MINISTRY OF BUSINESS, INNOVATION & EMPLOYMENT
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COVERSHEET

Minister	Hon Dr David Clark	**Portfolio**	Commerce and Consumer Affairs
Title of Cabinet paper	Resolving Historical Issues with Companies Office Funding and Proposed Long-Term Funding Model	**Date to be published**	1 July 2022

List of documents that have been proactively released		
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Information redacted **YES**

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Some information has been withheld for the reasons of Legal professional privilege or Confidential advice to Government.

In Confidence

Office of the Minister of Commerce and Consumer Affairs

Cabinet Economic Development Committee

Resolving historical issues with Companies Office funding and agreeing a long-term funding model

Proposal

1 I am seeking agreement to proposals designed to resolve issues with the way that corporate registry services have been funded in the past, and to put in place a robust, future-focussed funding model to ensure that such issues do not arise again.

Relation to government priorities

2 The proposals in this paper are necessary to support the effective implementation of the Incorporated Societies Bill which is currently before Parliament.

Executive Summary

3 The Companies Office is the public facing name of the Business Registries unit within Ministry of Business, Innovation and Employment (MBIE). This unit is responsible for administering 16 corporate registry functions (and supporting a range of statutory registrars to perform their duties).

4 In July of this year officials informed me that:

4.1 the Companies Office has been funding its corporate registry services in a way that is not consistent with the fee setting provisions under which that money was collected; and

Legal professional privilege [redacted]

5 Because of the gradual way in which this practice arose it is unclear exactly how far back it goes. However, it predates the current government and goes back to prior to the formation of MBIE.

6 This paper proposes a legislative solution to both validate historical charging and expenditure and provide a sound basis for the ongoing funding of the Companies Office.

Short-term Crown funding will also be required to put an end to Legal professional privilege [redacted] Legal professional privilege [redacted] spending while this legislative solution is put in place. This is to avoid a situation in which a government department Legal professional privilege [redacted] legal professional privilege [redacted]

8 If Cabinet does not agree to these proposals, I will need to seek Cabinet's agreement to significant fee increases, including an approximately 10-fold increase in the fees charged to the community and voluntary sector.

Background

Current policy and practice

9 The Companies Office administers a range of different corporate registry functions as well as supporting a range of statutory registrars to perform their functions. These registers are made up of:

9.1 entity registers such as the Companies Register, the Incorporated Societies Register and the Charitable Trusts Register;

9.2 occupational licensing registers such as the Insolvency Practitioners Register and the Auditor Register;

9.3 public notice and disclosure registers such as the Disclose Register (on which the documents associated with the offer of financial products are registered) and the Personal Property Securities Register (on which a lender's right of recourse over a borrowers assets is registered); and

9.4 other registers which more broadly support the economy by allowing organisations to record their status with the Government such as the New Zealand Business Number (NZBN) Register and the Register of Unions.

10 At the time that each of these registers was established, policy decisions were made that each should be independently funded from fees charged to the users of that specific register or by the Crown from general taxation. This funding model was predicated on it being possible to treat the operation of each register as separate from the others.

11 When memorandum accounts were introduced in the mid-1990s, all of the registers' surpluses/deficits were accounted for in a single account: *Registration and Provision of Statutory Information.* The Companies Office originally operated a notional memorandum account with any surpluses returned to the Crown at the end of each financial year. In 2011 this practice changed, when these memorandum accounts were brought within agency balance sheets and surpluses managed internally.

12 Over time, as the Companies Office has moved to provide shared services to the various registers (e.g. shared legal and information technology support) it has become increasingly difficult to treat the operation of each register as separate. The approach of providing shared services has resulted in significant efficiencies and driven down the cost of registries services to end users. This has contributed to New Zealand's international reputation as a country in which it is easy to do business.

13 This operational practice has made it difficult to draw a sharp distinction between the costs of providing services for each register. In addition, over

time, the fees charged on some smaller registers have not kept up with the costs of operating them. The shortfall on these registers has been met from surpluses generated from fees collected under other pieces of legislation and retained within an MBIE memorandum account. The extent of over-charging that has produced these surpluses is immaterial on a per-user basis (in the order of a few dollars per fee charged).

14 I understand that no deliberate decision has ever been made to subsidise the users of these smaller registers out of the fees charged to users of larger registers. Instead this practice gradually developed over time out of:

14.1 a desire to avoid significant fee increases on the users of smaller registers;

14.2 a decline over time in the functional separation between the registers; and

14.3 legal professional privilege

15 Finally, a small number of registers have also been established over time without the ability to charge for the provision of registry services, but Crown funding has not explicitly been provided for the operation of those registers (e.g. the Register of Unions and the Charitable Trusts Register). In more recent years the Companies Office has received Crown funding and this has been allocated to these registers.

16 Because of the gradual way in which this practice arose it is difficult to pinpoint precisely when this problem arose. However, advice from officials is that it predates the current government and goes back to prior to the formation of MBIE.

The problem with the current approach

Legal professional privilege

18 This means that without legislative change either:

18.1 additional Crown funding will need to be provided to enable the continued provision of corporate registry services; or

18.2 significant increases will be required to fees charged to some users of the Companies Office – particularly the community and voluntary sector.

Scale of the issue and impacted registers

19 Once this issue was identified officials were able to reprioritise Crown funding of $0.235 million within the Vote Business, Science and Innovation: Commerce and Consumer Affairs: Registration and Provision of Statutory Information appropriation, to reduce the extent of cross-subsidisation between

the registers funded through that appropriation. The total appropriation in 2021/22 (pre-OBU) is $44.333 million.

20 However, there remains a shortfall of $3.746 million in the 2021/22 financial year to meet the cost of providing some corporate registry services. It is not possible to meet these costs from outside of this appropriation. Rather than significantly adjust fees, at a time when the most impacted user groups are needing extra support to meet their compliance obligations, MBIE has decided to continue with its practice of funding these services out of surpluses generated from other users of corporate registry services. However, as noted above, Legal professional privilege [redacted].

Analysis

21 The present situation presents two linked issues that need to be resolved:

21.1 **Issue A**: How should we fund the corporate registry system for the future?

21.2 **Issue B:** Proposals to address the Legal professional privilege [redacted]

Issue A: How should we fund the corporate registry system for the future?

Securing the future funding of the Companies Office is important

22 The Companies Office provides essential registry services to both businesses and community and voluntary organisations. The registers it maintains are the basis on which new organisations are created and key disclosures provided to businesses and consumers. These registers form a key part of New Zealand's internationally recognised business environment.

The current funding arrangements of the Companies Office are fragmented

23 At the time that each register was established the decision was made that it should be self-funded from fees charged to users of that system (except where legislation provides no ability to charge users). I consider that this policy remains fundamentally sound. To the extent that the corporate registries system is delivering benefits to registered entities, they should be required to pay for them, rather than passing that burden on to the taxpayer. However, because of the piecemeal way in which the system has been built up over time (some of the registers are over 100 years old) that policy involves fragmented charging mechanisms that are no longer fit for purpose.

24 This level of fragmentation made sense when each of the registers operated as a separate, paper-based register and when each register was thought of as independent rather than as a part of a broader, unified registry system. MBIE has however, over time, moved towards a unified regulatory approach in order to:

24.1 put in place an organisational structure and operating model that produces economies of scale in the delivery of registry services; and

24.2 leverage technological developments enabling those services to be centralised/shared across registers, which has also contributed to reduced costs to users over time.

25 While this unified approach is permissible under current legislation, it requires each sub-part of the system to pay its own share of the costs associated with such a modern registry system. This requires the costs attributable to each part of the system to be readily identifiable and this has become increasingly difficult as MBIE has adopted such a unified regulatory approach.

26 In addition, because many of the costs of providing registry services are fixed, and there are materially different numbers of users of each system (ranging from 25,000 incorporated societies to over 600,000 companies) this requires materially different levels of fees to be charged for the same service. For example, to account for the significant fixed costs of registration resources, this would require not-for-profit clubs and societies to be charged $850 to incorporate, while businesses are charged $90 to incorporate as companies (GST exclusive).

27 I consider this outcome neither fair nor sustainable. Community and voluntary groups provide significant benefit to New Zealand and they should not be priced out of existence.

Proposed new consolidated funding model

28 I consider that the current funding model is no longer fit for purpose. I am therefore proposing to establish a unified funding system across the entire corporate registries system, which will allow like amounts to be charged for like services and will ensure that the Companies Office is empowered to use its resources flexibly in order to avoid this problem arising in future. Identifiable direct costs of a registry would still be directly charged to its users.

29 At a high level this would involve amendments allowing costs to be recovered from users holistically across the range of corporate registry functions.

30 More specifically, I am proposing amendments to:

30.1 Put in place the ability to charge users of corporate registry services a levy to fund corporate registry activities across the regulatory system. This would allow users of services provided under one piece of legislation to be charged the costs of services that wholly or partially benefit users of services provided under another piece of legislation. The levy would be able to be used to fund the provision of services across the range of registers administered by the Companies Office and would ensure that the Companies Office has the flexibility to respond to emerging needs as required. For example, if additional resource was needed to respond to an emerging issue among incorporated societies, the Companies Office could redeploy its levy funding to address this need, without being constrained by precisely which legislation it was collected under.

30.2 Amend existing fee charging provisions as necessary to make them consistent and coherent as a system of charging for both regulatory functions and the general functions of the regulator. At present there is not consistency in the fee charging provisions across the range of statutes and this has resulted in, for example, registration fees being set at a high level for some entities because there were concerns about the lawful basis for charging an annual amount.

31 Fees and levies would be made by regulations under these amended charging provisions. Powers to make these regulations would be subject to a requirement to consult with those likely to be affected (which would involve disclosing details of proposed charges, the costs they are attributable to and the proposed allocative methodology, based on principles of equity and means).

How the new funding model would work in practice

32 The main way that users will experience a difference to what is happening now (where current practice is already substantively implementing this policy) is that instead of being charged fees for doing certain things (i.e. incorporation, or filing an annual return) they will be charged both fees and a levy. This approach will be more transparent and principled in the long-run and will better meet best charging practices. Importantly, however, this should not result in a significant increase in the aggregate amount entities are charged.

33 In practice, I anticipate that this levy would be used to smooth out the amounts users are charged across the various registers for shared costs or infrastructure, or where the activity (e.g. annual return processing) is the same across multiple registers due to shared business processes. This will result in a perception of slight over-recovery from users of larger registers, but the order of magnitude would only be a few dollars per user.

34 The extent to which costs are smoothed between users will involve allocative decisions which will need be made by the relevant Minister at the time those fees and levies are set. In order to ensure that any over-recovery is proportionate and reasonable, I propose that any decision on the setting of the amount of fees and levies must be made following public consultation.

Issue B: Proposals to address [redacted] Legal professional privilege

Legal professional privilege [redacted]

36 This raises issues both in terms of funding the Companies Office until the long-term solution is put in place [redacted] Legal professional privilege

37 In order to resolve these concerns, I propose:

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37.1 Providing in 2021/22, $3.746 million Crown funding from the between-Budget contingency to the Vote Business, Science and Innovation: departmental output expense: Commerce and Consumer Affairs: Registration and Provision of Statutory Information appropriation.

37.2 In the near term:

37.2.1 amending the relevant pieces of legislation to enable the historical surpluses collected by the Companies Office to be used to fund the functions of the Companies Office; and

37.2.2 retrospectively validating the Companies Office's (MBIE's) charging and expenditure.

Short-term Crown funding

38 As indicated above, I am seeking $3.746 million of Crown funding from the between-Budget contingency. This funding will be used to ensure that no legal professional privilege ross-subsidisation occurs in the following registers:

Register	**Forecast under-recovery met through cross-subsidisation (millions, rounded)**
Disclose register	$0.202
Financial Service Providers Register	$0.707
Limited Partnerships Register	$0.265
Retirement Villages Register	$0.092
Incorporated Societies Register	$2.330
Friendly Societies/Credit Unions/Building Societies	$0.012
Auditors Register	$0.139
Total	**$3.746**

Legal professional privilege

40 I acknowledge that, as part of my proposed legislative solution, legal professional privilege legal professional ill be addressed by the retrospective validation of the Companies Office's (MBIE's) funding practices. However, failing to provide this funding between now and then would amount to a direction from Cabinet to the Companies Office Legal professional privilege . I do not consider that this is a tenable approach.

41 Accordingly, if this funding cannot be agreed to, I will seek Cabinet's agreement to immediately increase all of the relevant fees to full cost-recovery

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until such time as the longer-term funding solution in this paper can be implemented.

Short-term validation of current approach to meeting shortfalls

42 As noted at paragraph 13 above, to the extent that registers have not collected sufficient revenue to meet the cost of operating them, this shortfall is currently being met from surpluses generated by fee payers under other pieces of legislation. The balance (unaudited) as at 30 June 2021 of the *Registration and Provision of Statutory information* memorandum account managed by the Companies Office's is $9.866 million in surplus. The current fees review was aimed at setting fees to reduce this to nil over the next four years. I am proposing that the Companies Office's use of this existing surplus to fund such shortfalls should be legislatively authorised.

43 This will mean that:

43.1 The Companies Office will have certainty about its medium-term funding and give it the time to meaningfully consult with stakeholders before implementing the levy proposed in this paper; and

43.2 The Crown will not need to fund the ongoing provision of corporate registry services in 2022/23, while this long-term approach is consulted on and put into place.

44 I acknowledge the presumption against legislation having retrospective effect should only be reversed in exceptional cases. I believe this is such a situation. The charging practice in question was undertaken in good faith to support corporate registry services that benefit all users. It has caused minimal disadvantage, in material terms, to users who have been over-charged and would likely have complied with the long-term funding model I am recommending.

45 Although this situation does not clearly satisfy the possible grounds specified in the Legislation Design and Advisory Committee's 2021 guidelines[1] for making retrospective legislation, legal professional privilege [redacted].

Legislative Implications

46 The legislative proposals in this paper require amendments addressing both issues discussed in this paper with the funding of the Companies Office:

46.1 Validating the current approach in the short-term – Amendments to enable the historical surpluses collected by the Companies Office to be used to fund the functions of the Companies Office as well as validating historical practices.

[1] Page 58

46.2 Putting in place a unified funding model – Amendments enabling users of corporate registry services to be charged a levy to fund corporate registry activities across the regulatory system.

47 The funding I am seeking from between-Budget contingency will ensure legal professional privilege [redacted] However, at a minimum the current approach will need to be validated by 30 June 2022. Failure to address the funding of the Companies Office by this date will have operational, cost and reputational implications.

48 I therefore propose that a bill validating the current approach to funding of the Companies Office be introduced, and passed, on Budget night confidential advice [redacted] con fide [redacted]

49 I do not consider that there are any policy risks in addressing the legal basis for funding of the Companies Office under urgency and without the full scrutiny of the House.

50 We should not make use of Budget night legislation for this purpose without also presenting a viable, long-term and transparent way to set charges for corporate registry services. I propose to introduce a separate Bill establishing my proposed unified funding model on Budget night, but have this Bill follow the normal legislative process. Validating the current approach on Budget night will afford us the time to ensure the long-term proposals are subject to the full scrutiny of the House and, therefore, more likely to deliver an enduring solution.

51 I have considered seeking to have all proposals passed together via a single omnibus bill on Budget night. This would reduce the required House time and period during which the Legal professional privilege [redacted] charging practices are the subject of debate. However, I am conscious of the need for restraint in use of Budget night legislation, particularly given these reforms lack both a sufficient degree of urgency and immediate budgetary implications. Making these long-term reforms in haste would not only raise questions of propriety, but would involve risks to their quality that I do not consider necessary.

Impact Analysis

Regulatory Impact Statement

52 MBIE's Regulatory Impact Analysis Review Panel has reviewed the attached Impact Statement prepared by MBIE. As the proposals were not consulted on and one of the four assessment criteria has not been met, the Impact Statement cannot meet the full requirements. The Panel considers that the information and analysis summarised in the Impact Statement partially meets the criteria necessary for Ministers to make informed decisions on the proposals in this paper.

"Climate Implications of Policy Assessment"

53 The CIPA requirements do not apply to these proposals as they have no direct impact on emissions.

Population Implications

54 I do not expect the new funding model for corporate registry functions to have any notable implications for particular population groups. Intervention is, however, necessary to avoid significant fee adjustments that would disproportionately impact the community and voluntary sector.

Human Rights

55 There are no inconsistencies between the proposals in this paper and the New Zealand Bill of Rights Act 1990 and the Human Rights Act 1993.

Consultation

56 Officials have consulted with the Treasury, Ministry of Justice, and Parliamentary Counsel Office.

57 The Department of Prime Minister and Cabinet (PAG) has been informed.

58 The proposals in this paper have not been publicly consulted on, due to the sensitive nature of the issues they seek to address.

Communications

59 Once these changes are implemented, I will release a press statement explaining our decisions. How the levy will be implemented, on who, and at what level, will be the subject of public consultation by the Companies Office.

Proactive Release

60 MBIE will proactively release this paper after the issues with the funding of the Companies Office are addressed. While this is contrary to the Government's policy on proactively releasing Cabinet papers, I consider that this is justified because of the content and timing of the proposed changes.

Recommendations

The Minister of Commerce and Consumer Affairs recommends that the Committee:

1 **note** that there has been cross-subsidisation of certain registry functions carried out by the Companies Office (described in Treasury guidance as systematic under- and over-recovery) under a range of legislation;

2 **note** that this is a legacy issue that predates the current Government and goes back to prior to the formation of the Ministry of Business Innovation and Employment (MBIE);

3 **note** Legal professional privilege [redacted];

4 **agree** to retrospectively validate MBIE's collection and use, for corporate registry purposes, of fees prescribed and collected under any of the following legislation:

   4.1 the Companies Act 1993, New Zealand Business Number Act 2016, Incorporated Societies Act 1908, Insolvency Practitioners Regulation Act 2019, Limited Partnerships Act 2008, Building Societies Act 1965, Friendly Societies and Credit Unions Act 1982, Retirement Villages Act 2003, Financial Markets Conduct Act 2013, Financial Service Providers (Registration and Dispute Resolution) Act 2008, Personal Property Securities Act 1999, Auditor Regulation Act 2011, Industrial and Provident Societies Act 1908, Financial Reporting Act 2013, Building Societies Act 1965, Charitable Trusts Act 1957, and the Securities Act (Contributory Mortgage) Regulations 1988;

5 **agree** to provide that memorandum account funds that have historically been collected through fees charged under one of the pieces of legislation referred to in recommendation 4 may be used to fund corporate registry services and related functions under each other said piece of legislation;

6 **agree** to enable some or all users of a register established under one of the pieces of legislation listed in recommendation 4 to be charged fees and levies for corporate registry services and related functions provided under one of the other said pieces of legislation;

7 **agree** to amend charging provisions as necessary to deliver a consistent and coherent system of charging for both regulatory functions and the general functions of the regulator

8 **authorise** the Minister of Commerce and Consumer Affairs to extend recommendations 4 – 7 to any other legislation that may be identified as necessary to give full effect to those policies;

9 **agree** to fund the continued provision of corporate registry services (such as registration of an incorporated society) provided by the Companies Office that are forecast to operate at a loss in 2021/22, as a result of discontinuing any cross-subsidisation between registers;

10 **approve** the following changes to appropriations to give effect to the policy decision in recommendation 9 above, with a corresponding impact on the operating balance and net core Crown debt:

	$m – increase/(decrease)				
Vote Business, Science and Innovation Minister of Commerce and Consumer Affairs	**2021/22**	**2022/23**	**2023/24**	**2024/25**	**2025/26 & Outyears**
Departmental Output Expense: Registration and Provision of Statutory Information (funded by revenue Crown)	$3.746	-	-	-	-

11 **agree** that the proposed change to the appropriation for 2021/22 above be included in the 2021/22 Supplementary Estimates and that, in the interim, the increase be met from Imprest Supply;

12 **agree** that the expenses incurred under recommendation 10 above be charged against the between-Budget contingency established as part of Budget 2021;

13 **approve** the inclusion of two Bills giving effect to recommendations 4 to 8 on confidential advice [redacted]

14 **agree** that a Bill giving effect to recommendations 4 and 5 be introduced on Budget night and passed through all stages under urgency;

15 **invite** the Minister of Commerce and Consumer Affairs to issue drafting instructions to the Parliamentary Counsel Office to give effect to recommendations 4, to 8; and

16 **authorise** the Minister of Commerce and Consumer Affairs to make any minor policy changes or amendments necessary to address minor or technical matters that are not inconsistent with the recommendations in this paper.

Authorised for lodgement

Hon Dr David Clark

Minister of Commerce and Consumer Affairs

Appendix A: Table of registers managed by the Companies Office

#	Register	Statute
1[2]	Companies Register (for NZ and overseas companies)	*Companies Act 1993*
2	New Zealand Business Number (NZBN) Register	*New Zealand Business Number Act 2016*
3	Incorporated Societies Register	*Incorporated Societies Act 1908*
4	Insolvency Practitioners Register	*Insolvency Practitioners Regulation Act 2019*
5	Limited Partnerships Register (for NZ and overseas limited partnerships)	*Limited Partnerships Act 2008*
6	Friendly Societies and Credit Unions Register	*Friendly Societies and Credit Unions Act 1982*
7	Retirement Villages Register	*Retirement Villages Act 2003*
8	Disclose Register (encompassing a register of offers of financial products and a register of managed investment schemes)	*Financial Markets Conduct Act 2013*
9	Financial Service Providers (FSP) Register	*Financial Service Providers (Registration and Dispute Resolution) Act 2008*
10	Personal Property Securities Register (PPSR)	*Personal Property Securities Act 1999*
11	Auditor Register	*Auditor Regulation Act 2011*
12	Industrial and Provident Societies Register	*Industrial and Provident Societies Act 1908*
13	Approved Overseas Auditors and Associations of Accountants	*Financial Reporting Act 2013*
14	Building Societies Register	*Building Societies Act 1965*
15	Charitable Trusts Register	*Charitable Trusts Act 1957*
16	Contributory Mortgage Brokers Register	*Securities Act (Contributory Mortgage) Regulations 1988*

[2] Note that where registers are technically distinct, but experienced by users as a single register (e.g. for NZ and overseas companies), we have counted them only once.