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Submission on the Business Payment Practices Bill

The Institute of Directors (IoD) appreciates the opportunity to comment on the Business Payment Practices Bill.

Purpose

The purpose of the Act is to:

- improve transparency in certain business-to-business payment practices; and
- enable members of the public and entities to access information about those business-to-business payment practices so that they can make informed choices about whether to engage with certain large entities.

Bill needs to reflect an understanding of governance best practice

The governance framework in New Zealand is based on a board of directors (or equivalent governing body) managing an organisation on behalf of its owners, the shareholders (private persons, councils, community etc). Usually, this involves delegating day-to-day management to professional managers.

Governance sits with the board which is responsible for the strategic and overall direction of the organisation, including the development of strategic policies to achieve its goals. Good governance is about providing the organisation with the big picture to help enable good management decisions to be made.

About the Institute of Directors

The IoD has over 10,000 members, is New Zealand's pre-eminent organisation for directors and is at the heart of the governance community.

We believe in the power of good governance to create a strong, fair and sustainable future for New Zealand. Our role is to drive excellence and high standards in governance.

We support and equip our members who lead a range of organisations from listed companies, large private organisations, state and public sector entities, small and medium enterprises, not-for-profit organisations 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 governance.

Management is responsible for implementing the policies set down by the governing body and co-ordinating the day-to-day activities to achieve the organisation's goals. Management operationalises the guidance and strategic direction that is set down or agreed to by the governance function.

Disclosures – Governance/oversight and management/operational roles

In Section 8(4)(c) it notes that the disclosure must “confirm that a director of the entity is satisfied that the information disclosed is complete and accurate”.

Business payment practices including timing and terms of payments are an operational matter overseen under delegation by the Chief Financial Officer and/or the Chief Executive Officer. The register contents and disclosure requirements are technical by nature, accordingly, this level of financial detail, particularly for large entities, is not a governance matter.

At the board/governance level, section 194(1) of the Companies Act 1993 requires the board of a company to ensure that accurate accounting records are kept to enable the production of annual financial statements, and that the company has a satisfactory system of control of its records (194(2)).

The individual director sign off in the Bill introduces extensive operational responsibilities into the boardroom, which is not best governance practice, and financial oversight is already covered within existing legislation. To this end, it is not clear why a director of the entity would be required to sign off the disclosure. It is noted that the Companies Act (201(b)) and the Financial Markets Conduct Act (460(1)(b)) require a director/s to date and sign the financial statements; this is because financial oversight is a key governance requirement of boards. Financial statements that present a (true and fair) view of the organisation's position and performance; they are not analogous to technical disclosures.

“A director must understand the fundamentals of the business, monitor performance and review financial statements regularly.”

Miller J in Davidson v Registrar of Companies, High Court, 27 August 2010

An intent of the Bill is to ensure timely and fulsome reporting and an absence of any misleading information. The absence of misleading information is quite different to the requirement to confirm that all of the information is correct. In order for a director to sign off on behalf of the entity, the entire board would need to be satisfied with the disclosure, given the duties on directors to act collectively prescribed in various parts of the Companies Act 1993.

We consider instead that it should be signed at an officer level, or, that it should be analogous with section 214(3) of the Companies Act that requires annual returns to be signed by a director of the company, or by a solicitor or qualified statutory accountant. This change aligns with the Bill's general requirement that “entities will be required to certify their information disclosures” while recognising that day-to-day, business-to-business payment practices are determined at an operational level within large entities. Similarly, the Charities Act 2005 requires entities to comply with annual return

reporting requirements (41) incorporating accompanying financial statements (41(2)(b)), to be dated and signed on behalf of the entity ((41(1)(b)) with no stipulation as to by whom.

Summary

We applaud this Bill as a response to the concerns raised by small businesses which should see value shared between large entities with smaller entities providing services to them. This is consistent with one of our Top 5 issues for directors for 2023, "Shared Value". Nonetheless, we suggest care should be taken before elevating an operational matter to the board table. Anything that deflects best practice governance or distracts from a strategic focus is problematic.

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

Ngā mihi nui



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