

# **Fair Trading Amendment Bill (No 3)**

Government Bill

As reported from the Commerce Committee

## **Commentary**

### **Recommendation**

The Commerce Committee has examined the Fair Trading Amendment Bill (No 3) and recommends that the bill be passed with the amendments shown.

The Committee recommends the following changes:

- amend clauses 6 and 7 to ensure that the District Courts have jurisdiction to determine proceedings for offences under section 47J, and the High Court has jurisdiction to determine appeals in relation to these proceedings
- clarify clause 14 so that the question the Court must decide is whether a search is necessary, not whether a warrant is necessary.

### **Background**

The Fair Trading Act 1986 (the Act) prohibits certain conduct and practices in trade, provides for the disclosure of consumer information relating to the supply of goods and services, and promotes product safety. Since the Act came into force in 1987, some barriers to effective enforcement have become apparent. The Fair Trading Amendment Bill (No 3) aims to strengthen the Act by making amendments to enforcement and procedural provisions and, in particular, creating a new additional penalty regime for pyramid selling schemes based on commercial gain from the scheme.

## **Increased penalties for all offences**

Existing maximum fines under the Act are \$30,000 for an individual and \$100,000 for a company. To date, the courts have imposed penalties that are significantly below the maximum available. The bill doubles these maximums to \$60,000 for individuals and \$200,000 for companies, except in the case of pyramid selling schemes where the maximum penalty is \$200,000 for both individuals and companies. We consider that this will give the courts greater flexibility to impose higher sentences and should deter offending, as people are less likely to offend if they know in advance that the penalties are likely to render the offending activity profitless.

## **Pyramid selling schemes**

Clause 5 amends the definition of pyramid selling schemes in the Act. The revised definition incorporates newer schemes, which may involve participants buying or selling an investment opportunity, and using an agent who is provided by the scheme operators to recruit other participants on their behalf, instead of having to recruit new participants themselves. One submitter is concerned that the definition would unduly penalise legitimate franchise schemes. However, we consider that a legitimate franchise scheme is not likely to be unfair to many participants and will therefore will not be a pyramid selling scheme as defined in the Act.

As previously discussed, clause 8, creates a new maximum penalty for contravening section 24. The \$200,000 penalty will apply to both individuals and companies. Clause 9 allows the court to order a person convicted of contravening section 24 to pay an amount not exceeding the value of any commercial gain resulting from the contravention. The current level of penalties for pyramid selling schemes under the Act has little deterrence value. Some pyramid schemes have yielded profits or revenue that greatly exceed the current maximum penalties.

## **Criminal limitation period**

Clause 8 amends section 40(3) of the Act to provide that the criminal limitation period runs three years from the date a breach is discovered or ought reasonably to have been discovered. This will not operate retrospectively. The civil limitation period was similarly amended by the Fair Trading Amendment Act 2001. The reasoning

behind this is that in some markets (such as building, investment products, insurance, and long-term guarantees) consumers, or the Commerce Commission, are unlikely to discover a breach until well after three years from the date the breach occurs.

Some submitters are concerned that this amendment could result in significant contingent liability for many businesses. However, the courts have remedies to protect traders from stale claims. The amendment will also remedy an inconsistency between the civil and criminal limitation periods that may result in matters more appropriately dealt with in the criminal jurisdiction being pleaded in the civil jurisdiction if the criminal limitation period has expired.

### **Interim injunctions**

Clause 10 exempts the Commerce Commission from giving undertakings as to damages when seeking interim injunctions. In determining the Commission's application, the Court must not take this exemption into account. Some submitters are concerned this exemption may provide a disincentive for the Commission to exercise due consideration before seeking interim injunctions. Submitters were concerned that innocent parties may be left without a remedy if they suffer loss as a result of the order sought by the Commission. We consider that the judicial process will provide an adequate check by rigorously testing injunction applications. The amendment is consistent with the Commerce Act 1986, which exempts the Commerce Commission from the requirement to give undertakings as to damages when seeking interim injunctions.

### **Corrective advertising orders**

The bill gives the District Court jurisdiction to hear applications for corrective advertising orders<sup>1</sup> and allows applications for these orders to be made in conjunction with criminal proceedings. Currently, corrective advertising orders can only be made by the High Court after a civil application by the Commerce Commission. There are significant delays associated with High Court civil proceedings and these delays make it unlikely that a court will order corrective advertising. Allowing applications for corrective advertising orders to be made in conjunction with criminal proceedings in the District Court will greatly reduce the lengthy times previously associated

---

<sup>1</sup> Requiring offenders to publish advertisements correcting false or misleading statements.

with these applications. This amendment was well received by submitters.

### **Search powers**

The current wording of section 47 in the Act provides that the Commerce Commission can search to ascertain whether a person has or may have contravened the Act. The bill will extend the Commerce Commission's search power, under section 47 of the Act, so the Commission may obtain a warrant to search for evidence to demonstrate the nature and extent of a breach of the Act, revenue obtained though offending, or other matters material to the seriousness of the breach. This will assist the Commission in gathering evidence for courts to consider in sentencing. In particular, it will help implement the commercial gain penalty for pyramid selling schemes.

One submitter suggested that clause 14 be amended to clarify that the question for the Court in considering whether to issue a search warrant is whether a search is necessary, not whether a warrant is necessary. We agree with this recommendation because there is no intention to change the 'reasonable grounds' test from the current provisions in the Act.

NZ First does not support this provision.

### **New powers**

Clause 15 introduces a new power that will allow the Commerce Commission to issue notices requiring people to supply information or documents. The power is based on the Commission's powers under the Commerce Act 1986. The power would be an alternative to the search warrant and is most likely to be used when the Commission seeks information from witnesses who are not hostile.

New section 47J, inserted by clause 15, creates an offence of failing or refusing to comply with a notice without reasonable excuse. Sections 37 and 38 of the Act need to be amended to ensure that the District Courts have jurisdiction to determine proceedings for offences under section 47J and the High Court has jurisdiction to determine appeals in relation to these proceedings, and we recommend the bill be amended accordingly.

## **Appendix**

### **Committee process**

The Fair Trading Amendment Bill (No 3) was referred to the committee on 2 May 2002. The closing date for submissions was 14 June 2002. The committee received and considered six submissions from interested groups and individuals. The committee heard one submission. Hearing evidence took 30 minutes and consideration took 55 minutes. The committee received advice from the Ministry of Consumer Affairs.

### **Committee membership**

Mark Peck (Chairperson)

Gerry Brownlee (Deputy Chairperson)

Brent Catchpole

Darren Hughes

David Parker

Hon Richard Prebble

HV Ross Robertson

Hon Maurice Williamson

---

## Key to symbols used in reprinted bill

### As reported from a select committee

#### Struck out (unanimous)

Subject to this Act,

Text struck out unanimously

#### New (unanimous)

Subject to this Act,

Text inserted unanimously

*(Subject to this Act,)*

Words struck out unanimously

Subject to this Act,

Words inserted unanimously

---

*Hon Judith Tizard*

## Fair Trading Amendment Bill (No 3)

Government Bill

### Contents

1	Title	10	Injunctions may be granted by Court for contravention of Part I, Part II, Part III, and Part IV
	<b>Part 1</b>		
	<b>Preliminary provision</b>		
2	Commencement	11	Order to disclose information or publish advertisement
	<b>Part 2</b>		
	<b>Amendments to principal Act and miscellaneous provision</b>		
3	False representations and other misleading conduct in relation to land	12	Defences
4	Trading stamp schemes prohibited	13	Finding in proceedings to be evidence
5	Pyramid selling schemes	14	Power to search
6	Jurisdiction of High Court	15	New sections 47G to 47J inserted
7	Jurisdiction of District Courts	47G	Commission may require person to supply information or documents
8	Contraventions of provisions of Part I, Part II, Part III, and Part IV an offence	47H	Notices
		47I	Service of notices
9	New section 40A inserted	47J	Offence to contravene section 47G
	40A Additional penalty for contravention of section 24 involving commercial gain	16	Provisions as to proceedings already barred and pending proceedings

**The Parliament of New Zealand enacts as follows:**

### **1 Title**

- (1) This Act is the Fair Trading Amendment Act **(No 3) 2001**.
- (2) In this Act, the Fair Trading Act 1986<sup>1</sup> is called "the principal Act".

<sup>1</sup> 1986 No 121

5

### **Part 1**

#### **Preliminary provision**

### **2 Commencement**

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

**Part 2**  
**Amendments to principal Act and miscellaneous provision**

- |                               |   |    |
|-------------------------------|---|----|
| <b>3</b>                      | <b>False representations and other misleading conduct in relation to land</b>   | 5  |
|                               | Section 14(1)(a) of the principal Act is amended by omitting the words “Falsely represent”, and substituting the words “make a false or misleading representation”.   |    |
| <b>4</b>                      | <b>Trading stamp schemes prohibited</b>   | 10 |
|                               | Section 18 of the principal Act is repealed.  |    |
| <b>5</b>                      | <b>Pyramid selling schemes</b>  |    |
|                               | Section 24(2)(a) of the principal Act is amended by repealing subparagraph (ii), and substituting the following subparagraph:   |    |
|                               | “(ii) that, to many participants in the scheme, constitutes primarily an opportunity to buy or sell an investment opportunity, whether personally or through an agent, rather than an opportunity to buy or supply goods or services; and”. | 15 |
| <b>Struck out (unanimous)</b> |   |    |
| <b>6</b>                      | <b>Jurisdiction of High Court</b>   | 20 |
|                               | Section 37 of the principal Act is amended by inserting, after paragraph (a), the following paragraph:  |    |
|                               | “(aa) appeals from proceedings in a District Court for orders under <b>section 40A</b> .”.  |    |
| <b>7</b>                      | <b>Jurisdiction of District Courts</b>  | 25 |
|                               | Section 38(b) of the principal Act is amended by omitting the expression “section 43”, and substituting the words “ <b>sections 40A, 42, and 43</b> ”.  |    |

## New (unanimous)

- |          |  |    |
|----------|--|----|
| <b>6</b> | <b>Jurisdiction of High Court</b>  |    |
| (1)      | Section 37 of the principal Act is amended by omitting from paragraph (a) the expression “section 40”, and substituting the words “sections 40 and <b>47J</b> ”.   |    |
| (2)      | Section 37 of the principal Act is amended by inserting, after paragraph (a), the following paragraph:<br>“(ab) appeals from proceedings in a District Court for orders under <b>section 40A</b> :”.   | 5  |
| <b>7</b> | <b>Jurisdiction of District Courts</b>   |    |
|          | Section 38 of the principal Act is amended by—   | 10 |
|          | (a) omitting from paragraph (a) the expression “section 40”, and substituting the words “sections 40 and <b>47J</b> ”;<br>and  |    |
|          | (b) omitting from paragraph (b) the expression “section 43”, and substituting the words “ <b>sections 40A</b> , 42, and 43”.   | 15 |
| <b>8</b> | <b>Contraventions of provisions of Part I, Part II, Part III, and Part IV an offence</b>   |    |
| (1)      | Section 40(1) of the principal Act is amended—   |    |
|          | (a) by omitting the words “sections 9, 14(2), and 23”, and substituting the words “sections 9, 14(2), 23, and 24”:   | 20 |
|          | (b) by omitting from paragraph (a) the expression “\$30,000”, and substituting the expression “\$60,000”:  |    |
|          | (c) by omitting from paragraph (b) the expression “\$100,000”, and substituting the expression “\$200,000”.  | 25 |
| (2)      | Section 40 of the principal Act is amended by inserting, after subsection (1), the following subsection:<br>“(1A) Every person who contravenes section 24 commits an offence and is liable on summary conviction to a fine not exceeding \$200,000.” | 30 |
| (3)      | Section 40 of the principal Act is amended by repealing subsection (3), and substituting the following subsection:<br>“(3) Despite section 14 of the Summary Proceedings Act 1957, proceedings under this section may be commenced at any time       | 35 |

within 3 years after the matter giving rise to the contravention was discovered or ought reasonably to have been discovered.”

**9 New section 40A inserted**

The principal Act is amended by inserting, after section 40, the following section:

**“40A Additional penalty for contravention of section 24 involving commercial gain**

- “(1) If a person is convicted of an offence under **section 40(1A)**, the Court may, on the application of the Commission, in addition to any penalty that the Court may impose under that subsection, order that person to pay an amount not exceeding the value of any commercial gain resulting from the contravention if the Court is satisfied that the contravention occurred in the course of producing a commercial gain. 10
- “(2) The value of any gain must be assessed by the Court, and any amount ordered to be paid is recoverable in the same manner as a fine. 15
- “(3) The standard of proof in proceedings under this section is the standard of proof that applies in civil proceedings.
- “(4) In this section, **Court** includes a District Court.” 20

**10 Injunctions may be granted by Court for contravention of Part I, Part II, Part III, and Part IV**

Section 41 of the principal Act is amended by adding the following subsections:

- “(5) If the Commission applies to the Court for the grant of an interim injunction, the Court must not, as a condition of granting an interim injunction, require the Commission to give an undertaking as to damages. 25
- “(6) However, in determining the Commission’s application for the grant of an interim injunction, the Court must not take into account that the Commission is not required to give an undertaking as to damages.” 30

Compare: 1986 No 5 s 88A

**11 Order to disclose information or publish advertisement**

Section 42 of the principal Act is amended by adding, as subsections (2) and (3), the following subsections: 35

- “(2) The Court may hear and determine an application under subsection (1) in conjunction with any other proceedings under any of sections 40, **40A**, 41, or 43.
- “(3) In this section, **Court** includes a District Court.”
- 12 Defences** 5  
Section 44(5) of the principal Act is amended by omitting the expression “section 27”, and substituting the expression “section 28”.
- 13 Finding in proceedings to be evidence** 10  
Section 46 of the principal Act is amended by inserting, after the words “an order under”, the words “**section 40A** or”.
- 14 Power to search** 15  
Section 47 of the principal Act is amended by repealing subsections (1) and (2), and substituting the following subsections:
- “(1) The Commission may, from time to time, authorise an employee of the Commission to search, under a warrant issued under **subsection (2)**, any place named in the warrant for any of the purposes set out in that subsection.
- “(2) A District Court Judge, Justice, Community Magistrate, or Court Registrar (not being a constable) may, by warrant, authorise a person who is authorised under **subsection (1)** to search a place specified in the warrant if he or she is satisfied on application made on oath by that employee that there are reasonable grounds to believe that a (*warrant*) search is necessary for the purpose of— 25
- “(a) investigating—
- “(i) whether a person has engaged in, or is engaging in, conduct that constitutes, or may constitute, a contravention of this Act; or 30
- “(ii) the nature or extent of any conduct that constitutes, or may constitute, a contravention of this Act; or
- “(b) gathering, obtaining, or recovering evidence of—
- “(i) conduct that constitutes, or may constitute, a contravention of this Act; or 35

“(ii) the nature or extent of any conduct that constitutes, or may constitute, a contravention of this Act.”

**15 New sections 47G to 47J inserted**

The principal Act is amended by inserting, after section 47F, 5  
the following sections:

**“47G Commission may require person to supply information or documents**

“(1) If the Commission considers it necessary or desirable for the 10  
purposes of carrying out its functions and exercising its powers under this Act, the Commission may, by notice in writing served on any person, require that person—

“(a) to supply to the Commission, by writing signed by that 15  
person or, in the case of a body corporate, by a director or competent employee or agent of the body corporate, within the time and in the manner specified in the notice, any information or class of information specified in the notice; or

“(b) to supply to the Commission, or to a person specified in 20  
the notice acting on its behalf in accordance with the notice, any document or class of documents specified in the notice.

“(2) Every person who is required to supply information or docu- 25  
ments to the Commission has the same privileges in relation to the supply of the information or documents as witnesses have in any court.

Compare: 1986 No 5 s 98; 1994 No 143 s 138(2)

**“47H Notices**

“(1) Any notice given by the Commission under **section 47G** is 30  
sufficiently given if—

“(a) it is in writing; and

“(b) it is—

“(i) under the seal of the Commission; or

“(ii) signed by the Chairman of the Commission; or

“(iii) signed by 1 or more of the members of the Com- 35  
mission; or

“(iv) signed by any person purporting to act by direc-  
tion of the Commission; and

- “(c) it is served in accordance with **section 47I** on the person or persons primarily concerned or on any person or organisation considered by the Commission to represent the person or persons primarily concerned.
- “(2) In all courts and in all proceedings under this Act, notices given under **section 47G** that purport to be signed by, or on behalf of, the Commission or to be sealed with the seal of the Commission must be treated as having been signed or sealed with due authority in accordance with **subsection (1)(b)** unless the contrary is proved.
- Compare: 1986 No 5 s 101
- “47I **Service of notices**
- “(1) Any notice that is authorised to be served on, or given to, any person for the purposes of **section 47G** may be served or given by—
- “(a) delivering it to that person; or
- “(b) leaving it at—
- “(i) his or her usual or last known place of residence or business; or
- “(ii) at the address specified by him or her in any notice, application, or other document made, given, or tendered to the Commission under this Act; or
- “(c) posting it by letter addressed to him or her at that place of residence or business or at that address.
- “(2) If any notice is sent to any person by registered letter, then,—
- “(a) unless the contrary is proved, the notice must be treated as having been delivered to him or her when it would have been delivered in the ordinary course of post; and
- “(b) in proving the delivery, it is sufficient to prove that the letter was properly addressed and posted.
- “(3) If the notice is required to be served on an association or body of persons,—
- “(a) the notice may be served on the secretary, executive officer, manager, or other officer holding a similar position in the association or body; and
- “(b) service on the association or body must, unless otherwise directed by the Commission, be treated as service on all persons who are members of the association or

body, or who are represented on the association or body by those members.

Compare: 1986 No 5 s 102

**“47J Offence to contravene section 47G**

- “(1) No person may,— 5
- “(a) without reasonable excuse, refuse or fail to comply with a notice under **section 47G**; or
- “(b) in purported compliance with the notice, supply information, or supply a document, knowing it to be false or misleading. 10
- “(2) Every person who contravenes **subsection (1)** commits an offence and is liable on summary conviction to a fine not exceeding \$10,000 in the case of an individual, or \$30,000 in the case of a body corporate.
- “(3) Proceedings for an offence against **subsection (2)** may be commenced within 6 months after the matter giving rise to the contravention was discovered or ought reasonably to have been discovered. 15

Compare: 1986 No 5 s 103”.

**16 Provisions as to proceedings already barred and pending proceedings 20**

Nothing in this Act—

- (a) enables any proceedings to be brought that were barred before the commencement of this Act; or
- (b) affects any proceedings commenced before the commencement of this Act. 25

---

**Legislative history**

18 December 2001

Introduction (Bill 192–1)

2 May 2002

First reading and referral to Commerce Committee

---