

Regulatory Impact Statement: Updating the penalties regime in the Fair Trading Act 1986

Decision sought	Analysis produced for the purpose of informing final Cabinet decisions
Agency responsible	Ministry of Business, Innovation and Employment (MBIE)
Proposing Minister	Minister of Commerce and Consumer Affairs
Date finalised	10 September 2025.

The Minister proposes changes to the *Fair Trading Act 1986* to strengthen penalties and support better compliance. These changes respond to concerns that current penalties are often too low to deter business behaviour, and that the enforcement process can be inefficient.

The goal is to make penalties more effective, reflect harm and commercial gain, and align with other laws. This will help create a fairer trading environment for consumers and businesses.

Two key changes are proposed:

- Shift most criminal offences to civil penalties. Serious breaches, like obstructing investigations, would remain criminal.
- Increase maximum penalties. The most serious breaches would face penalties similar to those under the *Financial Markets Conduct Act 2013*.

The proposals are based on targeted consultation and follow guidance from the Law Commission and the Legislation Design and Advisory Committee.

Summary: Problem definition and options

What is the policy problem?

The Fair Trading Act already includes a three-tier penalties regime, but the current levels are outdated and too low to deter non-compliance. Tier 1 offences carry maximum penalties of \$200,000 for individuals and \$600,000 for body corporates, with lower penalties for Tier 2 and Tier 3 offences. The penalties regime in the Fair Trading Act is increasingly seen as outdated and ineffective. Several signs suggest it is not working as intended:

- **High and rising complaint volumes:** The Commerce Commission receives a large and growing number of complaints. Between 2020 and 2024 complaints rose by around 22.7 per cent.
- **Penalties too low to influence behaviour:** The Commission has advised that current penalties are often outweighed by the commercial gain from breaching the Act. For example, One New Zealand (formerly Vodafone) was fined \$3.6 million for misleading conduct, while the estimated gain was over \$22 million.
- **Inefficient enforcement:** Criminal proceedings require proof beyond

reasonable doubt. This can be slow, complex, and resource-intensive. The Commission has said this burden can prevent it from taking action, even when harm is clear.

- **Misalignment with other legislation:** The Fair Trading Act relies on criminal offences, while other regimes like the Financial Markets Conduct Act and *Commerce Act 1986* use civil penalties. This creates uncertainty and inconsistency for businesses and regulators.

These issues limit the effectiveness of the Act and undermine its purpose: to protect consumers, support fair competition, and build confidence in the market.

What is the policy objective?

To modernise and strengthen the Fair Trading Act's penalties regime so that it:

- Provides meaningful and proportionate penalties.
- Enables more efficient enforcement by the Commerce Commission.
- Aligns with other commercial legislation.
- Supports a fair and confident trading environment.

What policy options have been considered, including any alternatives to regulation?

Two proposals were assessed, each with multiple options:

Proposal A: Enhance enforcement of the Fair Trading Act

- Option One: Keep the current criminal-only model.
- Option Two (preferred): Introduce a civil pecuniary penalties regime to the Act to enhance compliance.
- Option Three: Provide additional resources to the Commission to enhance compliance.

Proposal B: Increase maximum monetary penalties.

- Option One: Keep current penalty levels.
- Option Two: Align Tier 1 penalties with the Commerce Act and increase Tiers 2 and 3.
- Option Three (preferred): Align Tier 1 penalties with the Financial Markets Conduct Act and increase Tiers 2 and 3.
- Option Four: Align Tier 1 penalties with the Australian Consumer Law and increase Tiers 2 and 3.

What external consultation has been undertaken?

MBIE ran a two-week targeted consultation starting 28 July 2025, seeking views on shifting to civil pecuniary penalties and raising penalty levels to improve deterrence. MBIE received 18 written submissions and held meetings with consumer groups, businesses, and law firms. While we acknowledge the consultation period was short, officials have reflected stakeholders' main concerns in the proposals and analysis set out in this document.

Consumer groups generally supported the proposals. Business groups raised concerns about proportionality and safeguards. Law firms supported modernisation but emphasised the need for a clear evidence base.

Is the preferred option in the Cabinet paper the same as the preferred option in the RIS?

Yes. Both recommend:

- Shifting most criminal offences to civil penalties (Proposal A, Option Two).
- Increasing penalties in line with the Financial Markets Conduct Act (Proposal B, Option Three).

Summary: Minister's preferred option in the Cabinet paper

Costs (Core information)

Monetised costs:

- Higher penalties for businesses that breach the Act. For example, Tier 1 penalties increase from \$600,000 to up to \$5 million or more, depending on commercial gain.
- Potential increase in enforcement activity by the Commerce Commission, with any associated costs likely to be met from within baselines.

Non-monetised costs:

- Increased compliance costs and legal exposure for businesses that breach the Fair Trading Act.
- Possible reputational impacts from civil proceedings, though less than criminal convictions.

Distributional impacts:

- Costs fall primarily on businesses that breach the Act.
- Larger firms may be more affected due to higher potential penalties linked to commercial gain.
- Consumers and compliant businesses are not expected to bear direct costs.

Benefits (Core information)

Monetised benefits:

- Reduced consumer harm: Fewer breaches mean fewer consumers are harmed. Eg by overpaying or receiving goods or services they did not want.
- Improved market competition: The proposal helps level the playing field by discouraging misleading conduct that could give a firm an unfair competitive advantage. This can lead to better pricing, more efficient markets, and increased consumer trust.
- Avoided enforcement costs: Civil proceedings are generally less costly than criminal prosecutions, saving resources for the Commerce Commission and courts.

Non-monetised benefits:

- More flexible enforcement tools for the Commerce Commission.
- Avoidance of criminal stigma for businesses that breach the Act, while still enabling meaningful penalties.
- Increased consumer confidence in fair trading practices.

Distributional impacts:

- Benefits accrue to consumers through fewer breaches and fairer market practices.
- Commerce Commission gains a more flexible enforcement toolkit.
- Businesses benefit from clearer alignment with other commercial legislation.

Balance of benefits and costs (Core information)

The RIS suggests that the benefits of the Minister’s preferred option are likely to outweigh the costs. This is based on qualitative evidence, comparisons with other legislation, and feedback from targeted consultation.

Benefits vs costs: The preferred option is expected to:

- Improve compliance by increasing the financial consequences of breaching the Act.
- Make enforcement more efficient by shifting to civil proceedings.
- Ensure penalties are proportionate to the harm caused and commercial gain made.

Costs will mainly affect businesses that breach the Act. Benefits will be shared across consumers, compliant businesses, and regulators.

Change over time: The benefit-cost balance is expected to improve over time. Higher penalties, once imposed in case law, may reduce the number of breaches in future. This could lower enforcement costs and reduce harm to consumers. The Commerce Commission will be able to take action more efficiently, especially for lower-level breaches.

Judgement confidence: The RIS draws on enforcement experience, stakeholder feedback, and alignment with other legislation. It uses guidance from the Law Commission on pecuniary penalties to support the shift to civil enforcement. However, there is limited empirical data on deterrence and optimal penalty levels.

Implementation

Responsibility:

- MBIE will lead legislative changes (MBIE is responsible for administering the Act).
- The Commerce Commission will enforce the penalties regime (the Commission is the existing enforcement agency for the Act).

Risks and mitigation:

- Risk of over penalisation mitigated by judicial discretion and tiered penalty structure.
- Stakeholder concerns about proportionality addressed by aligning with FMC Act rather than Commerce Act or Australian law.
- Select Committee process will allow further refinement and stakeholder input, helping to address concerns about the short consultation timeframes to date.

Timing and transition:

- Bill planned for introduction by December 2025 (Category 5).
- Transitional arrangements may be needed to support implementation and awareness.

Limitations and Constraints on Analysis

This analysis has several limitations that affect the level of confidence in the conclusions drawn:

Evidence gaps: There is limited data on how current penalties influence business behaviour or what penalty levels are most effective. Most of the analysis relies on qualitative indicators, such as complaint volumes, enforcement challenges, and case studies.

Time and consultation constraints: The policy process was completed at pace. Consultation was targeted rather than public and ran for two weeks. While this provided useful feedback, some stakeholders raised concerns about the timeframe and scope of engagement.

Scope of proposals: Some proposals consulted on are not being progressed at this stage. This reflects stakeholder concerns and the need for further evidence before advancing more complex or contentious changes.

Use of comparative frameworks: The analysis draws on penalty settings in the Financial Markets Conduct Act as a benchmark. This supports consistency across regimes but may not fully reflect the unique features of the Fair Trading Act.

Law Commission guidance: The design of the civil regime is informed by the Law Commission’s guidance on pecuniary penalties. This supports the proportionality of shifting most breaches from criminal to civil enforcement.

Judgement confidence: The RIS presents a reasoned view that the benefits of the preferred option are likely to outweigh the costs. However, this is a cautious judgement. The evidence base is limited, and further scrutiny through the Select Committee process will be important to test and refine the proposals.

I am satisfied that, given the available evidence, this RIS represents a reasonable view of the likely costs, benefits and impact of the preferred option.

Responsible Manager’s signature:

**Glen Hildreth, Manager, Consumer Policy
Building, Resources and Markets
5 September 2025**

Quality Assurance Statement

Reviewing Agency: MBIE

QA rating: Partially meets

Panel Comment: Quality Assurance Panel from MBIE has reviewed the Regulatory Impact Statement (RIS) prepared by MBIE titled, “Updating the penalties regime in the Fair Trading Act 1986” in September 2025.

The Panel consider that the information and impact analysis summarised in the RIS partially meets the Quality Assurance criteria.

While the Panel considers that “partially meets” assessment reflects the limitations in the available evidence and empirical data, the Panel notes that this limitation has been addressed in part by aligning policy options with comparable legislation.

Section 1: Diagnosing the policy problem

What is the context behind the policy problem and how is the status quo expected to develop?

1. The *Fair Trading Act 1986* (the **Fair Trading Act**, or the **Act**) is a cornerstone of New Zealand's consumer protection framework. It aims to foster a trading environment where consumers' interests are protected, businesses compete effectively, and consumers and businesses participate confidently. To this end, the Act:
 - a. prohibits certain unfair conduct and practices in relation to trade
 - b. promotes fair conduct and practices in relation to trade
 - c. provides for the disclosure of consumer information relating to the supply of good and services
 - d. promotes safety in respect of goods and services.¹
2. All breaches of the Act carrying monetary penalties are determined under criminal law. Breaches are prosecuted by the Commerce Commission in the District Court or dealt with through infringement notices for low-level offences. Criminal offences must be proven beyond reasonable doubt, and penalties are capped at relatively low levels.
3. The current penalties regime groups offences into three tiers, based on the type and seriousness of the conduct. The highest tier (Tier 1) applies to unfair conduct (such as misleading representations), product and service safety, and pyramid selling schemes. Tier 1 offences carry a maximum penalty of \$200,000 for individuals and \$600,000 for body corporates, except for pyramid schemes, which carry a \$600,000 maximum for both.
4. Tier 2 applies to breaches of management banning orders under Part 5A of the Act. These orders are used to prevent individuals from managing businesses where serious misconduct has occurred. The maximum penalty for Tier 2 offences is \$60,000 for individuals.
5. Tier 3 covers lower-level breaches, including failures to comply with consumer information standards and rules around consumer transactions and auctions. These offences typically involve administrative or technical non-compliance. The maximum penalties are \$10,000 for individuals and \$30,000 for body corporates. The penalties regime in the Act has not been reviewed for around ten years.
6. Stakeholder feedback gathered through targeted consultation suggests that the current penalties regime is not operating as intended. Consumer NZ described the penalties as too low to deter breaches, citing persistent issues such as misleading pricing and advertising. FinCap noted that weak enforcement discourages financial mentors from reporting breaches, contributing to ongoing harm. Citizens Advice Bureau New Zealand and

¹ See the purpose statement in section 1A of the Act, <https://www.legislation.govt.nz/act/public/1986/0121/latest/whole.htm#DLM5836703>.

Community Law Centres Aotearoa stated that the regime fails to hold larger businesses accountable and does not incentivise compliance.

7. Legal and commercial submitters also raised concerns about the regime's effectiveness. MinterEllisonRuddWatts and Summerset Group Holdings Limited observed that the current penalties lack proportionality and may not reflect the seriousness of some breaches. The New Zealand Law Society noted that resourcing constraints and procedural complexity can limit enforcement outcomes. Buddle Findlay acknowledged that while reputational risk may deter some businesses, penalties are often cumulative and still insufficient to shift behaviour.
8. These views suggest that, without reform, the status quo is likely to result in continued non-compliance, limited deterrence, and constrained enforcement capability.

What is the policy problem or opportunity?

9. The current penalties regime in the Fair Trading Act is no longer fit for purpose. It does not provide sufficient deterrence for many types of conduct, is inefficient to enforce in practice for a lot of the commercial conduct the Act deals with, and it is increasingly misaligned with other commercial legislation in New Zealand and overseas. These issues limit the Commerce Commission's ability to respond effectively to breaches of the Act and create uncertainty for businesses about the consequences of non-compliance.

Issue one: High and rising complaint volumes suggest persistent non-compliance

10. The Commerce Commission continues to receive a high volume of complaints about potential breaches of the Fair Trading Act, with a clear upward trend over time. Between July 2020 and July 2025 total complaints on the Fair Trading Act rose by around 22.7 per cent increasing from 8,841 to 10,851. Over this time the Commission received over 48,000 complaints related to the Fair Trading Act. This sustained level of complaints suggests that non-compliance with the Act is widespread and persistent.
11. Common complaint themes include misleading advertising, inaccurate pricing, refund refusals, non-delivery of goods, and subscription traps.
12. These complaints reflect a range of consumer harms and indicate that many businesses may not be sufficiently deterred from engaging in unfair practices. The volume and nature of complaints also place pressure on the Commerce Commission's resources and may undermine public confidence in the effectiveness of the Act.
13. Confidentiality and Confidentiality both reported high and persistent volumes of consumer complaints about misleading pricing, advertising, and other breaches, supporting the view that non-compliance remains widespread. Confidentiality

14. Confidentiality noted that weak enforcement discourages reporting, particularly among vulnerable consumers, and that the current regime does not provide sufficient incentive for businesses to comply.

Issue two: The criminal penalties regime does not effectively deter, or address, breaches of the Act

15. In its 2023 Briefing to the Incoming Minister, the Commerce Commission noted that the Fair Trading Act could benefit from improvements, and that current penalties are often “too weak to deter repeat offending”². The Commission also highlighted that some firms treat fines as a “cost of doing business”³ and that “commensurately chunky penalties”⁴ are needed to prevent sustained breaches by powerful firms. The penalties regime is intended to deter breaches and equip courts to respond effectively when breaches happen. However, the current regime does not provide sufficient deterrence for many types of conduct.
16. Businesses typically assess the likelihood of detection, potential penalty and expected commercial gain before engaging in potentially unlawful conduct. In practice, this means businesses weigh up the risk of enforcement against the financial benefit of non-compliance⁵. And under the current penalties regime, that balance can often favour breaching the Act given the relatively low penalty levels currently. This issue is particularly significant for large scale businesses because the significant commercial gain they can make from offending can easily outweigh even the maximum penalty in the Act currently.
17. Between 2020 and July 2025, the Commerce Commission secured over 50 Fair Trading Act enforcement outcomes involving financial penalties. Penalties ranged from under \$10,000 to over \$5.9 million, with several cases involving repeat offenders. Despite these outcomes, the average penalty remains modest relative to the commercial gain in many cases. For example, in a recent case taken against One New Zealand (formerly Vodafone), the company was convicted on 18 counts under section 11 of the Act and fined \$3.6 million for misleading customers about its FibreX broadband service. The Commission estimated that the commercial gain from the conduct was over \$22 million. This gap highlights the limited deterrence effect of current penalty levels.
18. This case was not an isolated incident. Vodafone has a long history of enforcement action under the Fair Trading Act, including:

² New Zealand Parliament, *Compendium of Annual Review Reports 2023/24*, page 12.

³ Commerce Commission, *Briefing to the Incoming Minister - Commerce and Consumer Affairs* (November 2023), p. 16.

https://comcom.govt.nz/_data/assets/pdf_file/0010/342100/Briefing-to-the-Incoming-Minister-Commerce-and-Consumer-.pdf

⁴ Rebecca Stevenson, ‘It has to hurt’: Commerce Commission chairman John Small says fines for breaching consumer law are too weak, *Interest.co.nz*, 6 September 2023.

Available at: <https://www.interest.co.nz/business/124137/it-has-hurt-commerce-commission-chairman-john-small-says-fines-breaching-consumer>

⁵ Law Commission, *Pecuniary Penalties - Guidance for Legislative Design*, page 16.

- a. A **\$960,000 fine in 2012** for misleading broadband and mobile promotions;
 - b. A **\$165,000 fine in 2016** for false price representations in mobile plan invoices;
 - c. A **\$350,000 fine in 2019** for false invoicing over a six-year period;
 - d. Multiple formal warnings between 2011 and 2020 for misleading advertising, loyalty promotions, and pricing claims.
19. This pattern of repeat offending over more than a decade suggests that the current penalties regime has not provided sufficient deterrence for breaches by a high-profile, well-resourced firm. It illustrates how some businesses may treat fines as a manageable cost of doing business, particularly where the commercial gain from non-compliance significantly exceeds the penalties imposed.
 20. Another example of the back of deterrence is the Lion’s Share gifting scheme, operated by Shelly Cullen. In 2024, the court imposed a penalty of \$5.9 million — the highest ever imposed under the Act – consisting of the maximum fine available for pyramid conduct of \$600,000 and the amount of estimated commercial gain of \$5.3 million.⁶ Despite this, Ms Cullen publicly stated: “I’m going to make history as one of the biggest scammers in New Zealand,” and “What’s the consequences, \$600,000 slap on the hand?” Her comments, recorded in sentencing notes, reflect a clear disregard for the law and suggest that even substantial penalties may not deter intentional or repeat offending. This case highlights the need for a regime that can respond proportionately to serious misconduct and escalate enforcement where required.
 21. The limited deterrence effect of the current regime likely stems from its criminal law model and the relatively low monetary penalties available. Because criminal convictions carry reputational stigma, the regime relies on lower fines to balance that punitive effect. This limits the ability to impose higher monetary penalties that would more effectively deter breaches and which could change the equation for businesses considering whether breaching the Act is worthwhile.
 22. However, businesses are primarily motivated by financial outcomes. Significant monetary penalties are likely to be a more effective deterrent than the threat of criminal convictions.⁷ This suggests that the current criminal law-based regime may not be well suited to deterring breaches of the Act.
 23. Confidentiality and Confidentiality stated that current penalties are often treated as a cost of doing business, particularly by larger firms, and do not provide an effective deterrent. In

⁶ Under section 40A of the Act, the court may impose an additional penalty equal to the commercial gain from a breach of section 24 (pyramid selling), if satisfied the breach occurred in the course of producing a commercial gain. However, this provision applies only to pyramid schemes and does not extend to other types of unfair conduct, limiting its deterrent effect.

⁷ Law Commission. Ibid.

their submission ConsumerNZ said “*We strongly agree the current penalties regime in the Fair Trading Act (FTA) is not as effective and efficient as it could be and does not provide businesses and others with the right incentives to comply*”. FinCap and Consumer NZ argued that the low level of penalties and the difficulty of securing criminal convictions mean that repeat offending is not uncommon.

Issue three: The criminal law regime is inefficient for addressing certain breaches of the Act

24. The Commerce Commission has also noted that, under the current criminal regime, it is administratively inefficient to take action against many breaches, even where there is clear evidence of consumer harm. This is primarily because criminal proceedings must be proven to the higher standard of ‘beyond reasonable doubt’, which makes enforcement action slower, more complex, and more resource intensive.
25. The cost and effort of meeting the criminal standard of proof can discourage enforcement action. In some cases, the Commerce Commission may decide not to pursue breaches of the Act where the harm is clear but the evidentiary burden is too high. This means some offending may go unaddressed, even when it causes direct consumer harm, limiting the Act’s ability to prevent unfair conduct.
26. Additionally, many of the provisions of the Act are strict liability offences. In these cases, imposing criminal liability, including the stigma of a conviction, may not be proportionate to the nature of the conduct. This raises fairness concerns and further complicates enforcement.
27. Between 2020 and 2025, the Commerce Commission received over 10,000 Fair Trading Act-related concerns annually. However, only a small proportion of these resulted in litigation, typically 2–4 per cent per year. Most investigations led to non-litigation outcomes, with 70–80 per cent resulting in information being provided to traders and 12–18 per cent resulting in compliance advice. Warnings, infringement notices, and settlements were used sparingly. See Annex Two for more detail on enforcement outcomes over the past five years.
28. In 2024 alone, the Commerce Commission received over 11,000 complaints, reflecting a significant increase in consumer concern. While the Commission has expanded its litigation fund to pursue more cases, many complaints are addressed through non-litigation tools such as formal warnings and compliance advice letters. For example, the Commission issued a warning to Law Debt Collection Ltd for misleading representations and a compliance advice letter to Vector regarding unfair contract terms. These tools are useful but may not provide sufficient deterrence for businesses that consider the potential high commercial gain from conduct in undertaking a breach of the Act. The proposed reforms aim to strengthen the Commission’s enforcement toolkit by enabling more efficient civil proceedings and higher penalties.
29. However, officials consider that criminal liability is suitable for a small number of serious breaches. These include cases where the course of law or justice is impeded, such as breaching a management banning order or

obstructing the Commerce Commission's investigations, as well as other 'truly criminal' types of conduct like operating a pyramid scheme or major product safety breaches. In these instances, criminal convictions and the higher procedural safeguards afforded by criminal proceedings are appropriate.

30. Confidentiality and Confidentiality highlighted that the high burden of proof required for criminal prosecutions can discourage both complaints and enforcement action, leading to under-reporting and under-enforcement. In their submission Confidentiality said "*We consider the lower burden of proof will make it easier for the Commission to bring successful actions against businesses that have breached the FTA. We also consider that more effective and visible enforcement of the law is likely to lead to more reporting of potential breaches*" Confidentiality and Confidentiality noted that civil proceedings may allow for more flexible and timely enforcement.

Issue four: The penalties regime in the Fair Trading Act is out of step with how other commercial legislation is enforced

31. The Fair Trading Act's penalties regime is based on criminal law, which is increasingly out of step with other commercial legislation in New Zealand and Australia. Other regimes use civil penalties with higher maximum monetary penalties to address similar types of conduct. This misalignment creates inconsistency and enforcement challenges.
32. Both the *Commerce Act 1986* and the *Financial Markets Conduct Act 2013* (the **FMC Act**) use civil proceedings and provide for higher monetary penalties than the Fair Trading Act. While these Acts have different purposes, they all deal with commercial conduct. The FMC Act in particular, addresses similar behaviour to the Fair Trading Act, such as misleading and deceptive conduct and unsubstantiated representations, but does so through a different enforcement model.
33. Inconsistent penalties for similar conduct across commercial legislation can create confusion and inefficiencies for regulators and businesses. For regulators, it complicates decisions about which enforcement pathway to pursue, such as whether the Financial Markets Authority should act under the FMC Act or refer a matter to the Commerce Commission under the Fair Trading Act. This can lead to duplicated effort, delays, and uncertainty about jurisdiction.
34. For businesses, the lack of alignment makes it harder to understand and compare the consequences of non-compliance, especially for firms operating across sectors. These overlaps reduce predictability, increase compliance complexity, and undermine the clarity and coherence that commercial law should provide.
35. Alignment also supports proportionality in penalty design. It ensures that similar types of conduct attract similar penalties across regimes, and that more serious breaches are penalised more severely. For example, misleading conduct under the FMC Act may attract penalties of up to \$5 million, while similar conduct under the Fair Trading Act is capped at \$600,000. Under the Commerce Act, penalties for anti-competitive conduct

can reach \$10 million or more, or be scaled to three times the commercial gain or 10% of turnover.

36. These settings reflect the seriousness of the conduct and ensure that penalties are proportionate to the harm caused. In contrast, the Fair Trading Act's lower penalty ceiling may understate the impact of breaches and reduce deterrence. Greater alignment helps ensure that penalties are scaled appropriately to the nature and impact of the breach, supporting fairness, coherence, and predictability in the regulatory system.
37. In Australia, the 'Australian Consumer Law' (included within the Competition and Consumer Act 2010) provides for both criminal and civil pecuniary penalties, depending on the nature and seriousness of the breach. In 2022, Australia significantly increased its penalties in response to concerns that existing levels were too low to deter breaches. This reinforces the trend toward civil enforcement models for commercial conduct with high penalty levels for breaches.
38. Confidentiality and Confidentiality supported aligning the Fair Trading Act's penalties regime with other commercial legislation, such as the FMC Act, to improve consistency and predictability for businesses.

What objectives are sought in relation to the policy problem?

39. The objectives of this work are to ensure that the Fair Trading Act has an up-to-date, effective and efficient penalties regime that:
 - a. Supports a fair and confident trading environment for consumers and businesses.
 - b. Provides meaningful and effective deterrence and proportionate punishment for breaches.
 - c. Enables more effective and efficient enforcement by the Commerce Commission.
 - d. Aligns with other similar commercial legislation in New Zealand, and comparable international approaches.

What consultation has been undertaken?

40. MBIE undertook a two-week targeted consultation between 28 July and 8 August 2025 on the proposals in this paper, alongside other potential changes.
41. Stakeholders consulted included industry bodies, consumer advocacy organisations, law firms, financial institutions, utilities companies, dispute resolution services, standards organisations, and government agencies. MBIE received 18 written submissions. MBIE held meetings with key industry groups and other stakeholders, such as larger law firms.
42. While some supported the proposals, businesses and business advocates raised strong concerns about the consultation process and proposals. Key themes included:
 - a. The size of the consultation paper and the short consultation timeframe (two weeks) limited meaningful engagement. Some requested public

consultation, rather than just targeted consultation, given the significance of the changes proposed.

- b. Concerns about whether the problem was clearly defined and whether sufficient evidence had been provided to support the proposed changes.
 - c. The potential impacts on compliance costs and investment certainty.
 - d. Concerns about the shift from a criminal law-based to a civil law-based penalties regime and size of the proposed maximum monetary penalties.
43. Feedback from submitters has informed the development of the preferred approach in this RIS. MBIE's targeted consultation paper, sought views on seven options for reforming the penalties regime, including replacing criminal offences with civil pecuniary penalties, increasing maximum fines, and expanding infringement offences.
44. Submitters broadly supported modernising the regime but raised concerns about proportionality, evidential thresholds, and the need to retain criminal liability for serious breaches. In response to this feedback, MBIE refined the scope of proposed penalties, confirmed the retention of criminal offences for conduct involving intent or obstruction, and clarified the rationale for civil penalties in cases of strict liability. The RIS reflects these refinements and aims to balance effective deterrence with fair enforcement.
45. MBIE has advised Ministers of stakeholders' concerns. MBIE acknowledges that the targeted consultation was limited in scope and duration. To address this, officials will use the Select Committee process to engage more broadly with stakeholders, test the proposals in greater depth, and refine the legislative settings as needed. This stage will provide an opportunity for stakeholders who were not part of the initial consultation to share their views and for Parliament to consider any remaining concerns about proportionality, enforcement, or implementation.

Section 2: Assessing options to address the policy problem

What criteria will be used to compare options for each proposal to the status quo?

46. The following criteria will be used to evaluate options for both Proposal A and Proposal B:
 - a. **Effectiveness** – the extent to which the option provides sufficient incentives to effectively promote compliance with the Fair Trading Act (aligns with the objective of supporting a fair and confident trading environment).
 - b. **Efficiency** – the extent to which the option enables enforcement action to be undertaken efficiently, at appropriate cost and complexity (aligns with the objective of ensuring efficient enforcement activity).
 - c. **Proportionality** – the extent to which the option reflects the nature of the conduct and potential harm that may be caused by breaches of the Act (aligns with the objective that punishment for breaches is proportionate).
 - d. **Alignment** – the extent to which the option aligns with comparable New Zealand commercial law (aligns with the objective that the Act aligns with comparable legislation).

What scope will options for each proposal be considered within?

47. The scope of options for each proposal has been shaped by Ministerial direction and stakeholder feedback received during targeted consultation.
48. Options have been developed to reflect the practical enforcement challenges identified by the Commerce Commission, and to ensure consistency with comparable legislation.

What proposals are being considered?

49. Two proposals are being considered in this RIS:
 - a. Enhance enforcement of the Fair Trading Act (**Proposal A**); and
 - b. Increasing the maximum monetary penalties provided for in the Fair Trading Act (**Proposal B**).
50. Proposal B above follows from the recommended option under Proposal A to amend the penalties regime in the Act to enhance compliance. Proposal B considers the maximum penalty levels that could be set under the amended penalties regime.

Proposal A: Enhance enforcement of the Fair Trading Act

Options considered

Option 1 – Status quo

51. Under Option 1, all breaches of the Act (these are detailed in Annex Two) would continue to be treated under the criminal law, with the potential imposition of fines by the District Court on conviction.

Option 2 – Introduce a civil pecuniary penalties regime to the Act to enhance compliance

52. Option 2 involves amending the Fair Trading Act to enhance the effectiveness of the penalties regime to address issues of non-compliance and make enforcement more efficient. Under this option, amendment legislation would shift most (but not all) criminal offences under the Act to pecuniary penalties. Pecuniary penalties are defined as (non-criminal) monetary penalties imposed by a court under civil procedure where:⁸
- a. liability is established on the civil standard of proof (ie ‘on the balance of probabilities’)
 - b. the pecuniary penalty can be substantial
 - c. no criminal conviction or imprisonment results
 - d. penalties are paid to the Crown, rather than any victim, ie pecuniary penalties are not intended or designed to compensate.
53. Under this option, pecuniary penalties could enhance compliance with the Act by enabling action to be taken that better addresses the financial motivations behind breaches of the Act by body corporates. It would achieve this by removing the possibility of a criminal conviction and replacing it with civil penalties with much higher maximum fine amounts. It can also make enforcement more efficient by removing the need to prove a breach to the criminal standard of ‘beyond reasonable doubt’ – a high standard that may not be warranted for some conduct that is not ‘truly criminal’.
54. Implementing Option Two would result in the following changes to the penalties regime:
- a. Most strict liability offences under section 40 of the Act (including subsections 40(1), 40(1A), and 40(1B)) would be replaced with civil pecuniary penalties.
 - b. Some offences would remain criminal, specifically where the conduct is considered serious or involves obstructing enforcement, such as:
 - i. Sections that relate to serious and ‘truly criminal’ conduct – like undertaking a pyramid scheme or very serious product safety breaches;
 - ii. Breaching a management banning order;
 - iii. Resisting, obstructing, or delaying enforcement officers;
 - iv. Failing to supply information or giving false or misleading evidence to the Commission.
55. These offences often involve serious conduct or deliberate non-cooperation or deception, and we consider that the reputational impact of a criminal conviction is considered proportionate to the harm caused.

⁸ Law Commission “Pecuniary Penalties: Guidance for Legislative Design”, Report 133 (August 2014) at p. 14, para 1.1, <https://www.lawcom.govt.nz/our-projects/law-relating-civil-penalties?id=917>.

56. The Commerce Commission would still have the option of taking criminal proceedings in some instances under the Crimes Act 1961 for prohibited conduct considered to be particularly egregious. For example, section 240 of the Crimes Act relates to using deception for gain or to cause loss (including by knowingly or recklessly making false representations). This gives the Commission flexibility in its enforcement approach.

Option Three - Provide additional resources to the Commission to enhance compliance

57. Under option Three the Fair Trading Act would remain unchanged, but the Commerce Commission would receive increased funding to improve enforcement under the current criminal regime. This could include additional legal resources, improved case triaging, and enhanced public guidance.

58. The goal would be to improve deterrence and responsiveness without changing the legal framework - instead, this option would seek to enhance compliance with the Act and increase deterrence by increasing the volume of enforcement activity the Commission could undertake.

Stakeholder views on options

59. Stakeholders expressed a range of views on the three options for improving enforcement under the Fair Trading Act:

- a. **Option One:** Some submitters, including Confidentiality (and those who supported their submission), supported retaining the current criminal model. Confidentiality questioned whether the proposed shift to civil penalties was justified and raised concerns about the removal of criminal sanctions, which they considered an important deterrent.
- b. **Option Two:** Several legal and commercial submitters supported legislative change, noting that civil enforcement is increasingly used in commercial law and allows for more proportionate and efficient responses. Confidentiality and Confidentiality favoured the shift to civil penalties, while the New Zealand Law Society observed that civil proceedings may enable more timely enforcement and better reflect the nature of most breaches. Consumer advocacy groups including Confidentiality and Confidentiality also supported legislative change, highlighting that the lower burden of proof in civil proceedings could improve enforcement outcomes and encourage more reporting of breaches. Confidentiality stated, "We consider the lower burden of proof will make it easier for the Commission to bring successful actions against businesses that have breached the FTA."
- c. **Option Three:** No submitters explicitly recommended increasing the Commission's resourcing as a standalone alternative to legislative reform. However, Confidentiality noted that resourcing constraints at the Commerce Commission can limit enforcement outcomes.

How do the options compare to the status quo?

Table Two: Proposal A - Enhance enforcement of the Fair Trading Act

	Option One - (Status quo)	Option Two - (Introduce a civil pecuniary penalties regime to the Act to enhance compliance)	Option Three - (Provide additional resources to the Commission to enhance compliance)
Effectiveness	<ul style="list-style-type: none"> Criminal penalties are lower than civil ones, limiting deterrence, especially for larger firms that treat fines as a manageable cost. <p>Rating: 0</p>	<ul style="list-style-type: none"> Option Two may provide more meaningful and effective deterrence than the status quo. the proposed change under this option can be set at significantly higher levels than criminal fines, because they do not carry the reputational stigma or procedural safeguards associated with criminal convictions. This allows penalties to more directly target the financial incentives behind breaches, especially where conduct is motivated by commercial gain. For example, a penalty set at three times the value of the gain made can outweigh the benefit of non-compliance and act as a strong deterrent. Supported by Law Commission guidance that pecuniary penalties are a flexible and effective tool for promoting compliance in regulatory regimes. <p>Rating: ++</p>	<ul style="list-style-type: none"> Increased resourcing would allow the Commerce Commission to take more cases, investigate more non-compliance, and improve visibility of enforcement. This may improve deterrence, especially for lower-level breaches. However, the deterrent effect may remain limited for serious breaches due to low maximum penalties and the burden of proof required under criminal law. The Commission is already using non-litigation tools extensively. In 2024/25, over 80 per cent of investigation outcomes involved information or compliance advice. Which suggests that the issue is not a lack of guidance, but rather the limited deterrence available under the current penalties regime. <p>Rating: +</p>
Efficiency	<ul style="list-style-type: none"> Criminal proceedings require proof beyond reasonable doubt and follow strict procedures, which are more onerous than civil ones due to stigma and potential imprisonment. The criminal regime may not be efficient for addressing breaches of the Act that often deal with commercial conduct. <p>Rating: 0</p>	<ul style="list-style-type: none"> In most cases, the proposed legislative change would allow the Commerce Commission to establish liability on the balance of probabilities, avoiding the higher burden of proof warranted in criminal cases. Civil rules of evidence and procedure are less onerous than criminal rules because they do not carry the same reputational or punitive consequences. This makes enforcement faster, less complex, and less costly. Admissions can be made without admitting criminal wrongdoing, reducing the need for trial and saving resources. While civil proceedings afford fewer procedural protections, many defendants are large corporates with significant legal resources which may seek to use these resources to limit their liability in a civil case. <p>Rating: +</p>	<ul style="list-style-type: none"> Additional funding could help the Commerce Commission could take enforcement action on a greater number of breaches. However, enforcement of serious and higher-end breaches would still rely on criminal proceedings, which are slower and more resource-intensive than civil processes. <p>Rating: -</p>
Proportionality	<ul style="list-style-type: none"> The nature of the conduct and potential harm caused from breaches of the Fair Trading Act may not warrant the application of the criminal law (aside for the most serious breaches). Given that most breaches of the Act are not truly criminal by their nature and in terms of their potential harm, they may not be deserving of the stigmatising effect (socially and/or reputationally) of a criminal conviction. <p>Rating: 0</p>	<ul style="list-style-type: none"> The proposed legislative change better reflects the nature and harm of most breaches under the FTA's. These breaches typically involve financial harm, not physical harm or serious moral wrongdoing, and are often strict liability offences. A civil regime is more proportionate for this type of regulatory conduct. Pecuniary penalties allow courts to impose meaningful consequences without over-penalising conduct that is regulatory rather than criminal in nature. For serious breaches, such as obstructing investigations or knowingly misleading consumers, the Commerce Commission retains the ability to pursue criminal charges under the Crimes Act. <p>Rating: ++</p>	<ul style="list-style-type: none"> The Commission already has a range of tools it can use to take proportionate action in relation to breaches – like issuing warnings or providing guidance. Under this option, it would be able to take more of these enforcement measures. However, issues of proportionality in the Act would persist – the low maximum penalties in the Act would not enable appropriately significant enforcement response, or deterrent, for the largest breaches of the Act or conduct by the largest firms. These issues could not be addressed by providing the Commission with more resourcing because the penalties are limited by the current provisions in the Act. <p>Rating: -</p>
Alignment	<ul style="list-style-type: none"> The FTA's reliance on criminal offences is increasingly out of step with other commercial legislation in New 	<ul style="list-style-type: none"> Option Two would bring the FTA' into closer alignment with other commercial legislation in New Zealand and Australia, 	<ul style="list-style-type: none"> This option retains a criminal-only enforcement model, which is increasingly out of step with other commercial legislation in

	Option One - (Status quo)	Option Two - (Introduce a civil pecuniary penalties regime to the Act to enhance compliance)	Option Three - (Provide additional resources to the Commission to enhance compliance)
	<p>Zealand and Australia.</p> <ul style="list-style-type: none"> Comparable regimes like the Financial Markets Conduct Act and the and Commerce Act use civil penalties for similar conduct, such as misleading representations and unfair practices. This misalignment creates inconsistency for regulators and businesses and may reduce the predictability and coherence of the regulatory framework. <p>Rating: 0</p>	<p>including the Financial Markets Conduct Act and Commerce Act.</p> <ul style="list-style-type: none"> The Financial Markets Conduct Act is a good comparator, as it also covers ‘fair dealing’ provisions that mirror many of the Fair Trading Act’s prohibited conduct sections. Aligning the Fair Trading Act’s penalties regime with the civil regime used in the Financial Markets Conduct Act would therefore support a more consistent legislative regime on the types of fair dealing and conduct behaviours that both Acts deal with. Greater alignment improves consistency, reduces compliance complexity, and enhances predictability. <p>Rating: +</p>	<p>New Zealand and Australia.</p> <ul style="list-style-type: none"> It does not address misalignment with regimes like the FMC Act or Commerce Act, and the limited deterrence effect of the low penalties in the Act would persist. <p>Rating: -</p>
Overall assessment	<ul style="list-style-type: none"> The current criminal-only model is increasingly seen as outdated and ineffective. It provides limited deterrence, particularly for larger firms, and is inefficient to enforce due to the high burden of proof and procedural complexity. It does not reflect the nature of most breaches and is out of step with other commercial legislation. <p>Rating: 0</p>	<ul style="list-style-type: none"> This option enables more proportionate and efficient enforcement, improves deterrence by allowing for higher penalties, and aligns the Fair Trading Act with other modern regulatory regimes. Given that businesses, particularly large ones, consider the potential financial gain from a breach, encouraging their compliance likely rests on addressing the limited deterrence of the current penalties regime in the Act. It retains criminal liability for serious breaches, ensuring appropriate safeguards remain in place. <p>Rating: +</p>	<ul style="list-style-type: none"> This option could improve enforcement outcomes by enabling the Commerce Commission to take more cases and increase visibility of enforcement. But this benefit would likely only be realised for low-end offending as the limitations of the current low penalties regime would persist. <p>Rating: -</p>

Key for qualitative judgements:				
<p style="text-align: center;">++</p> <p style="text-align: center;">much better than doing nothing/the status quo/counterfactual</p>	<p style="text-align: center;">+</p> <p style="text-align: center;">better than doing nothing/the status quo/counterfactual</p>	<p style="text-align: center;">0</p> <p style="text-align: center;">about the same as doing nothing/the status quo/counterfactual</p>	<p style="text-align: center;">-</p> <p style="text-align: center;">worse than doing nothing/the status quo/counterfactual</p>	<p style="text-align: center;">--</p> <p style="text-align: center;">much worse than doing nothing/the status quo/counterfactual</p>

Proposal B: Increase the size of maximum monetary penalties in the Act

60. Under Proposal B, MBIE proposes increasing maximum monetary penalties to strengthen deterrence and ensure the penalties regime more effectively addresses unfair conduct. This proposal links closely to our preferred option under Proposal A – to introduce a civil pecuniary penalties regime to the Act to enhance compliance. MBIE assessed four options for updating penalty levels under the Fair Trading Act, each involving a three-tier structure based on the seriousness of the conduct.
61. The proposed approach retains the existing offence tiers in the Act.
 - a. Offences currently covered by section 40(1) and 40(1A) including contraventions of Parts 1, 3, and 4, and breaches of section 24, would move to Tier 1.
 - b. Breaches of management banning orders under section 46C going into Tier 2.
 - c. Offences currently covered by section 40(1B), including contraventions of Part 2 and Part 4A, would move to Tier 3.
62. This ensures that the most serious offences under the current regime are matched with the highest penalties, without reclassifying individual provisions. This ensures alignment with the Act's current provisions.
63. The four options considered are summarised below and set out in Table 1:
64. **Option One** – Status quo:
 - a. Retain current maximum monetary penalties. Tier 1 penalties would remain set at \$200,000 for individuals and \$600,000 for body corporates.
 - b. Tier 2 penalties would remain at \$60,000 for individuals.
 - c. Tier 3 penalties would remain at \$10,000 for individuals and \$30,000 for body corporates.
65. **Option Two** – Increase penalties, with Tier 1 aligned with the Commerce Act
 - a. Increase penalties, with Tier 1 penalties aligned with the highest available under the Commerce Act. This includes a maximum penalty of \$500,000 for individuals and \$10 million for body corporates, or higher amounts based on commercial gain or turnover.
 - b. Tier 2 penalties would increase to \$200,000 for individuals.
 - c. Tier 3 penalties would increase to \$60,000 for individuals and \$200,000 for body corporates.
66. **Option Three** – Increase penalties, with Tier 1 aligned with the Financial Markets Conduct Act (preferred):
 - a. Increase penalties, with Tier 1 penalties aligned with the Financial Markets Conduct Act. This includes a maximum penalty of \$1 million for

individuals and \$5 million for body corporates, or higher amounts based on gain or loss avoided.

b. Tier 2 and Tier 3 penalties would increase in line with Option Two.

67. **Option Four** - Increase penalties, with Tier 1 aligned with Australian Consumer Law

a. Increase penalties, with Tier 1 penalties aligned with the Australian Consumer Law. This includes a maximum penalty of AUD\$2.5 million for individuals and AUD\$50 million for body corporates, or higher amounts based on benefit obtained or turnover.

b. Tier 2 and Tier 3 penalties would increase in line with Options Two and Three.

68. Stakeholder views on increasing penalties varied:

a. Some submitters, including Confidentiality supported retaining the status quo (**Option One**) and expressed concern that higher penalties could increase compliance costs and reduce investment certainty, or deter businesses looking to invest in New Zealand.

b. Few submitters supported aligning with the Commerce Act model (**Option Two**). While acknowledging the need for stronger deterrence, some noted that Commerce Act penalties are designed for more serious anti-competitive conduct, such as cartel behaviour, and may not be appropriate for breaches of consumer law.

c. Legal submitters such as Confidentiality and Confidentiality favoured alignment with the Financial Markets Conduct Act (**Option Three**), noting that it deals with similar types of conduct, such as misleading or deceptive representations, and provides a proportionate and familiar model for enforcement.

d. Similarly, while stakeholders acknowledged the trend toward higher penalties in Australia (**Option Four**), there was limited support for adopting the Australian Consumer Law model. Confidentiality and Confidentiality raised concerns that the penalty levels may be disproportionate in the New Zealand context and could overstate the commercial gains typically associated with Fair Trading Act breaches.

Table 2: Current maximum monetary penalties in the Fair Trading Act and three options for increasing the size of the maximum monetary penalties

Tier	Option One - Status quo	Option Two - Commerce Act model	Option Three - FMC Act model (preferred)	Option Four - Australian Consumer Law
1	Applies to Part 1 (Unfair conduct) (except sections 9, 14(2), 24, and 23), Part 3 (Product safety), or Part 4 (Services safety)	Applies to Part 1 (Unfair conduct) (except sections 9, 14(2), and 23), Part 3 (Product safety), or Part 4 (Services safety)		
	<ul style="list-style-type: none"> \$200,000 for individuals \$600,000 for body corporates 	<ul style="list-style-type: none"> \$500,000 for individuals For body corporates the greater of: <ul style="list-style-type: none"> \$10 million, or 3x commercial gain (if ascertainable), or 10 per cent of turnover (if gain not ascertainable) 	<ul style="list-style-type: none"> The greater of: <ul style="list-style-type: none"> \$5 million (body corporate) and \$1 million for individuals, or 3x gain made or loss avoided, or consideration for the transaction 	<ul style="list-style-type: none"> AUD\$2.5 million for individuals For body corporates the greater of <ul style="list-style-type: none"> AUD\$50 million 3x benefit obtained, or 30 per cent of adjusted turnover of the corporation's adjusted turnover during the breach turnover period for the contravention
2	Applies to Part 5A (<i>Management banning orders</i>)			
	<ul style="list-style-type: none"> \$60,000 for individuals 	<ul style="list-style-type: none"> \$200,000 for individuals 		
3	Applies to Part 2 (<i>Consumer information standards</i>) and Part 4A (<i>Consumer transactions and auctions</i>)			

	<ul style="list-style-type: none">• \$10,000 for individuals• \$30,000 for body corporates	<ul style="list-style-type: none">• \$60,000 for individuals• \$200,000 for body corporates
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How do the options compare to the status quo?

Table Three: Proposal B - Increase the size of maximum monetary penalties in the Act

	Option One - Status quo	Option Two - Increase penalties, with Tier 1 penalties set in line with the Commerce Act	Option Three - Increase penalties, with Tier 1 penalties set in line with the Financial Markets Conduct Act	Option Four - Increase penalties, with Tier 1 penalties set in line with Australian Consumer Law
Effectiveness	<ul style="list-style-type: none"> The current penalty levels may not offer sufficient incentives to promote compliance, particularly for larger firms where the commercial gain from breaching the Act can exceed the maximum fines. This limits the deterrence effect of the regime and may reduce its ability to prevent unfair conduct. Rating: 0	<ul style="list-style-type: none"> Option Two would strengthen deterrence by increasing the downside risk of non-compliance, especially where breaches are financially motivated. Penalties that reflect or exceed the commercial gain from a breach are more likely to promote compliance as the ability to impose fines that exceed commercial gains means that businesses cannot just treat any fine as a cost of doing business. Rating: +	<ul style="list-style-type: none"> Option Three would also strengthen deterrence by increasing the downside risk of non-compliance, especially where breaches are financially motivated. However, this option retains components that enable penalties to be set with reference to commercial gains made. This means that businesses cannot just treat any fine as a cost of doing business. Rating: +	<ul style="list-style-type: none"> Penalties under the Australian Consumer Law are significantly higher than those currently available under the Fair Trading Act, including penalties of up to AUD\$50 million for corporations. These levels are likely to provide strong incentives to comply, particularly for large firms where the commercial gain from misleading conduct may be substantial. Rating: ++
Efficiency	<ul style="list-style-type: none"> There is no material difference in administrative efficiency between the options, as all involve court-imposed penalties. Rating: 0	<ul style="list-style-type: none"> No difference between Options. Rating: 0	<ul style="list-style-type: none"> No difference between Options. Rating: 0	<ul style="list-style-type: none"> No difference between Options. Rating: 0
Proportionality	<ul style="list-style-type: none"> The current penalty levels may not reflect the nature or impact of many breaches. In some cases, penalties are too low to be proportionate to the harm caused or the commercial benefit gained. This limits the ability of courts to impose consequences that match the seriousness of the conduct and harm caused. Rating: 0	<ul style="list-style-type: none"> Tier 1 penalties include a formula that allows the court to impose the greater of a fixed amount, 3 times the commercial gain, or 10 per cent of turnover. This enables penalties to reflect the financial benefit of the breach, particularly for larger firms, and enables fines to be set that are proportionate to the nature of the breach. Tier 2 and Tier 3 penalties are also increased from current levels but remain relatively lower, supporting a structured response across offence types. However, the Commerce Act model is designed for more serious conduct, such as cartel behaviour, and may result in penalties that are disproportionately high for some Fair Trading Act breaches. Rating: +	<ul style="list-style-type: none"> Tier 1 penalties are based on the Financial Markets Conduct Act and allow the court to impose the greater of a fixed amount, three times the gain made or loss avoided, or the consideration for the transaction. This links penalties to the financial impact of the breach. Tier 2 and Tier 3 penalties are increased but remain relatively lower. Compared to Option Two, this approach avoids the risk of over-penalising Fair Trading Act breaches, as the FMC Act deals with similar types of conduct, such as misleading or deceptive representations. Rating: ++	<ul style="list-style-type: none"> Penalty levels set in the Australian Consumer Law reflect the size and scale of their economy and markets as a proxy for the level of commercial gains that could be achieved by breaching the legislation. It is likely that setting maximum monetary penalties in New Zealand at levels similar to those for the Australia Consumer Law may mean that penalties disproportionately overstate the potential commercial gains achievable from breaches relative to commercial gains achievable in Australia. Rating: --
Alignment	<ul style="list-style-type: none"> The Fair Trading Act's maximum penalties are low compared to other commercial legislation in New Zealand, such as the Commerce Act and the Financial Markets Conduct Act and compared to the Australian Consumer Law. This creates inconsistency across regimes that deal with similar types of conduct, such as misleading representations and unfair practices. Rating: 0	<ul style="list-style-type: none"> Option Two would result in Fair Trading Act penalties being higher than those available under the Financial Markets Conduct Act for similar conduct, such as misleading or deceptive representations. This would reduce legislative alignment. It may also mean that the most serious Fair Trading Act breaches attract penalties equivalent to those imposed for cartel conduct under the Commerce Act, which are generally considered more serious in that they undermine free market competition. Rating: -	<ul style="list-style-type: none"> Tier 1 penalties are based on the 'fair dealing' provisions in the Financial Markets Conduct Act, which address similar types of conduct to those prohibited under the Fair Trading Act. This supports strong consistency across regimes that deal with comparable behaviour. A fundamental principle of penalty design is that similar offences should attract similar penalties to ensure fairness in how different laws are applied. Rating: ++	<ul style="list-style-type: none"> While the Australian Consumer Law deals with similar types of conduct, adopting its penalty levels would make the Fair Trading Act's penalties significantly higher than those in other New Zealand commercial legislation, including the Financial Markets Conduct Act and the Commerce Act. This would create significant inconsistency across domestic regimes and reduce clarity for businesses operating in New Zealand. Rating: --
Overall assessment	Current penalty levels are too low to deter breaches, especially by larger firms. They lack proportionality and alignment with other regimes and offer limited incentives to comply. Rating: 0	Option Two would strengthen deterrence by allowing penalties to be set with reference to commercial gain and with significantly higher penalties of up to \$10 million for businesses. However, the Commerce Act model is designed for more serious anti-competitive conduct and may result in disproportionately high penalties for typical	Option Three offers a balanced approach. It improves deterrence while maintaining proportionality and alignment with similar legislation. The FMC Act deals with comparable conduct, making it a suitable benchmark. This option supports fairness, consistency, and effective enforcement. Rating: ++	Option Four provides strong deterrence but risks excessive penalties that may not reflect the scale of harm or gain in the New Zealand context. It could create misalignment with domestic regimes and reduce clarity for businesses, raising concerns about fairness and consistency.

	Option One - Status quo	Option Two - Increase penalties, with Tier 1 penalties set in line with the Commerce Act	Option Three - Increase penalties, with Tier 1 penalties set in line with the Financial Markets Conduct Act	Option Four - Increase penalties, with Tier 1 penalties set in line with Australian Consumer Law
		Fair Trading Act breaches. It also risks misalignment with other consumer protection legislation. Rating: +		We also note that Australia has a much larger economy and consumer market that warrants imposition of much higher penalties in their market given the much higher potential gain that can be made from offending, and the much higher potential impacts to consumers. Rating: -
Key for qualitative judgements:				
++ much better than doing nothing/the status quo/counterfactual	+ better than doing nothing/the status quo/counterfactual	0 about the same as doing nothing/the status quo/counterfactual	- worse than doing nothing/the status quo/counterfactual	-- much worse than doing nothing/the status quo/counterfactual

What option is likely to best address the problem, meet the policy objectives, and deliver the highest net benefits?

69. Based on the analysis in this paper, and the available evidence of a problem, MBIE considers that the combination of Proposal A, Option Two (introducing civil pecuniary penalties for most breaches of the Fair Trading Act) and Proposal B, Option Three (increasing maximum monetary penalties in line with the Financial Markets Conduct Act), is most likely to address the problem, meet the policy objectives, and deliver the highest net benefits.
70. Proposal A, Option Two would shift most breaches from criminal offences to civil pecuniary penalties. This would improve enforcement efficiency by removing the need to meet the higher criminal standard of proof, allowing the Commerce Commission to take action more efficiently for the types of commercial conduct the Act deals with. It would also reduce the procedural burden associated with criminal prosecutions, while retaining criminal liability for the most serious breaches, such as obstructing investigations or breaching banning orders, where the reputational impact and procedural safeguards of a criminal prosecution remain appropriate.
71. The Law Commission has noted that pecuniary penalties are increasingly used in regulatory regimes because they offer a flexible and effective enforcement tool. They can impose significant financial consequences without the procedural burden of criminal trials, making them well-suited to promoting compliance in commercial contexts.⁹
72. Proposal B, Option Three would increase maximum penalties in a way that reflects the financial impact of breaches and aligns with comparable legislation. Tier 1 penalties would be based on the Financial Markets Conduct Act, which deals with similar types of conduct, such as misleading or deceptive representations and unsubstantiated claims. This supports proportionality by ensuring penalties are scaled to the benefit gained or harm caused and avoids the risk of over-penalising Fair Trading Act breaches by applying penalty levels designed for more serious conduct under the Commerce Act. The tiered structure also ensures that less serious breaches remain subject to lower penalties, maintaining a balanced and proportionate regime.
73. In response to stakeholder feedback, MBIE refined the proposals by retaining criminal liability for certain serious breaches, narrowing the scope of civil penalties to strict liability offences, and aligning maximum penalties with the Financial Markets Conduct Act rather than the Commerce Act or Australian Consumer Law. These changes reflect concerns about proportionality, enforcement burden, and legislative consistency, and aim to balance effective deterrence with fair and practical enforcement. Officials acknowledge that the Financial Markets Conduct Act and Fair Trading Act deal with different sectors and types of businesses. The Fair Trading Act applies to all businesses in New Zealand while the Financial Markets

⁹ Law Commission, Pecuniary Penalties – Guidance for Legislative Design, Foreword, page iv

Conduct Act applies to typically larger firms involved in financial markets and services like major banks, listed companies and insurers. However, we still consider that aligning the penalties in the Fair Trading Act with those in the Financial Markets Conduct Act is appropriate due to the need to ensure that maximum penalties can address fair trading conduct by any business operating here regardless of their size – from corner dairies through to the largest multi-national retailers – by ensuring that maximum penalties in the Act have enough ‘headroom’ to address conduct of any scale. Without this headroom, the Act’s ability to address the most serious conduct, or breaches by the largest businesses, is limited. It is important to note that courts retain discretion to set penalties up to the maximum amount and that they have readily applied this discretion to set penalties at lower levels than the maximum in many cases to date.

74. This combined approach best meets the objectives of the reform: it strengthens deterrence, enables more efficient enforcement, supports proportionality, and aligns the Fair Trading Act with other commercial legislation in New Zealand.

Limitations with our analysis

75. MBIE acknowledges that the policy process to consider these changes has been undertaken at pace, and that there are limitations in the available evidence. While there is a clear rationale for reform, including concerns raised by the Commerce Commission and stakeholder feedback, there is limited empirical data on the extent to which the current penalties regime has failed to deter non-compliance across sectors or over time.
76. There is also limited evidence to inform what an appropriate penalty level should be. To mitigate this, MBIE has recommended aligning penalties with comparable legislation, notably the Financial Markets Conduct Act, which addresses similar types of conduct and provides a tested benchmark for penalty design.
77. Further consultation on the proposals will be undertaken through the Select Committee process, which will provide an opportunity to test the proposed changes more fully with stakeholders and refine the approach if needed.

Is the Minister’s preferred option in the Cabinet paper the same as the agency’s preferred option in the RIS?

78. Yes, the Minister’s preferred option under Proposal A and Proposal B are the same as officials’ preferred options in this RIS.

What are the marginal costs and benefits of the preferred options in the Cabinet paper?

Affected groups	Comment	Impact	Evidence Certainty
Additional costs of the preferred options compared to taking no action			
Regulated groups – New Zealand businesses	<p>Businesses facing enforcement action for breaches of the Fair Trading Act will face increased potential penalties under proposed changes – though the exact amounts will still be determined by the courts on the facts of each case.</p> <p>Therefore, costs would not accrue to most businesses – only if they breach a provision in the Act.</p>	High (but depends on the facts of each case and would impact a limited number of businesses)	Low – level of impact on businesses will depend on the level of penalty imposed by the courts on a case-by-case basis. This is uncertain for future cases.
Regulators – Commerce Commission	<p>May result in the Commerce Commission taking more enforcement action under a civil proceedings and pecuniary penalties regime.</p> <p>However, the costs of taking civil proceedings should be lower relative to taking criminal proceedings under the Act currently.</p>	Low - Medium.	Low – unclear how many additional cases would be undertaken.
Ministry of Justice	<p>The Ministry will incur some increased operational costs in processing civil penalties imposed by the courts.</p> <p>System changes will be needed to reflect changes to offence rules, which the Ministry estimates at \$200,000 (+/- 50 percent) which cannot be met within baselines and will be reassessed after Cabinet decisions are made.</p>	Low - Medium	Moderate – based on information and estimates provided by the Ministry of Justice.
New Zealand consumers	No direct costs to consumers.	None.	Not applicable.
Non-monetised costs	Much higher potential costs for businesses breaching the Fair Trading Act, and likely increased costs for the Commerce Commission’s enforcement activities.	Medium.	Low – as above.
Additional benefits of the preferred options compared to taking no action			
Regulated groups – New Zealand businesses	<p>Businesses would avoid the stigma of criminal convictions under many of the Fair Trading Act’s enforcement provisions, though noting that these come with much higher potential penalties than under the Act currently.</p> <p>Increased compliance is also likely to benefit compliant businesses by reducing unfair competitive advantages held by non-compliant firms, supporting a more level playing</p>	Low.	Low – benefit of avoided stigma from criminal convictions is unable to be quantified.

	field.		
Regulators – Commerce Commission	Benefits from having access to a more effective, efficient and flexible regulatory toolkit means that the Commerce Commission can take the most appropriate course of enforcement action for many breaches. More likely to pursue lower level breaches, which supports market confidence.	Medium.	Low – unable to be quantified.
New Zealand consumers	Less likely to be impacted by conduct that breaches the Fair Trading Act as the penalties regime will better deter breaches. This can reduce instances where consumers pay more for goods and services or incur the costs of bad purchases (like goods or services not asked for).	Medium.	Low – the level of benefit to consumers based on avoided breaches is unable to be estimated with certainty.
Non-monetised benefits	Increased benefits to consumers through fewer future breaches of the Act, while the Commerce Commission benefits through having a more effective and efficient enforcement toolkit.	Medium.	Low – as above.

Section 3: Delivering an option

How will the proposal be implemented?

The changes proposed will be implemented through amendment legislation

79. The proposals set out in this RIS, once agreed by Cabinet, will be implemented by amending the Fair Trading Act through an amendment bill. This Bill is expected to be introduced to Parliament by the end of 2025 and has a proposed Category 5 legislative rating (to be referred to Select Committee in 2025)¹⁰.
80. It is likely the Bill would be passed in 2026. The actual commencement date for the new regime will be determined as part of drafting the Bill. Officials will also consider, as part of drafting, whether a transition period is needed for businesses to familiarise themselves with the changes before they come into effect.
81. Changes to the Act will not apply retrospectively. MBIE will continue to administer the Fair Trading Act.

The Commerce Commission will be responsible for enforcement

82. The changes in this RIS will be enforced by the Commerce Commission – the existing enforcement agency for the Fair Trading Act. The Commerce Commission has an existing and well-established enforcement function that

¹⁰ Noting that this rating is yet to be confirmed at the time of writing.

will monitor compliance with the amended regime and take enforcement action where necessary.

83. Enhancing the penalties regime may lead to more enforcement action being taken by the Commission. Any additional enforcement activity, or resource needs, will likely be met by the Commission from within baselines (this is to be confirmed at the time of writing).

Communicating the changes to those affected

84. The Fair Trading Act applies to all New Zealand businesses and individuals in trade – from small and medium enterprises (SMEs) to large corporates. The Commission will issue guidance about the amended penalties regime before it comes into force to outline the changes to New Zealand businesses and consumers.
85. The Commission is experienced in issuing guidance for similar regulatory changes in the past – including previous amendments to the Fair Trading Act (see the Commission’s *Your Obligations as a Business* webpage here: [Commerce Commission - Your obligations as a business](#)). The Commission will:
 - a. Update its website;
 - b. Update its online [enforcement response guidelines](#);
 - c. Update its online [criminal prosecution guidelines](#);
 - d. Potentially develop new public-facing guidelines related to civil proceedings; and
 - e. Develop or update training for investigators and implement this new training.

Implementation risks

86. Submitters on the draft proposals have raised a potential risk that implementing higher penalties in the Act could make New Zealand a less attractive destination for companies to invest or operate due to the higher financial risks from breaching our consumer law.
87. We have considered this risk and note that, while the changes lift the maximum penalties under the Act, these are not to levels that are higher than comparable regimes internationally. For example, Australia has much higher penalties for breaches of its consumer law, and their regime has not proven a barrier to investment.
88. However, we note the potential risk and will consider this risk as part of monitoring and evaluation (discussed below).

How will the proposals be monitored, evaluated, and reviewed?

89. As the Commerce Commission already enforces the Act, it has well-established processes for monitoring and reporting on compliance. The Commission will update MBIE (as the Commission’s monitoring agency) on how the proposed amendments to the Act are enhancing its enforcement abilities.

90. The Commerce Commission will monitor the effectiveness of the changes and the benefits to its enforcement of the Act. The Commission will:
91. Monitor compliance with the Act and whether the changes in this paper have had the benefits and effects anticipated – like deterring breaches of the Act more effectively. Monitoring will consider:
 - a. consumer complaints data (and whether the recent increasing trend of complaints decreases as a result of these proposals);
 - b. whether the changes lead to more enforcement action being taken, and whether these are more efficient in terms of cost and time taken;
 - c. whether the levels of penalties issued by the courts have increased.
92. Continue reporting quarterly to MBIE and the Minister of Commerce and Consumer Affairs about compliance with the Act through their existing quarterly reporting process.
93. MBIE will work with the Commission to update Ministers on benefits of the regime and any implementation issues (including unintended consequences or implementation risks, like deterring investment) and whether further amendments to the enforcement regime are necessary later.
94. If the monitoring activity above reveals issues with the amended penalties regime, MBIE will consider options for addressing them, test options with the Commission, and advise the Minister of Commerce and Consumer Affairs accordingly.
95. An evaluation of the regime’s effectiveness will be undertaken at a later date, yet to be determined.

Annex One: Current maximum monetary penalties for criminal offences under the Fair Trading Act 1986

Offence type	Offence section	Breaches under the Act	Current maximum monetary penalties
Criminal	40(1)	Breaches of a provision of: Part 1 of the Act (relating to unfair conduct), except for sections 9, 14(2), 23 or 24; ^{11, 12} a. Part 3 of the Act (relating to product safety); or b. Part 4 of the Act (relating to safety of services).	\$200,000 fine in the case of an individual and \$600,000 in the case of a body corporate. However, see section 40(2) below in this table for condition on imposing the maximum fine.
	40(1A)	Breaches of section 24 (relating to the prohibition on promoting or operating a pyramid selling scheme).	\$600,000 fine. However, see section 40(2) below in this table for condition on imposing the maximum fine. In addition to any fine imposed under section 40(1A), under section 40A , the court may, on the application of the Commerce Commission, order the person to pay an amount not exceeding the value of any commercial gain resulting from the breach if the court is satisfied that the breach occurred in the course of producing a commercial gain. The standard of proof in proceedings for a court order under section 40A for an additional penalty for a breach of section 24 involving commercial gain is the standard of proof that applies in civil proceedings (ie 'on the balance of probabilities').
	40(1B)	Breaches of a provision of: a. Part 2 (relating to consumer information); or b. Part 4A (relating to consumer transactions and auctions).	\$10,000 fine in the case of an individual and \$30,000 in the case of a body corporate. However, see section 40(2) below in this table for condition on imposing the maximum fine.
	40(2)		With respect to the penalties in section 40 of the Act above (ie as set out in sections 40(1), 40(1A) and 40(1B)), where a person is convicted, whether in the same or separate proceedings, of two or more offences in respect of breaches of the same provisions of the Act and those breaches are of the same or a substantially similar nature and occurred at or about the same time, the aggregate amount of any fines imposed on that person for those convictions cannot exceed the amount of the maximum fine that may be imposed for a conviction for a single offence.
	46E	Breach by a person of a management banning order made against him or her.	\$60,000 fine.
	47F	Resisting, obstructing or delaying:	\$10,000 fine in the case of an individual and \$30,000 in the case of a body corporate.

¹¹ **Section 9** relates to misleading and deceptive conduct generally, which is prohibited. There is no offence in relation to section 9. Misleading and deceptive conduct is prohibited more specifically under other sections in Part 1 of the Act and breaches of those provisions are an offence under Act. **Section 14(2)** relates to the prohibition on the use of physical force, harassment, or coercion in connection with the sale or grant or possible sale or grant of an interest in land, or the payment for an interest in land. **Section 23** relates to the prohibition on the use of physical force, harassment, or coercion in connection with the supply or possible supply of goods or services or the payment for goods or services. A breach of sections 14(2) or 23 (both relating to use of physical force, harassment or coercion) **is not an offence under section 40(1) of the Act, and therefore there are no penalties for breaches of these sections.** **Section 24** relates to the prohibition on promoting or operating a pyramid selling scheme (see section 40(1A) below in this table).

¹² Note that **section 26** in Part 1 of the Act prohibits goods being imported into New Zealand that bear a "false trade description" (ie any representation which if made in connection with the supply or possible supply of goods or with the promotion by any means of the supply or use of goods would constitute a breach of sections 13(a), 13(d) or 13(j) of the Act. Such goods are prohibited to be imported under section 96 of the Customs and Excise Act 2018. It is a criminal offence under section 388(1) of the Customs and Excise Act to import such goods. Under section 388(2) of the Customs and Excise Act, a person convicted of an offence is liable to a maximum fine of \$5,000 in the case of an individual and \$25,000 in the case of a body corporate. See also **section 33** of the Act where there is an equivalent effect in relation to the importation of goods which, if supplied, would constitute a breach of Part 3 (relating to product safety) of the Act.

Offence type	Offence section	Breaches under the Act	Current maximum monetary penalties
		<ul style="list-style-type: none"> a. any product safety officer exercising a power under sections 33C (relating to safety of products) or 33D (relating to suspension of supply notices); b. any authorised person acting pursuant to a search warrant issued under section 47; or c. any authorised employee exercising a power to enter a "place" under section 47L. 	
	47J	Refusing or failing to comply with a notice under section 47G (relating to requirement that a person supply information or documents or give evidence to the Commerce Commission); or in purported compliance with the notice, supply information, or supply a document, knowing it to be false or misleading.	\$10,000 fine in the case of an individual and \$30,000 in the case of a body corporate.

Annex Two: Enforcement outcomes to date for complaints about Fair Trading Act breaches

As at 4 September 2025

	Financial Year (FY)	20/21		21/22		22/23		23/24		24/25	
1	Reported Concerns	10,047		7,889		11,805		11,918		11,736	
2	Reported Concerns FTA	8,841	88%	7,075	90%	10,664	90%	10,762	90%	10,851	92%
3	Investigation Outcomes	437		245		323		352		293	
4	Info to trader	276	63%	164	67%	260	80%	261	74%	207	71%
5	Compliance Advice	80	18%	36	15%	38	12%	52	15%	38	13%
6	No further action	54	12%	28	11%	13	4%	15	4%	25	9%
7	Litigation	8	2%	6	2%	6	2%	10	3%	12	4%
8	Warning	17	4%	10	4%	5	2%	13	4%	9	3%
9	Enforceable undertaking					1	0%			1	0%
10	Infringement Notice	1	0%							1	0%
11	Commission Settlement	1	0%								

Notes:

Concerns often relate to more than one Act and investigations often relate to more than one concern. Some concerns are still under investigation so won't be counted under investigation outcomes.