transitional, savings, and related provisions)

After section 3, insert:

3A Transitional, savings, and related provisions 25

The transitional, savings, and related provisions (if any) set out in **Schedule 1AA** have effect according to their terms.

6 Section 26A and cross-heading replaced

Replace section 26A and the cross-heading above section 26A with:

*Oppressive contract terms***26A Oppressive contract terms in standard form consumer contracts**

A person in trade must not—

- (a) include an unfair contract term in a standard form contract; or
- (b) apply, enforce, or rely on the term.

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*Oppressive enforcement***26B Oppressive enforcement of contract term**

A person in trade must not enforce a standard form contract term if to do so would, in the circumstances, be oppressive to a party to the contract who is a consumer.

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7 New section 44A inserted (Curbing oppressive use of limitation defence)

After section 44, insert:

44A Curbing oppressive use of limitation defence

(1) If a consumer brings civil proceedings that relate to a consumer contract, a person in trade cannot rely on a limitation defence in respect of the claim unless—

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- (a) the person in trade—
 - (i) knew or ought reasonably to have known that the act or omission on which the claim is based might be the basis of proceedings; and
 - (ii) gave the consumer at least 6 months' notice in writing that the period in which the claim could be filed was to end; or
- (b) the proceedings are brought at least 10 years after the date of the act or omission on which the claim is based.

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(2) This section limits the Limitation Act 2010.

8 Sections 46H to 46M and cross-heading repealed

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Repeal sections 46H to 46M and the cross-heading above section 46H.

9 New Schedule 1AA inserted

Insert the **Schedule 1AA** set out in the **Schedule** of this Act as the first schedule to appear after the last section of the principal Act.

Part 2

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Consequential amendment**10 Credit Contracts and Consumer Finance Act 2003**

(1) This section amends the Credit Contracts and Consumer Finance Act 2003.

- (2) In section 9C(3)(f)(ii), replace “unfair contract terms” with “oppressive contract terms or oppressive enforcement”.

Schedule
New Schedule 1AA inserted

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Schedule 1AA
Transitional, savings, and related provisions

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s 3A

Part 1
Provisions relating to Fair Trading (Oppressive Contracts)
Amendment Act 2018

There are no transitional, savings, or related provisions relating to this Act as enacted. 10