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ERGANZ SUBMISSION ON PROPOSED AMENDMENTS TO THE FAIR TRADING ACT 1986

The Electricity Retailers' and Generators' Association of New Zealand ('ERGANZ') takes this opportunity to provide feedback on MBIE's targeted consultation paper, 'Amendments to the Fair Trading Act 1986' from late July 2025.

ERGANZ is the industry association representing companies that sell electricity to Kiwi households and businesses. Collectively, our members supply almost 90 per cent of New Zealand's electricity. We work for a competitive, fair, and sustainable electricity market that benefits consumers.

ERGANZ supports the substantive submission of Business NZ and endorses their views on the proposed amendments. We share their concerns about both the policy-making process and the real-world consequences that would result from these reforms.

The short consultation timeframe, combined with the narrow scope of targeted engagement, is inappropriate given the scale and pace of the proposed changes. The Fair Trading Act is a foundational piece of legislation that applies across every sector of the economy. A more inclusive and thorough consultation process is necessary to ensure that any changes are robust and have a clear mandate.

Overall, the consultation paper does not sufficiently establish the underlying problems or present clear evidence that justifies such far-reaching amendments.

The consultation paper lacks sufficient data or analysis to demonstrate that the current penalties regime is not achieving its policy objectives. While the document suggests that penalties are too low to act as a deterrent, it does not present evidence showing that current enforcement outcomes are inadequate, or that non-compliance is widespread and underpunished.

For example, the proposed increase in maximum monetary penalties is substantial, up to \$10 million or 10% of turnover in some cases. However, the consultation paper does not provide any analysis showing that current maximum fines are routinely being reached or are otherwise constraining the courts or the Commerce Commission. The consultation paper provides no evidence to substantiate

the claim made in paragraph 19 that businesses simply view fines as an acceptable cost of conducting poor business practices. Without such evidence, the rationale for tripling or more the financial exposure for businesses remains unclear.

In the absence of robust data, it is difficult to assess whether the proposed changes are proportionate or necessary. Quantifying the enforcement challenges under the existing regime and evaluating whether existing penalty settings are failing to incentivise compliance would be a more appropriate starting point for such significant legislative reform.

The proposal to allow individuals, rather than the Commerce Commission, to directly challenge unfair contract terms, including through the Disputes Tribunal, raises concerns about consistency and legal certainty. The Disputes Tribunal is specifically designed to operate without strict adherence to legal forms or technical rules. Under section 18(6) of the Disputes Tribunal Act 1988, the Tribunal is not required to give effect to strict legal rights or obligations, nor to legal forms or technicalities. While this approach is suitable for resolving small-scale consumer disputes, it introduces a high risk of divergent outcomes when applied to complex or systemic legal questions.

Allowing the Tribunal to issue declarations that a contract term is unfair, without requiring adherence to precedent or formal legal procedures, could result in inconsistent decisions across similar contracts or fact patterns. This would undermine certainty for businesses that rely on standard form contracts across their customer base, and could lead to unpredictability in enforcement. If declarations made by the Tribunal are then used to trigger penalties under the Act, businesses (especially small businesses) could face significant legal and financial consequences based on decisions made without formal legal reasoning.

The proposal to prohibit insurance and indemnification against Fair Trading Act penalties may have the unintended consequence of reducing, rather than increasing, commercial discipline. Allowing insurance markets to price regulatory risk creates an independent, expert-driven mechanism for assessing compliance practices. Insurers scrutinise business conduct and contract terms before offering cover, and higher-risk behaviour attracts higher premiums. This pricing mechanism reinforces compliance incentives by rewarding good conduct with lower premiums and penalising poor risk management with higher costs or loss of coverage.

Removing access to this risk-based discipline forces businesses to self-insure. For large firms, this means setting aside capital to cover potential penalties, costs that are ultimately borne by customers through higher prices. For smaller firms, this may mean facing a level of risk they cannot reasonably manage, which could deter market entry or lead to overly defensive business practices. In both cases, the lack of a commercial safety valve risks inefficient outcomes that may do little to improve actual compliance with the law.

The proposed changes are also likely to deter new foreign entrants from entering the New Zealand market. For many overseas businesses, particularly those operating at scale across multiple jurisdictions, the cost and complexity of navigating a substantially more punitive and uncertain legal environment may simply outweigh the benefits of competing in a relatively small market of five million people. Introducing high maximum penalties, expanding the scope of liability, and allowing

legal determinations to be made through forums like the Disputes Tribunal, without consistent legal reasoning, creates a perception of legal unpredictability.

New Zealand already faces inherent structural challenges as a geographically remote and small economy. Ensuring a competitive, dynamic market requires policy settings that are clear, proportionate, and consistent with international norms. Overly aggressive compliance regimes, especially those not backed by a compelling problem definition, may instead signal a high-risk regulatory environment. This would ultimately reduce market entry, limit consumer choice, and entrench existing market power, which runs counter to the stated objectives of the Fair Trading Act.

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