MINISTRY OF BUSINESS, INNOVATION & EMPLOYMENT
HĪKINA WHAKATUTUKI

COVERSHEET

Minister	Hon Stuart Nash Hon Kris Faafoi	**Portfolio**	Small Business Commerce and Consumer Affairs
Title of Cabinet paper	Unfair Commercial Practices: Policy Decisions	**Date to be published**	19 August 2019

List of documents that have been proactively released		
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Information redacted **YES / ~~NO~~** *(please select)*

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Some information has been withheld for the reason of Confidential advice to Government.

In Confidence

Office of the Minister for Small Business

Office of the Minister of Commerce and Consumer Affairs

Chair, Cabinet Economic Development Committee

Unfair Commercial Practices: Policy Decisions

Proposal

1 This paper seeks agreement to:

1.1 introduce a prohibition against unconscionable conduct in connection with the supply and acquisition of goods or services; and

1.2 extend the current protections against unfair contract terms in standard form consumer contracts to also apply to some standard form business contracts.

Executive summary

2 Unfair commercial practices – such as the use of pressure tactics, deception, one-sided contract terms, and practices that generally exploit a consumer or small business's vulnerabilities – can undermine the economic and social objectives sought by government. While there are already a number of legislative protections against unfair practices, we have also heard concerns about potential gaps in these protections. In December 2018, the Ministry of Business, Innovation and Employment (MBIE) released a discussion paper which sought feedback on whether additional protections are needed.

3 Submitters provided a range of examples of unfair conduct and contracts they had experienced, and submitted that these could have a number of negative impacts including negative cash flow, stress, business interruption, reduced profitability, and a reduced ability to focus on growing their business. Unfair practices can also lead to high levels of financial detriment and stress for consumers.

4 We propose to introduce a new prohibition against unconscionable conduct, modelled on the approach taken in Australia. This is conduct that has been deemed to be 'against conscience by reference to the norms of society'.

5 We also propose to extend the Fair Trading Act 1986's protections against unfair contract terms (UCTs), which currently apply to standard form business-to-consumer contracts, to also apply to standard form business-to-business contracts with a value below $250,000.

6 Extending the UCT protections to businesses is a significant step, and will impact on a wide range of contracts. However, a prohibition against unconscionable conduct should have no significant impact on the vast majority of businesses that act fairly and reasonably on a day-to-day basis, and the unfair contract terms protections should not inhibit businesses' ability to enter into efficient or pro-competitive contracts. We consider that the costs and risks associated with reform are outweighed by potential benefits, including:

6.1 reduced transaction, operating and finance costs for businesses;

6.2 a better allocation of risk and liability;

6.3 making it easier for businesses to focusing on growing and innovating; and

6.4 reduced detriment for consumers.

Background

7 Unfair commercial practices can undermine the Government's goals of a more productive, sustainable, and inclusive economy. Unfair practices can broadly be grouped into two categories:

7.1 **Unfair contracts**. This may include contract terms which shift risk from one party to another, make it difficult for a party to terminate a contract, allow one party to unilaterally vary the terms (including the price) of a contract, or are otherwise very one-sided.

7.2 **Unfair conduct** outside of the terms of a contract itself. This may include the use of pressure tactics to induce a party to enter into a contract, deceptive conduct, or enforcing a contract in a harsh manner.

8 Legislation such as the Fair Trading Act 1986 and the Commerce Act 1986 already prohibits a range of unfair business-to-business and business-to-consumer practices, including harassment and coercion, misleading and deceptive conduct, and anti-competitive conduct. However, we have also heard concerns about potential gaps in these protections. In December 2018, Cabinet agreed [CAB-18-MIN-0592] to the release of a discussion paper seeking feedback on whether additional protections should be introduced, including:

8.1 new prohibitions against unconscionable, oppressive or unfair conduct; and/or

8.2 extending the protections against unfair contract terms (UCTs) in standard form consumer contracts to also apply to standard form business contracts.

9 44 submissions were received from small and large businesses, industry organisations, law firms, and other parties. Stakeholders were relatively evenly divided as to whether additional protections should be introduced.

The problem

10 Unfair commercial practices can prevent markets from functioning effectively by decreasing trust, increasing search and transaction costs, and skewing the playing field in favour of businesses that act dishonestly. They may restrict competition and, with it, productivity and innovation. Even where practices are not strictly anti-competitive, they may restrict the ability of firms to grow and thrive, by diverting their attention away from their core business.

11 A number of submitters on the discussion paper (mostly small businesses and their representatives) told us about unfair business-to-business practices that they had experienced. This included unfair contract terms such as unilateral termination rights, extended payment terms, limitations and exclusions of liability, unilateral dictation of price and quality, one-sided indemnities, and being 'locked in' to contracts for long periods,

amongst other concerns. Some businesses noted that they had little choice but to accept these contract terms, due to factors such as a lack of viable alternatives. Submitters also pointed to conduct such as non-compliance with the terms of a contract, excessive demands, 'blacklisting', and bullying. Few submitters commented on unfair business-to-consumer conduct, although the Commerce Commission and Consumer NZ provided some examples.

12 Submitters argued that unfair contracts and conduct could have a range of impacts for businesses, including sudden unexpected costs, wasted supply, negative cash flow, stress, business interruption, and reduced profitability. A common theme was that unfair practices can affect businesses' ability to invest in new materials, technology and product development, and therefore reduce their ability to expand and succeed. This could have flow-on effects to the economy, resulting in lower competition and higher prices, more limited choice, and reduced quality. Unfair practices can also lead to high levels of financial detriment and stress for consumers. Most submitters who identified instances of unfair practices were in favour of reform.

13 On top of this, around half of the respondents to a survey run by MBIE in 2018 indicated that they had experienced unfair business-to-business practices in the last year. There also appears to be a genuine fear among some businesses about the prospect of speaking out and presenting evidence of unfair practices, for fear of the impact on their business. Given this, available evidence may just represent the 'tip of the iceberg'.

14 Having said this, it is not the role of government to protect consumers or businesses from *all* practices that they consider to be unfair, or any transaction that they might ultimately regret. We also want to make sure that any measures to protect individual businesses do not over-reach or unduly undermine commercial certainty, and ensure that honest businesses can continue to compete effectively, negotiate firmly, and freely enter into contracts that reflect their wishes. For example, we do not want to prohibit robust commercial negotiations between businesses and their suppliers, as this can lead to lower prices for consumers.

15 Taking all of this into account, we think that additional protections are needed for businesses and consumers against unfair conduct such as:

15.1 Exploitative business practices that take advantage of a consumer or smaller business's vulnerabilities. This can include consumers who are elderly, sick, have difficulty understanding English, lack confidence, do not understand their legal rights, have poor financial capability, or are generally naive. In business-to-business cases, vulnerabilities may be a function of a business's lack of legal or commercial sophistication.

15.2 Businesses taking advantage of a consumer or smaller business's lack of bargaining power, such as where a business knows that the other party has no alternatives.

15.3 Conduct that may be within a business's legal rights, but which goes well beyond what is commercially necessary or justifiable.

16 There is also conduct which can potentially be captured under existing legislation, but only indirectly. This can make enforcement more difficult, and reduces predictability for businesses and consumers about how the law will be interpreted.

17 We also consider that additional protections are needed for businesses against unfair contracts. There are legitimate arguments that it is not the role of government to intervene in business-to-business contracts, and that the prevalence of unfair terms can already be mitigated to an extent by firms taking their own action. But there are also good arguments that government intervention is justified to address the unfair and potentially economically inefficient terms that currently exist in some contracts.

Proposals

18 We propose to:

18.1 introduce a prohibition against unconscionable conduct in connection with the supply (or possible supply) and acquisition (or possible acquisition) of goods or services; and

18.2 extend the current protections against unfair contract terms in standard form consumer contracts to also apply to some standard form business contracts.

Unconscionable conduct

19 We propose to introduce a new prohibition against unconscionable conduct in connection with the supply (or possible supply) and acquisition (or possible acquisition) of goods or services.

20 The concept of unconscionability already exists within the New Zealand courts, and may be invoked where a court considers it would be inequitable to allow a party to enforce its contractual rights against another party who is detrimentally affected by an agreement. However, the concept as it exists is narrow, and only applies in limited circumstances. In addition, there is no positive duty on parties to act in good conscience, as it only applies when it is invoked in court.

21 We intend to introduce a statutory prohibition against unconscionable conduct, which goes beyond the narrow concept that exists in the courts. Unlike the existing concept of unconscionability, the Commerce Commission will be able to take a case and seek penalties against parties engaging in practices which are unconscionable. While we do not propose to define what is unconscionable, the intention is for the prohibition to address similar conduct as in Australia, where the courts have found that conduct is unconscionable if it is 'against conscience by reference to the norms of society'. The Australian courts have stated that such norms can include acting honestly, fairly, and without deception or unfair pressure.

22 The prohibition would apply to conduct towards all consumers and businesses, and would include:

22.1 the circumstances surrounding the formation of a contract;

22.2 the terms of a contract; and

22.3 the way a contract is enforced.

23 It would also apply to a system of conduct or pattern of behaviour, regardless of whether a particular individual is identified as having been disadvantaged by the conduct or behaviour, and regardless of whether a particular contract was ultimately entered into.

24 The legislation will include a list of factors for a court to have regard to in determining whether conduct is unconscionable, broadly consistent with guidance in Australian legislation. This includes factors such as:

24.1 the relative strengths of the bargaining positions of the parties;

24.2 whether one party was required to comply with conditions that were not reasonably necessary for the protection of the legitimate interests of the other party;

24.3 the presence of any undue influence or pressure, or any unfair tactics; and

24.4 the extent to which the supplier and the customer acted in good faith.

25 The threshold at which conduct would be judged to be unconscionable is likely to be relatively high. The Australian courts have been clear that unconscionability involves serious misconduct and that mere inequality in bargaining power that results in one party being disadvantaged is not, in itself, sufficient for a finding of unconscionability. We see this as appropriate, given that the Fair Trading Act already prohibits many forms of unfair conduct. In Australia, the courts have found a range of practices to be unconscionable, while avoiding interfering in everyday, reasonable, commercial transactions.

Enforcement

26 We propose that it would be an offence to engage in unconscionable conduct. This would be subject to maximum penalties of $600,000 for bodies corporate and $200,000 for individuals, in line with current maximums in the Fair Trading Act. We also propose that the Fair Trading Act's general regime in terms of civil proceedings and remedies (such as injunctions, refunds, damages, and having contract terms altered or declared void) would apply.

Other options considered

27 We also considered prohibitions against 'oppressive' conduct (based on the Credit Contracts and Consumer Finance Act 2003), or 'unfair' practices (based on the approach taken in the European Union), as alternatives. There are arguments in favour of prohibiting oppressive conduct, including that the test for oppression might be more objective and predictable, and that it might cover a slightly wider range of conduct. However, our preference is to prohibit unconscionable conduct so as to provide for consistency with Australia, and so that New Zealand courts can draw on existing Australian case law. We do not favour a European Union-style unfair practices prohibition on the basis that it would have the most uncertain, and potentially far-reaching, impacts.

Unfair contract terms

28 We also propose to extend the current protections against UCTs in standard form business-to-consumer contracts to also apply to standard form business-to-business contracts.

29 Like the current consumer UCT regime, we propose to retain the current test that contract terms are unfair if:

29.1 the term is in a standard form contract, which is a contract in which the terms have not been subject to effective negotiation between the parties;

29.2 the term would cause a significant imbalance in the parties' rights and obligations arising under the contract;

29.3 the term is not reasonably necessary in order to protect the legitimate interests of the party who would be advantaged by the term; and

29.4 the term would cause detriment (whether financial or otherwise) to a party if it were applied, enforced, or relied on.

30 We also to propose to retain the same exclusions from the UCT regime, namely terms that:

30.1 define the main subject matter of the contract;

30.2 set the upfront price payable under the contract; or

30.3 are required or expressly permitted by any enactment.

Transaction value cap

31 The protections would only apply to arrangements where the goods or services provided have a value below $250,000 (or a value below $250,000 *in a given year* in some cases where the arrangement spans more than one year). A transaction value cap recognises that it is not realistic to expect businesses to do due diligence, seek legal advice, or attempt to negotiate low-value or routine contracts. However, there is a stronger case that the onus should continue to remain on businesses to do due diligence and seek legal advice on higher value, potentially more strategic, contracts. It will also serve to reduce the risks associated with reform.

32 While some arrangements may be as simple as one contract between two parties, others may involve a series of closely-related contracts between two parties, or multiple contracts between one party and several related entities. The legislation will set out factors for determining what constitutes an arrangement, and when the transaction value cap has been reached. The overall principle will be that a court will have the discretion to consider the substance of the relationship between parties and look behind the specific legal form of contracts when determining whether the UCT protections apply.

33 The legislation will also define what 'value' is for the purpose of the transaction value cap. This could be the upfront price of a contract, or another measure, as appropriate. We also anticipate providing a regulation-making power to allow for the clarification of the value of an arrangement in situations where the value might otherwise be unclear (such as, potentially, complex financial products).

Enforcement

34 Currently, for consumer contracts, it is not an offence to include a UCT, and the Fair Trading Act's civil remedies are not available, unless the Commerce Commission has sought (and received) a court declaration that the term is unfair. Private parties are not able to seek declarations. The enforcement of consumer UCTs is currently being considered as part of a broader review of the Fair Trading Act. For business contracts, we think that a stronger enforcement regime is needed to ensure that there are effective incentives to remove UCTs from contracts. However, to avoid having two parallel enforcement regimes, we propose to temporarily extend the current consumer UCT

enforcement regime to business UCTs. Once the broader review of the Fair Trading Act is complete, we will seek Cabinet decisions regarding amending the enforcement provisions for consumer and business UCTs at the same time.

Insurance contracts

35 At present, some terms in insurance contracts are exempt from the consumer UCT regime. These exemptions are currently being reconsidered as part of the government's review of insurance contract law. We propose that the current insurance exemptions be extended to business contracts, until final decisions are reached on the insurance contract law review.

Other options considered

36 We considered limiting the UCT protections to small businesses only, such as those with fewer than 20 employees, as is currently the case in Australia. However, such a distinction would be arbitrary, as businesses with more than 20 employees can also lack bargaining power when dealing with larger businesses in many instances. In addition, limiting the protections to small businesses could distort competition at the margins, and it could be difficult for businesses to determine whether the business they were contracting with had fewer than 20 employees, and therefore whether the protections applied. We also considered limiting the protections to arrangements with a value below $100,000, but decided that broader coverage is desirable.

Technical amendments

37 In addition to the new protections discussed above, we also propose a number of minor, technical amendments to the Fair Trading Act, which are set out in Annex 1. These will improve the functioning of the Act and support consistency with other legislation enforced by the Commerce Commission.

Impacts of the proposals

38 Some stakeholders opposed to reform were concerned that any new protections would create uncertainty, increase compliance costs, and undermine efficient negotiations. They argued that prices could increase if businesses are less able to negotiate vigorously or pass on risks to the other party, and that removing 'unfair' terms could impact the viability of some business models, because such terms are necessary to conduct business.

39 We agree that there are legitimate risks and costs associated with reform, and that extending the UCT protections to businesses is a significant step that will affect a wide range of business contracts. For example, officials have estimated that there would be a one-off cost of $13 million for businesses to review their contracts for consistency with the UCT protections, as well as lower ongoing costs.

40 However, the risks associated with reform should not be overstated. A prohibition against unconscionable conduct should have no significant impact on the vast majority of businesses that act fairly and reasonably on a day-to-day basis. Similarly, we think the risk of reform leading to price increases is relatively small. This is because it is not the intent of these reforms to prevent businesses from negotiating robustly with each other. Furthermore, because of the design of the UCT regime (in particular, that it only applies to standard form contracts, and does not apply to the main subject matter of the contract, the upfront price, or terms that are reasonably necessary), we do not expect that these

changes would significantly inhibit businesses' ability to enter into efficient or pro-competitive contracts.

41 To the extent that there are costs and risks associated with reform, we – and many of the stakeholders that submitted in favour of reform – think that these are outweighed by potential benefits. These benefits include:

41.1 Reducing detriment and providing increased remedies for consumers, as well as contractors who nominally function as businesses, but have similarities to employees.

41.2 Reducing transaction costs for businesses, by reducing the need to spend as much time doing 'due diligence' on contracts or to seek as much legal advice.

41.3 Reducing operating costs or finance costs, such as if firms face fewer cash-flow issues as a result of being paid more promptly.

41.4 Making it easier for businesses to grow and innovate, by diverting fewer of their limited resources into dealing with unfair conduct and unfair contract terms.

41.5 A better allocation of risk, cost, and liability to the firms that are best-placed to deal with it (rather than it being allocated on the basis of negotiating strength alone).

41.6 Consumers and businesses transacting with increased confidence, in the knowledge that there will be fewer instances of unfair practices in markets.

Consultation

42 The Treasury, the Ministry of Justice, the Ministry for Primary Industries, the Parliamentary Counsel Office, and Commerce Commission staff have been consulted on this Cabinet paper and the attached Regulatory Impact Statement. The Department of the Prime Minister and Cabinet has been informed.

43 The main proposals in this paper were consulted on publicly through a discussion paper. Further information on submitters' perspectives is available on the MBIE website and is included in the Regulatory Impact Statement accompanying this paper. The technical changes outlined in Annex 1 have been subject to targeted consultation with relevant stakeholders.

Financial implications

44 The policy proposals in this paper involve new functions for the Commerce Commission as the regulator responsible for enforcing the Fair Trading Act. It is important that the Commerce Commission is adequately resourced to carry out these functions. Confidential advice to Government Confidential advice to

Legislative implications

45 The proposals in this paper will require legislation. A Fair Trading Amendment Bill currently has a category Confidential advice to Government on the 2019 Legislative Programme.

46 We propose that the Amendment Act will bind the Crown to the extent that it engages in trade, consistent with current provisions in the Fair Trading Act.

Impact analysis

47 The impact analysis requirements apply to the main proposals in this paper. A Regulatory Impact Statement has been prepared and is attached.

48 MBIE's Regulatory Impact Analysis Review Panel has reviewed the attached Regulatory Impact Statement prepared by MBIE. The Panel considers that the information and analysis summarised in the Regulatory Impact Statement meets the criteria necessary for Ministers to make informed decisions on the proposals in this paper.

49 In terms of the technical amendments outlined in Annex 1, the Regulatory Quality Team at the Treasury has determined that the regulatory decisions sought in this paper are exempt from the requirement to provide a Regulatory Impact Assessment as they have no or minor impacts on businesses, individuals or not for profit entities.

Human rights

50 The proposals in this paper are consistent with the New Zealand Bill of Rights Act 1990 and the Human Rights Act 1993

Publicity

51 We intend to publicly announce policy decisions shortly following Cabinet approval.

Proactive Release

52 This paper will be proactively released in part on MBIE's website at the time that policy decisions are announced, subject to redactions as appropriate, consistent with the Official Information Act 1982.

Recommendations

The Minister for Small Business and the Minister of Commerce and Consumer Affairs recommend that the Committee:

1 **note** that on 3 December 2018, Cabinet agreed to release the discussion paper *Protecting businesses and consumers from unfair commercial practices* [CAB-18-MIN-0592];

2 **note** that 44 submissions were received on the discussion paper, with submitters relatively evenly divided for and against reform;

Unconscionable conduct

3 **agree** to introduce a new prohibition against unconscionable conduct in connection with the supply (or possible supply) and acquisition (or possible acquisition) of goods or services;

4 **agree** to provide a list of factors for a court to consider in determining whether conduct is unconscionable, consistent with the guidance in the Australian Consumer Law;

5 **agree** that it be an offence to engage in unconscionable conduct, subject to maximum penalties of $600,000 for bodies corporate and $200,000 for individuals;

6 **agree** that the Fair Trading Act's civil remedies apply in respect of unconscionable conduct;

Unfair contract terms

7 **agree** to extend the Fair Trading Act's unfair contract terms protections to standard form business arrangements with a value below $250,000 (or a value below $250,000 *in a given year* in some cases where the arrangement spans more than one year);

8 **agree** that the courts can have regard to factors set out in legislation, and have discretion to consider the substance of the relationship between parties and look behind the specific legal form of arrangements, when determining whether the UCT protections apply;

9 **agree** to provide for a regulation-making power to allow for clarification of the scope and value of an arrangement, for the purposes of determining whether the UCT protections apply;

10 **note** that the Minister of Commerce and Consumer Affairs may seek Cabinet agreement to changes to the enforcement regime for unfair contract terms following the completion of a broader review of the Fair Trading Act;

11 **agree** to extend the current exemptions from the consumer unfair contract terms regime for certain terms in insurance contracts to the business unfair contract term regime, until final decisions on the insurance exemptions are made as part of the insurance contract law review;

Technical amendments

12 **agree** to the minor policy changes to the Fair Trading Act set out in Annex 1;

Financial implications

13 **note** that the policy proposals in this paper will have resource implications for the Commerce Commission, Confidential advice to Government

Legislative implications

14 **agree** to give effect to the above proposals through a Fair Trading Amendment Bill (and associated regulations if necessary), which has category Confidential advice to Government on the 2019 Legislative Programme;

15 **invite** the Minister of Commerce and Consumer Affairs to issue drafting instructions to the Parliamentary Counsel Office to give effect to the above recommendations;

16 **authorise** the Minister of Commerce and Consumer Affairs and Minister for Small Business to make additional policy decisions and minor or technical changes, consistent with the policy intent of this paper, on issues that arise in drafting and passage;

Communications

17 **note** that the Minister of Commerce and Consumer Affairs and the Minister for Small Business will publicly announce policy decisions following Cabinet approval.

Authorised for lodgement

Hon Stuart Nash
Minister for Small Business

Hon Kris Faafoi
Minister of Commerce and Consumer Affairs

Annex 1: Technical amendments to the Fair Trading Act 1986

Topic	Status quo	Reason for change	Proposed change
Disclosure requirements relating to extended warranty agreements	S36U provides that when a consumer purchases an extended warranty, a copy of the agreement must be provided to the customer at the time of purchase. This includes purchases made over the phone.	It may be difficult to comply with the requirement to provide a copy of the extended warranty at the time of purchase for agreements made by phone. This requirement is also inconsistent with the Act's provisions for uninvited direct sales, where in the case of an agreement entered into over the phone, a copy must be provided within five working days after the date on which the agreement was entered into	Align the provisions for disclosure of extended warranty agreements purchased over the phone with those for uninvited direct sales. In the event an extended warranty is purchased over the phone, the business would have five working days to provide the agreement to the consumer. Consumers would still have five working days to cancel an extended warranty, commencing from the time the consumer receives the agreement.
Referring Fair Trading Act matters to the High Court	The Commerce Commission has no express power to 'state a case' for the opinion of the High Court on any question of law relating to the Fair Trading Act. It has this power under the Credit Contracts and Consumer Finance Act 2003 (CCCFA) and Commerce Act 1986.	Stating a case allows the Commerce Commission to take a 'test case' to get clarity over unclear or novel areas of law, without necessarily naming a defendant. At present, the Commission can seek 'declaratory relief', but this requires naming a defendant and subjecting them to the costs of a full trial, and is case-specific, so may not provide the required clarification.	Give the Commerce Commission an express power to state a case for the opinion of the High Court on Fair Trading Act matters.
Disclosure of information in the course of a Fair Trading Act investigation	The Commerce Commission does not have the power to restrict the disclosure of information provided to it during an investigation, or restrict the disclosure of the Commission's line of questioning in an investigation under the Fair Trading	The lack of this power presents a risk of investigations being prejudiced by, for example, investigation subjects who are being interviewed separately discussing what information should be provided to the Commission. In addition, the lack of a power under the Fair Trading Act creates issues	Give the Commerce Commission the power to restrict the disclosure of information provided to it during an investigation (including its line of questioning).

	Act. It has these powers under the Commerce Act and the CCCFA.	when an investigation spans both the Fair Trading Act and the CCCFA.	
Enforceable undertakings	When the Commerce Commission takes out-of-court enforcement action under the Fair Trading Act, it is able to accept enforceable undertakings. These are able to be enforced much more easily than a standard settlement if they are breached. However, unlike the Commerce Act, the current provision does not explicitly provide that undertakings may include an undertaking to pay compensation, or to reimburse the Commission for its investigation costs.	There is a theoretical risk that the Commission may not be able to accept undertakings of this nature. Such undertakings are critical for ensuring timely and cost-effective resolution of cases, and ensuring that affected parties can benefit from appropriate redress.	Amend s46A to clarify that an undertaking may include an undertaking to pay compensation, or to reimburse the Commission for its investigation costs.
Management banning orders	Currently, The Fair Trading Act provides that a court may make a management banning order against an individual who, within a 10 year period either: • personally committed an offence on at least two occasions, or • was a director of a business that committed an offence on at least two occasions.	The current situation does not allow action to be taken against individuals who have: • been involved with multiple businesses that have breached the Act, if each business has only breached it once, or • personally breached the Act once themselves, and (on a different matter) been a director or manager of a business that has breached the Act.	Amend s46C 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 businesses that have cumulatively committed offences under the Act on at least two occasions within a 10 year period, or • personally breached the Act once themselves, and (in relation to different conduct) been a director or manager of a business that has breached the Act.