Level 4, 276 Lambton Quay
PO Box 25335 (Featherston Street)
Wellington
Email: info@fincap.org.nz
Phone: 04 471 1420
www.fincap.org.nz

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Submitted via: consumer@mbie.govt.nz

Consumer Policy Team
Building, Resources and Markets
Ministry of Business, Innovation and Employment
Wellington

Re: Amendments to the Fair Trading Act 1986 Targeted consultation paper
Modernising the Fair Trading Act now can minimise the risk of further harm from unreasonable debt collection conduct associated with the unmanageable debts many households currently face.

FinCap welcomes the opportunity to comment on the Ministry of Business Innovation and Employment (**MBIE**) *Amendments to the Fair Trading Act 1986* (**FTA**) *Targeted consultation paper* (**Consultation Paper**). We strongly support expedited action to close gaps in consumer protections relating to debt collection. FinCap has long recommended the proposed changes for clarifying what defines prohibited harassment, as well as introducing penalties for harassment and coercion. We also recommend further action to create strong and detailed guidance on what the legislation means when a debt collector approaches an alleged debtor.

Our recommendations in this submission are mostly informed by the frontline experiences of financial mentors helping whānau experiencing financial distress and pressure from debt collectors, alongside research presented in *Debt Collection in New Zealand: Considering the Case for Adoption of Guidelines, Modelled on Australian Debt Collection Guidelines, to Address Poor Conduct by Debt Collectors.* We republish part of that paper here:

> *"It is suggested that the Government should give consideration to amending the FTA to include the word 'undue' before harassment and make breach of s 23 an offence. This would line New Zealand law up with Australian law, generally contributing to trans-Tasman business law harmonisation, and allowing the adoption of guidelines that mirror the Australian Guidelines. It would also recognise the seriousness of this type of conduct and potentially make enforcement easier, as the Commerce Commission and New Zealand courts would have a body of Australian law to guide them. Importantly it would remove the need for the Commission or any other person seeking a remedy under s 43 of the FTA to prove that a person has suffered loss or damage by reason of the harassment or coercion, as is currently required under s 43 of the FTA."*[1]

We also support improving the enforcement of the ban on unfair contract terms. Otherwise, we are generally supportive of anything to improve product safety but have no further comment beyond this statement on the proposed product safety changes.

We recommend that the Government still otherwise conduct a wider, thorough review and public consultation of the FTA beyond this limited and targeted consultation on focused changes. The FTA has broad coverage, and we have heard of other consumer protection issues that are not mentioned in this Consultation Paper. It would also be good for financial mentors and the whānau they work

[1] See p.29: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3799718

with to have the opportunity to comment directly on any wider concerns with fair trading in another process.

We expand on these comments further in the responses to the Consultation Paper questions below.

About FinCap
FinCap (the National Building Financial Capability Charitable Trust) is a registered charity and the umbrella organisation supporting the 177 local, free financial mentoring services across Aotearoa. These services supported almost 62,000 whānau facing financial hardship in 2024. We lead the sector in the training and development of financial mentors, the collection and analysis of client data and encourage collaboration between services. We advocate on issues affecting whānau to influence system-level change to reduce the causes of financial hardship.

Responses to Consultation Paper questions:

Q1: Do you have any comments on the problem definition and what Chapter 1 is aiming to achieve?

FinCap generally supports the problem definition and what Chapter 1 aims to achieve. We comment further that under current settings, financial mentors are not seeing swift action to enforce the law when they report a concern about debt collectors' conduct. Settings promoting a timelier enforcement response to breaches of the FTA by debt collectors could:

- provide a greater incentive for financial mentors to dedicate their limited time to report potential breaches;
- improve the chances that vulnerable consumers working with financial mentors who are harmed most by breaches remain contactable and engage with any investigation and enforcement work by the Commerce Commission;
- increase the incentive for debt collectors to comply when they know they could face more immediate consequences for breaches.

Q2: Do you agree with the proposal as set out in Option A, which would replace the majority of criminal offences in the Fair Trading Act with pecuniary penalties subject to civil proceedings? Why or why not?

FinCap agrees with these changes as they may lead to timelier, and more successful regulator action, which acts as a greater deterrent to breaches. This deterrence has the potential to better prevent breaches that could cause hardship and increase the workload of financial mentors.

Timelier action could increase financial mentors' confidence in the enforcement system around debt collection and consequently increase the likelihood they put resources into reporting potential breaches.

We form this position on the basis of the commentary in the Consultation Paper that s240 of the Crimes Act will remain as a back stop for very serious misconduct. We note however that the equivalent Australian regulator clearly has both civil and criminal penalties available for encouraging compliance and this is worth exploring.

Response to Option B
We support Option B as preferable to the status quo. However, many traders, including the debt collectors we are focused on in our feedback, operate in both Australia and New Zealand. In hui with

Australian based staff of traders in both jurisdictions, they have raised that our consumers in New Zealand are less likely to make complaints or pursue their rights.

FinCap therefore recommends that the maximum penalties are instead aligned to the current Australian equivalent on page 14 of the Consultation Paper. Avoiding discrepancy in potential penalties would incentivise compliance managers at businesses operating in both jurisdictions to take the rights of New Zealand consumers just as seriously.

FinCap also recommends that any new maximum penalties are indexed to inflation or another appropriate measure. This would avoid the penalties losing value or influence in between reviews of the FTA.

Q3: Which options above relating to infringement offences (Options C, D and E) do you support (if any)? Why or why not?
FinCap supports Option C if it is more likely to lead to action and significant enough penalties to deter breaches of the proposed list of requirements.

FinCap supports Option D as it is preferable to the status quo. However, we recommend the change is expanded to include a requirement for a review to assess whether the relevant Minister should increase infringement fees, within the new higher limit, after two years. This is on the basis that evidence of whether or not the infringement fee has or hasn't been an effective deterrent for these breaches should be known within this time. **FinCap also recommends that any new maximum penalties are indexed to inflation or another appropriate measure.**

FinCap supports Option E as it is preferable to the status quo. However, **FinCap recommends a longer time period given our experience that financial mentors will often identify potential breaches of laws long after they occur.** Those seeing a financial mentor for support will have often tried every other option to resolve their financial issues before presenting for support, given the shame many feel in relation to having debt issues. Where a potential breach has triggered the hardship that contributed to the presentation to a financial mentor, this may not be spotted and reported to the regulator (who also needs time to complete some work) within the 10-month period.

At least 12 months would be a better timeframe within the context of the community workers we support. FinCap has been aware of traders continuing to run business models similar to layby and mobile trading schemes that have harmed consumers, after the designation of mobile traders as being subject to Credit Contracts and Consumer Finance Act protections. It would be unfortunate for situations to arise where the regulator doesn't have all the envisaged tools to deal with potential breaches due to the time it takes for vulnerable consumers' issues to surface.

Q4: What additional strict liability offences in the Fair Trading Act (if any) should be included to expand the range of the infringement offences scheme? Why or why not?
FinCap supports the list as described in Option C on the basis that it could increase the likelihood of timely regulator action to deter others from similar conduct.

Q5: Do you agree that insurance and indemnification against breaches of the Fair Trading Act should be prohibited? Why or why not?
We agree with Option F for insurance and indemnification against breaches to be prohibited. This is on the basis that FinCap believes this proposed change would better incentivise compliance with consumer protections, including decision makers at businesses seriously considering any concerns raised by financial mentors.

Q6: If indemnification is prohibited, should this prohibition extend to all provisions of the Act, or only certain ones? Please indicate which provisions you consider should be covered and outline why?

FinCap would particularly like to see indemnification prohibited to incentivise compliance with prohibitions of:

- Unconscionable conduct;
- Misleading and deceptive conduct;
- Harassment (or undue harassment) and coercion; and
- Unfair contract terms.

We list the above on the basis that we believe these are the most relevant aspects of the Act for requiring reasonable conduct from debt collectors who can cause significant harm to vulnerable borrowers. We otherwise recommend that MBIE assess prohibiting indemnity against breaches, where that breach could involve significant hardship to consumers and contribute to demand on financial mentors' limited resources.

Q7: Should harassment and coercion be defined in the Fair Trading Act? If so, how?

Our recent *Voices* report[2] details how there is growing unmanageable debt amongst households presenting to financial mentors. Our report then points out that, regardless of where these debts originate, there are gaps in effective consumer protections for these debtors who are now exposed to harm from unreasonable debt collector conduct.

Ideally, protections will arise that stop harassment to demand payment where:

- the debt collector should know repayment would cause substantial hardship; or
- repeating attempted contact is unlikely to make the alleged debtor any more aware of the alleged overdue amount.

Such conduct increases strain to financial mentors' limited resources and causes or prolongs adverse social, health and mental health issues, among the many other problems associated with avoidable financial hardship.

The risk of harm to mental health from harassment from debt collectors is very significant. Recent research in the United Kingdom has noted half of the participants who were behind on consumer credit bills had experienced suicidal ideation in relation to the cost of living.[3] It built on earlier research findings that those with two or more debts were five times more likely to have attempted suicide.[4] This overseas research also highlighted the following as the five key drivers of mental health impact from debt collection practices:

- the stigma of being in debt;
- insensitive debt collection practices;
- the tone of communications from creditors;
- the frequency of communications; and
- the cumulative impact of multiple creditors' collections activities.[5]

This overseas research can be taken as a proxy of the potential scale of harm of debt collection practices here, alongside evidence from financial mentors of their clients' mental health challenges and disclosed suicidal ideation.[6] This potential scale of harm and overseas research points to a need to

[2] See: https://www.fincap.org.nz/blog/fincap-voices-report-2025/
[3] See: https://www.moneyandmentalhealth.org/publications/debts-and-despair/
[4] See p.13: https://www.moneyandmentalhealth.org/publications/suicide-and-debt/
[5] See: https://www.moneyandmentalhealth.org/publications/debts-and-despair/
[6] See p.34: https://www.fincap.org.nz/images/files/FinCap-Voices-report-2023.pdf?_cchid=6a354d77322e8cb2ac259214127740d9

urgently define and effectively deter harassment that creates, invokes or contributes to the five key drivers identified in this overseas research.

Harassment and coercion are prohibited in the FTA but the Commerce Commission currently does not have the tools and resources to respond to issues in a timely way to strongly deter this conduct. This leads to significant consumer harm from repeated interactions where alleged debtors are frightened, and this can lead to them paying sums they cannot afford without experiencing substantial hardship. Financial mentors are experts in working with creditors to establish what amount is legitimately owing and payable. However, FinCap is still hearing that mentors encounter debt collectors who are impossible to work constructively with and that consumer protections are not practical to use as leverage to resolve this impasse. Harm caused by debt collection and the issues behind it are covered in detail in a research report, a quote of which is republished below:

> *Many participants in the study noted that debt collectors often take approaches to collection that are deliberately distressing and highly unsuccessful. Bombarding clients, frightening them or making constant unachievable demands do not, in the end, do much to see debt repaid.*[7]

Based on Victoria Stace's research,[8] FinCap recommends amending the law to prohibit 'undue harassment and coercion.' We are primarily focused on debt collection issues in making this recommendation and believe there is benefit in aligning with Australia. We are not aware of any other consequences for other activity governed by the FTA from this recommended amendment to s23. An amendment to add 'undue' helps the necessary balancing to avoid prohibiting legitimate and reasonable debt collection which is a necessary part of markets. However, work needs to be done around the amendment to ensure it is unquestionable that it is totally unacceptable that a business debt collects in a way that has the effect of morally punishing a person for experiencing hardship. Their role is to action professional, pragmatic business decisions around reasonably contacting alleged debtors and asking to negotiate repayment, before considering any legal avenues.

> *"…the frequency, nature or content of the approaches and communications associated with them is such that they are calculated to intimidate or demoralise, tire out or exhaust a debtor rather than convey the demand and an associated legitimate threat of proceedings, the harassment will be undue."* ACCC v McCaskey [2000] FCA 1037, at [48].

Adopting the Australian legislation's drafting and the definitions from Australian court findings, like the definition quoted above, carries less risk of unintended consequences than settling drafting in this quick targeted consultation process now. Issues with harassment and coercion can also change over time so drafting in the law now might not be futureproof. Examples of areas where legislation may become out of date due to technology changing include financial mentors having reported debt collectors:

- using automated contact by phone, text and email using software;
- making contact through social media; and
- finding alleged debtors through monitoring alerts on credit reports that the consumer is unaware of.

All of these technologies are likely to change in the next decade with the use of AI, introduction of open banking and the ever-changing online media environment.

Also, most debt collectors FinCap is aware are operating on a large scale, are operating in both jurisdictions. Based on what financial mentors have told us, the larger debt collection agencies can have the same contact centres for onshore and those they contact in Australia. We have compared the

[7] See: https://www.fincap.org.nz/images/files/Debt-collection-in-Aotearoa-from-the-perspective-report.pdf
[8] See: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3799718

protections in practice with the Australian equivalent of our sector and concluded that the consumer protections there are workable and an improvement on our status quo. The Australian protections are not perfect from a community worker perspective[9] but are well ahead of our own in realising appropriate regulator action and better consumer outcomes consistent with the purposes of the FTA. Consistency in law is likely to lead to lower costs for businesses and a greater chance of compliance, where training to front line debt collection staff who are interacting in both jurisdictions is simple and consistent.

Given that legislation is unlikely to keep pace with changes in the way debt collectors and alleged debtors might interact, **FinCap also recommends work beyond this Consultation Paper includes a commitment for more detailed regulator guidance on acceptable debt collector conduct, including strong guidance on the frequency and nature of contact that reflects unacceptable harassment.** Such guidance could adapt better than legislation to new developments. It could also help financial mentors and alleged debtors have more constructive interactions where the guidance leaves very little room for different understandings of what conduct is expected from a debt collector in the relevant context. This could see less escalation of disagreements and instead more realistic repayments set up for what are clearly evidenced outstanding debts.

We currently have three pages of higher-level debt collector guidance from the Commerce Commission[10] compared to much more practical guidance from the Australian regulators.[11] An example of the difference in clarity is: our current guidance says *"It may be harassment and/or coercion to:… …make unreasonably frequent attempts to contact the debtor, their family and friends";* while the ASIC ACCC Guideline says communication must have a reasonable purpose and recommends contact (also described relative to 'attempted contact') with a debtor doesn't exceed three times a week or 10 times per month.[12] FinCap's current position is that the Australian guidance is a good starting point for developing guidance that is better suited to our context and more consumer centric.

Research involving interviews with the debt collection industry has also revealed clearer guidance would benefit debt collectors. The research shares that debt collectors acting appropriately could better demonstrate compliance and that this can give rise to a competitive advantage when seeking to purchase debt or act as an agent.[13] It may also be relevant to consider that in 2018, ANZ, BayCorp, Credit Recoveries Ltd, the Financial Services Federation and Milton Graham submitted some form of support for aligning with Australian guidelines. [14] Some of this list also said they were already operating in accordance with those guidelines here.

Q8: Should harassment and coercion that is prohibited conduct be subject to a civil pecuniary penalty or strict liability offence, with Tier 1 penalties (see Option B, Table 1)? If so, should the penalties relate to harassment and coercion outright, undue harassment and coercion (as in Australia), or only harassment and coercion that meets certain other conditions?
Please refer to the above response which explains our recommendation to align with the Australian legislation drafting prohibiting 'undue' harassment.

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[9] See discussion on improving on Australian guidelines p.35-36: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4161249
[10] See: https://comcom.govt.nz/__data/assets/pdf_file/0026/157661/Guidance-for-debt-collectors-June-2019.pdf
[11] https://www.accc.gov.au/system/files/Debt%20collection%20guideline%20for%20collectors%20and%20creditors%20-%20April%202021.pdf
[12] Ibid p.13-14
[13] See p.34: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4161249
[14] See: Vict p.15 - 17

FinCap recommends amendments so that 'undue harassment and coercion' is subject to civil pecuniary penalty, with Tier 1 penalties.

> *If you contact a debtor to request payment of a debt then you are a debt collector whether the debt is owed to you or another company.*[15]

The above is a definition demonstrating the breadth of debt collection that occurs from the Commerce Commission. Some specialist debt collectors operating here are large, ASX listed companies that earnt tens of millions in profits last year.[16] Other essential service creditors who debt collect overdue payments relating to their core business can have over a billion dollars in annual profits at times. Orders to pay $115,500 including reparations, as have recently arisen from a debt collector who misled alleged debtors,[17] could not be sufficient to deter misconduct for such large traders. 'Tier 1' maximum monetary penalty levels from the table in Option B are therefore necessary to incentivise widespread compliance with the law.

We recommend civil pecuniary penalties, noting the commentary at 10 in the Consultation Paper that s240 of the Crimes Act may be available where relevant to the breach as is consistent with our support of Option A. However, both clear criminal offences and civil pecuniary penalties could be useful for the regulator to have available to incentivise compliance around the broad range of debt collection activity that could occur. Regardless, any penalty arising will be an improvement on the limitations currently experienced with enforcing compliance with the law without penalties for harassment and coercion.

We are also unsure whether the changes being proposed to penalties would ensure there was still sufficient opportunity for the Commerce Commission to force remediation for harm caused to impacted consumers. We recommend work to ensure it is viable for this to occur where changes are made to the FTA, so that harm can be addressed. This potential for remediation as an outcome could also provide further incentive for consumers and financial mentors to assist the regulator with any enforcement.

Q15: Do you support allowing private parties to challenge unfair contract terms? Why or why not?
FinCap supports allowing private parties to challenge unfair contract terms as it may remove a bottleneck to resolving consumer issues that lead to financial hardship and demand on financial mentors.

Q16: What types of parties should be able to take action (e.g. individuals, businesses party to a small trade contract)?
Any change should not result in any less expectation that the Commerce Commission has the main responsibility for actively enforcing this aspect of the law.

We recognise however that the Commerce Commission will potentially be unable to monitor every contract in the economy. Therefore, it would be helpful for financial mentors or their clients to have the option to pursue a potential unfair contract term with any legal representation they can access. In our sector's context this would mostly be for contracts between traders and consumers. FinCap

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[15] Definition offered by the Commerce Commission guidance: *https://comcom.govt.nz/__data/assets/pdf_file/0026/157661/Guidance-for-debt-collectors-June-2019.pdf*
[16] See: https://www.creditcorpgroup.com.au/media/1919/asx-5-august-2025-ccp-annual-report-2025.pdf
[17] See: https://comcom.govt.nz/news-and-media/news-and-events/2025/debt-collector-convicted-and-fined-for-misleading-conduct

does occasionally hear of instances where the driver of a presentation to a financial mentor is a sole trader who has not received expected payment from another business.

Q17: What impacts would this change have on your organisation or sector?
Creating this option might help financial mentors work with a client to realise their goal, where it may have not been possible otherwise. However, financial mentors might have difficulty with finding the resources or having the technical expertise to make use of this change under the status quo. Where our recommendation for the funding of the Financial Rights Legal Service pilot proposal from Community Law[18] is actioned, this could help financial mentors make use of this change. We also note that penalties, or other orders that arise from regulator action, could be a source of ring-fenced funding for supports for raising consumer issues, such as the funding of the Financial Rights Legal Service pilot.

The change also has the potential to increase the likelihood systemic issues with unfair contract terms are dealt with. This could lower demand for strained financial mentoring availability if it leads to financial hardship from unfair contract terms being avoided.

Q18: Do you support introducing penalties for including unfair terms, even if they haven't been declared unfair by a court in a previous case?
FinCap supports this change to further deter breaches and make enforcement more effective and timelier. This could increase the likelihood that hardship from unfair contract terms is addressed or avoided in the first place.

Q19: If so, what types of penalties (e.g. pecuniary penalties, offences) would be appropriate?
We recommend civil pecuniary penalties and infringement notices are available for the Commerce Commission to apply according to which will best address each breach. The maximum 'Tier 1' penalties from Option B would be needed given the large turnover of some businesses the FTA applies to.

Again, FinCap notes the commentary at 10 in the Consultation Paper that s240 of the Crimes Act may be available where relevant to the breach as is consistent with our support of Option A. Again, we also note that it may be helpful for the Commerce Commission to have both criminal and civil penalties available for deterring non-compliance as relevant to the nature of the breach.

Q20: Should penalties be restricted to where a business knew or was negligent in using a term that was unfair?
Whether or not the business was negligent or knew that using an unfair term was unfair, consumers are likely to have been exposed to the risk of, or actual, harm. Penalties should apply in all instances.

Please contact Senior Policy Advisor Jake Lilley on jake@fincap.org.nz or 027 278 2672 to discuss any aspect of this submission further.

Ngā mihi,

Fleur Howard
Chief Executive
FinCap

[18] A copy of this pilot proposal is available on request.