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Committee Secretariat
Finance and Expenditure Committee
Parliament Buildings
Wellington

Dear Committee Secretariat

Re: Fair Trading Amendment Bill

SECTION 1: BACKGROUND

BusinessNZ welcomes the opportunity to submit on the Fair Trading Amendment Bill ("the Bill"). BusinessNZ has submitted on previous versions of this reform, and our views are informed by that experience and by direct feedback from members across sectors.

Given the diversity of our membership, some members and sectors will have specific issues within the Bill that they wish to comment on in some detail. Therefore, we have encouraged individual members and sector representatives to make their own submissions raising those issues specific to their areas of interest and expertise.

BusinessNZ does not condone misleading or deceptive conduct. No evidence has been provided to support the idea that businesses willingly breach existing rules, or that existing penalties coupled with reputation harm are not an effective deterrent. We support a consumer law framework that deters genuine misconduct and maintains consumer confidence, and the vast majority of New Zealand businesses take their Fair Trading Act 1986 obligations seriously. At the same time, a disproportionate framework (one that treats system failures outside an individual's or business's direct control the same as deliberate misconduct) risks a chilling effect on investment. It would also make it harder to attract and retain capable, high skilled directors in affected industries, who may be deterred by the idea of personal liability for failures they could not realistically prevent. Penalties of this kind risk discouraging investment, innovation and the adoption of new technology, including through the adoption of productivity tools and systems (like AI), that New Zealand businesses must now adopt at pace and scale, at a time when the Government is rightly focused on economic growth.

Our submission focuses on one central concern in the Bill's penalties and enforcement framework, with its failure to distinguish between deliberate misconduct and inadvertent errors that are generated by the systems that businesses rely on to operate at scale and are outside of a business's direct control which was a concern that BusinessNZ also raised during the targeted consultation on these reforms. These errors may occur even where a business has taken all reasonable and prudent steps to configure these systems properly and monitor their performance. We also briefly note our support (with reservations) for the scam-disruption and product safety measures.

RECOMMENDATIONS

Recommendation 1: BusinessNZ recommends that: The penalties framework should distinguish between deliberate misconduct and inadvertent system-generated errors, rather than applying the same high-end exposure to both.

Recommendation 2: BusinessNZ recommends that: The Bill should introduce a safe harbour or materially reduced penalties for first-time inadvertent system failures where the business acts promptly to remediate and compensate affected customers, with full enforcement preserved for repeat or unremedied failures.

Recommendation 3: BusinessNZ recommends that: Director liability settings should be reconsidered to ensure that personal exposure is proportionate in the context of system failures outside an individual's direct control.

Recommendation 4: BusinessNZ recommends that: The overall approach to penalties should reflect proportionate regulation rather than a primary punitive approach.

Recommendation 5: BusinessNZ recommends that: The reasonable mistake defence available for criminal offences under the Bill be reinstated for the equivalent civil liability provisions, with the defence defined to exclude a mistake of law or mistake in interpretation of any document to guard against inappropriate reliance.

Recommendation 6: BusinessNZ recommends that: The safe harbour for online service providers be broadened beyond circumstances where a provider acts voluntarily and extended to appropriately protect the specialist third parties that support providers' scam disruption decisions, subject to suitable safeguards.

SECTION 2: GENERAL DISCUSSION

A more proportionate approach to penalties

BusinessNZ's consistent position is that consumer law should be calibrated to the nature and scale of the conduct involved, and a business's culpability for this conduct. Strong consequences are appropriate for businesses that deliberately mislead consumers. The Bill is well suited to that particular purpose and BusinessNZ supports stronger deterrence of false advertising, misleading promotional claims and pricing representations that are solely designed to deceive potential buyers.

Our main concern is that the Bill applies the same high-end penalty exposure to a very different category of conduct, that being errors that arise from billing, pricing and other automated systems, which can affect consumers without any intention to mislead and without any realistic possibility of the business detecting the error in real time. These system generated errors are an unavoidable feature of operating complex businesses at scale. They can affect large numbers of consumers, but they reflect technical failure rather than deliberate choice. Equally, consumers are direct beneficiaries of automated systems. They enable businesses to deliver products and services at lower costs, in more innovative ways and in forms that are more responsive to customer demand.

As BusinessNZ noted during the targeted consultation of these reforms, the problem definition underpinning the penalties changes was not well supported by evidence. Neither the consultation nor the regulatory impact statement of the penalties regime (dated 23 April 2026) appears to have identified inadvertent system-generated errors as a distinct category or tested whether applying the highest penalty tier to them is necessary or proportionate. Also missing from that analysis is any evidence basis for treating errors that arise from automated system (that have no intent to mislead), the same way as deliberate misconduct. This is not a matter that can be simply left to the Commerce Commission to resolve through the exercise of enforcement discretion. In reality how the Commission will approach each case cannot be predicted and there is little consistency to its enforcement practice across similar fact scenarios. It cannot be assumed that the Commission would, in all instances act reasonably and pragmatically when faced with these sorts of errors, particularly where there is an attractive opportunity to take enforcement action against a high-profile business or in a target sector.

Treating both categories the same, with the same maximum penalties and the same enforcement response, is not proportionate nor appropriate regulation. It reflects a preference for punitive settings and approaches over a proportionate framework, which BusinessNZ does not support. Applying the highest penalties to inadvertent failures of this kind adds little to deterrence, while weighing on investment, innovation and New Zealand's attractiveness as a place to do business. We are also concerned that some of the practical impacts of the Bill on businesses operating large scale systems do not appear to have been fully tested during the development of this policy and we encourage the Select Committee to examine and consider them more closely.

A safe harbour for inadvertent system failures

BusinessNZ submits that the Bill should provide a safe harbour or materially reduced penalty exposure, for businesses that experience an inadvertent system generated error for the first time and act promptly to identify, remediate and compensate affected consumers. The existing defences in the Bill are largely framed around reliance on third parties and do not adequately address errors that arise within a business's own systems despite having a 'good faith' effort and sound governance.

A first-breach safe harbour would strike the right balance because:

- It would preserve strong deterrence of deliberate misconduct, which is the Government's stated primary concern;
- It would provide a proportionate response to inadvertent failures, recognising that prompt remediation and compensation are more appropriate outcomes than punitive penalties;
- It would reduce the risk of over-enforcement against businesses acting in good faith while also preserving the full enforcement response for repeat or unremedied failures; and
- It would encourage business to engage constructively with the Commerce Commission when system errors arise, to share learnings, understand root causes and enhance focus on remediation of issues. Such engagement will not occur in the context of prosecution by the Commission.

It is also consistent with BusinessNZ's established position that a threshold distinguishing a first, inadvertent breach from repeated or continued conduct is a proportionate safeguard for businesses that make genuine mistakes, not a weakening of deterrence. This is the same proportionate and conditional model that the Bill already adopts for online scam disruption, and we encourage the Committee to extend that thinking to system generated errors under the penalties regime.

Reinstating the reasonable mistake defence

The Bill removes the ability to rely on the reasonable mistake defence (section 44(a) of the Fair Trading Act 1986) for the range of provisions that move from criminal to civil liability, and this gap is not adequately addressed by the new civil liability defence provisions. The defence is retained for the equivalent criminal offence provisions but not extended to their civil counterparts. This leaves a material gap for inadvertent errors that fall outside an automated system context (for example, manual or process-based mistakes), which the safe harbour proposed above for system failures would not capture. The shift from criminal to civil liability is not, of itself, a sufficient basis for removing a defence of this kind, particularly given the significant maximum penalties proposed and the degree of moral blameworthiness the civil regime is intended to reflect. Equivalent defences already exist in other civil pecuniary penalty regimes, including the Unsolicited Electronic Messages Act 2007. To guard against inappropriate reliance, the defence could be defined to exclude a mistake of law or a mistake in the interpretation of any document.

Director liability

BusinessNZ is concerned that the Bill's penalty and attribution settings could expose directors to significant personal liability for system failures that fall outside any individual's direct control.

There is no such thing as a zero-risk operating environment. Businesses that run complex, large-scale systems accept a degree of residual technical risk as an unavoidable cost of operating at scale and the law should reflect that reality. Where the penalty framework does not, the consequence is not better compliance, it's risk aversion. Businesses become more cautious, slower to adopt new technology and less willing to take general risks and invest in innovation when the downside of an inadvertent system error has the same legal exposure as deliberate wrongdoing. The effect on director recruitment and retention compounds on top of this. New Zealand already operates in a competitive market for high-skilled and experienced board directors. Exposing directors to significant personal liability for failures they could not have realistically prevented (and for which their business has promptly taken responsibility for), makes directorships in all industries materially less attractive. Over time this creates the risk of narrowing the pool of capable governance available to New Zealand businesses at exactly the moment when strong oversight of complex systems matters the most.

Personal liability is appropriate where a director has failed in their governance responsibilities, like when there were warning signs ignored, controls not put in place or a culture of non-compliance that the director enabled or permitted. It is not appropriate where a failure arises from the inherent unpredictability of complex automated systems, even when adequate governance frameworks are in place. The Bill does not draw that distinction.

Directors of large businesses can, and do, take reasonable steps to reduce the risk of system failures, typically through governance frameworks that are designed for that particular purpose. But failures at scale cannot be eliminated entirely, and it is not proportionate to expose directors to substantial personal exposure for failures they could not realistically have prevented, particularly where the business has acted promptly to address them. This is consistent with the Government's broader signals including 2025 reforms to the Credit Contracts and Consumer Finance Act 2003 to remove personal liability for directors and senior managers, and the reconsideration of director liability under the Climate-Related Disclosures regime, that excessive personal liability risks deterring capable governance. We ask the Select Committee to ensure personal exposure for directors remains proportionate in the context of inadvertent system errors.

Other matters

BusinessNZ supports the safe harbour for online service providers and other businesses, that act in good faith to disrupt suspected scam activity. Members have long advocated for a provision of this kind. However, in order to be effective in practice, the safe harbour needs to be paired with clear government direction on what should be treated as a scam. As drafted, it leaves providers to make those judgements and carry the associated due diligence burden and liability risk, including the risk of wrongly disrupting legitimate businesses. The Committee should address this by broadening the circumstances in which the safe harbour is available beyond a provider acting on its own volition, including where a provider acts at the direction of government or in reliance on intelligence from an authorised third party, subject to appropriate safeguards. The specialist third parties that support providers to identify suspected scam activity should also be brought within the safe harbour's protection; without this, providers and their intelligence sources face a disproportionate due diligence and liability burden for judgement calls that government and its agencies are often better placed to anchor.

The Bill should also more clearly delineate a scam, such as coordinated fraud, from conduct already prohibited as misleading conduct under sections 9 to 14 of the Act, to avoid the safe harbour's scope blurring into those existing prohibitions. In addition, the safe harbour as drafted appears to protect providers against claims brought by victims of a scam but does not clearly extend the same protection to claims brought by legitimate sellers on e-commerce platforms who are wrongly affected by a disruption action. This gap should also be addressed. We encourage MBIE to ensure the safe harbour is supported by an authoritative system, such as the "trusted flagger" system we understand it is developing, and to progress that work in tandem with the safe harbour rather than after it. BusinessNZ would like to highlight that businesses should not bear disproportionate liability for judgment calls that government is better placed to anchor.

We also support the product safety measures as being sensible and consistent with good regulatory design. Enabling technical requirements to be updated more efficiently will reduce the lag between changes to international standards and updates to New Zealand requirements, which benefits businesses as well as consumers, and supports alignment with our trading partners.

We thank you for the opportunity to submit. We would welcome the opportunity to discuss any of these points further.

Kind regards,

Katherine Rich

Katherine Rich
Chief Executive
BusinessNZ