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Ministry of Business, Innovation & Employment
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Submission on management banning orders under the Fair Trading Act 1986

The Institute of Directors (IoD) appreciates the opportunity to comment on the Ministry of Business, Innovation & Employment's (MBIE) consultation on a proposed amendment to management banning orders under the Fair Trading Act 1986 (the Act). It is intended that the amendment would form part of a Regulatory Systems Bill, the purpose of which is to make minor amendments to other legislation to ensure that regulatory systems are functioning effectively.

About the Institute of Directors

The IoD is a non-partisan voluntary membership organisation committed to driving excellence in governance. We represent a diverse membership of over 8,500 members drawn from listed issuers, large private organisations, small and medium enterprises, State Sector organisations, not-for-profits and charities.

Our Chartered Membership pathway aims to raise the bar for director professionalism in New Zealand, including through continuing professional development to support good corporate governance.

Background

The purpose of the Fair Trading Act 1986 is to contribute to a trading environment in which:

- the interests of consumers are protected
- businesses compete effectively and
- consumers and businesses participate confidently.

In furtherance of this, the Act provides for management banning orders that essentially prohibit an individual from being a director or manager in any company for up to 10 years.

At present, section 46C(1)(a) and (b) of the Act provide that a court may make a management banning order against an individual who:

- a) has, on at least 2 separate occasions within a 10-year period, committed an offence against section 40(1) or (1A) (these sections cover misleading and deceptive conduct, product safety, safety of services, and pyramid selling schemes) or
- b) is, or was at the time of the commission of the offence, a director of, or concerned in the management of, an incorporated or unincorporated body that has, on at least 2 separate occasions within a 10-year period, committed an offence against section 40(1) or (1A)

The court may make the order only if it is satisfied that the order is necessary to protect the public from the risk that the person or entity of which the person is a director or manager will commit further offences against section 40(1) or (1A).

A problem identified

MBIE and the Commerce Commission have identified a problem with section 46C(1)(b) (which was introduced in the Fair Trading Amendment Act 2013). The way section 46C(1)(b) works is that a management banning order can be made against a director or manager of an entity where *that entity* has breached the Act twice or more. It appears that a management banning order cannot be made against a director or manager who has been involved with *multiple entities* but each entity has breached the Act only *once*.

MBIE states in the consultation document that the Commerce Commission has found that directors of entities which breach the Act (on one occasion) often set up other similar entities and are involved in offending by those new entities. Under the Act, the Commission cannot seek to ban those directors unless it can show that they have breached the Act personally (under section 46(1)(a)). MBIE considers that the public needs protection from these individuals.

Proposed solution

As a solution, MBIE has proposed to amend section 46C of the Act to provide that a court may also make a management banning order against an individual who has been a director or manager of one or more entities that have cumulatively committed offences under the Act on at least two occasions within a 10-year period.

Comments

The IoD recognises the need for management banning orders to help achieve the purpose of the Act. We support the intent to introduce a provision to ban directors/managers of entities that breach the Act (on one occasion) and then go on to set up other entities and are involved in similar offending by those new entities. We agree that the public needs protection from such individuals.

We acknowledge that it is up to the court to make the order only if it is satisfied that the order is necessary to protect the public from the risk that the person or entity of which the person is a director or manager will commit further offences against the Act. However, in order to prevent any unintended consequences we suggest the Commerce Commission provide guidance clarifying that the provision is:

- intended to capture individuals who essentially have a deliberate intent to breach the Act and demonstrate a pattern of being involved in entities that breach the Act (we expect that they will often be directors in closely-held entities)
- not intended to capture directors who are involved with two completely different entities over a 10-year period and where both entities happen to breach the Act (eg independent directors in large companies in different sectors).

We appreciate the opportunity to comment on behalf of our members and would be happy to discuss this submission with you.

Yours sincerely



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