



COVERSHEET

Minister	Hon Stuart Nash Hon Kris Faafoi	Portfolio	Small Business Commerce and Consumer Affairs
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List of documents that have been proactively released

Date	Title	Author
Considered by DEV on 3 April 2019	<i>Use of Fee Revenue Collected under the Companies Act</i>	Office of the Minister for Small Business Office of the Minister of Commerce and Consumer Affairs
3 April 2019	<i>DEV-19-MIN-0065</i>	Cabinet Office

Information redacted

NO

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In Confidence

Office of the Minister for Small Business

Office of the Minister of Commerce and Consumer Affairs

Chair, Cabinet Economic Development Committee

Use of fee revenue collected under the Companies Act 1993

Proposal

1. We are seeking Cabinet agreement to proposals resolving issues with the way in which the New Zealand Business Number (NZBN) register has been funded, and to ensure that similar issues do not arise under the Insolvency Practitioners Bill.

Executive Summary

2. The NZBN is a unique, numeric identifier available to all businesses in New Zealand. It enables easier and more efficient interactions for businesses, including by supporting and enabling high-quality, flexible and cost-effective public services. Businesses with an NZBN are recorded on the NZBN register.
3. Since its establishment, the NZBN register has been mostly funded by fees charged under the Companies Act 1993 (Companies Act) [CAB Min (15) 10/5 refers].
4. In November 2018 we became aware that funding the NZBN register in this way is outside the scope of the relevant fee setting power in the Companies Act.
5. As at the end of November 2018, approximately \$7.000 million had been spent on the NZBN register outside of the relevant statutory authority. Crown funding has been used to meet the costs of operating the NZBN register from this date.
6. We consider that a legislative solution is needed to validate historic expenditure and to regularise the ongoing funding of the NZBN register. Officials have advised us that if the funding of the NZBN register is not able to be addressed by 30 June, the NZBN register will need to cease operation. This will have serious operational, cost and reputational implications.
7. Officials also advise that a similar issue could arise under the Insolvency Practitioners Bill, which is a government bill to strengthen the regulation of insolvency practitioners. The Insolvency Practitioners Bill was reported back from Select Committee on 20 December 2018 and is awaiting its next Parliamentary stages.
8. When Cabinet considered the policy behind the Insolvency Practitioners Bill in 2016 it was noted that “the Minister of Commerce and Consumer Affairs intends to make a Budget bid in 2017 to seek an appropriation for independent oversight, to be funded through the annual return fee for companies” [EGI-16-MIN-0304 and CAB-16-MIN-0606 refer].

9. This effectively sought to replicate the funding model of the NZBN register; it is now clear that this approach is not possible.
10. We also propose addressing this by amending the Insolvency Practitioners Bill, by Supplementary Order Paper (SOP), to enable all companies (and other businesses able to be liquidated) to be charged for the provision of independent oversight of insolvency practitioners.

Background

What the NZBN is

11. An NZBN is a unique, numeric identifier available to all businesses in New Zealand. NZBNs can be allocated to eligible corporate and public entities and to individuals in business (unincorporated entities) such as sole traders, partnerships and trustees of trusts.
12. The purpose of the NZBN is to enable easier and more efficient interactions for businesses, including by supporting and enabling high-quality, flexible and cost-effective public services, e.g. through more efficient gathering and sharing of information about businesses. It gives businesses a single identifying number which links to the core information held about them which is used across government.
13. The NZBN also enables other initiatives, which have potential for significant productivity benefits for small business. Two important examples are Electronic Invoicing (e-Invoicing) and Business Connect (see paragraphs 28 - 30).

Previous Cabinet decisions

14. When Cabinet agreed to the introduction of the New Zealand Business Number Bill, it agreed that "NZBN operating costs associated with the registered entities [i.e. entities that already appear on other statutory registers] be funded from existing business registry fees [i.e. fees charged under the authority of the other statutes that provide for the maintenance of registers of those entities]" [CAB Min (15) 10/5 refers].
15. Cabinet also agreed to broadening the scope statement of the Vote Business and Innovation Minister of Commerce and Consumer Affairs: *Registration and Provision of Statutory Information* appropriation (the Appropriation) to enable it to be used for NZBN registry activities [CAB Min (15) 10/5 refers].
16. At that time, the need to amend legislation to align with these decisions was not recognised.

How the NZBN register is funded currently

17. Consistent with the 2015 Cabinet decisions, the annual cost of operating the NZBN register has been funded annually from:
 - 17.1. \$1.552 million collected through the fees charged to all companies to cover the registry costs of registered entities (including companies, and to a lesser extent via incorporated societies and other corporate entities); and

- 17.2. \$0.428 million from the Crown to cover the registry costs for unregistered entities (sole traders, partnerships and trusts).
18. In Budget 2017 a further \$3.2 million of Crown funding for each of 2017/18 and 2018/19 was appropriated for the costs of the NZBN adoption and implementation programme.
19. Since mid-2017 a portion of the fees collected from companies under the Companies Act has been earmarked for funding the NZBN register. The annual \$1.552 million of registry costs is spread across the fees paid by approximately 600,000 companies, and each company currently pays approximately \$2.60 annually to fund the NZBN register. Until November 2018 approximately \$7.000 million of Companies Act revenue has been spent on NZBN registry services.
20. When the funding for the NZBN adoption and implementation activities cease at the end of 2018/19, it had been intended that the ongoing programme of information and education activities would be funded by third party fees also collected under the Companies Act.

The problem with the current approach

21. Recent legal advice indicates that the use of fees collected under the Companies Act to fund functions under the New Zealand Business Number Act 2016 (NZBN Act) is outside the scope of the relevant fee-setting powers.
22. This means that without legislative change Companies Act fees cannot continue to be used to fund the annual costs of NZBN registry services (the \$1.552 million) or to fund the additional cost of information and education activities that is intended to continue following the completion of the NZBN adoption and implementation programme.
23. Once this issue was identified the Minister for Small Business agreed that Crown funding, intended to be used for NZBN adoption and implementation activity, should be redeployed to meet the immediate costs of providing the NZBN registry services. This is not a viable long term solution as this Crown funding will expire on 30 June 2019.

Analysis

Securing the future funding of the NZBN register is important

24. If a legislative solution cannot be put in place to enable the use of third party fee revenue to fund NZBN functions, new Crown funding will be required for 2019/20 and outyears.
25. We do not propose submitting a 2019 Budget bid to fund these functions. The original policy intent was that the operation of the NZBN register would be funded by fees charged to businesses under the Companies Act (and other legislation under which New Zealand businesses are incorporated). We consider that this remains good policy. The NZBN provides benefits to businesses not the general public. We therefore agree with the existing policy that the NZBN should be funded by business directly.

26. If neither a legislative or other funding solution is put in place, the NZBN register will need to cease operation. This will have serious operational, cost and reputational implications.

Without secure funding the e-Invoicing initiative, and other government NZBN-enabled work, will not be able to go ahead.

27. Mutual recognition of business identifiers (the NZBN and the Australian Business Number) and e-Invoicing are key parts of the Single Economic Market Agenda work programme with Australia. The e-Invoicing initiative (which is dependent on the NZBN) is the subject of public commitments by the Prime Minister (made together with the Prime Minister of Australia in March 2018) and an international Arrangement with Australia.
28. Commitments have been made to implement e-Invoicing this calendar year. E-Invoicing is, by itself, anticipated to deliver a \$1.25 billion benefit to the New Zealand economy annually.
29. Business Connect is a cross-agency platform that will allow businesses to reuse the data held about them, manage their information from one place and share that information across government. This initiative, which is also reliant on the NZBN, has the potential to make a range of regulatory (e.g. licensing) services provided by central and local government more efficient. Business Connect has also been announced publicly, with implementation due later this year.
30. In addition, since mid-2016, more than 90 government agencies have been working to meet NZBN implementation requirements set out in Government directions. Those directions were revised and renewed in 2018. This work will need to cease, and work may need to be done to assess whether any of those implementation steps need to be reversed.

The NZBN Act will need to be amended quickly

31. Section 18 of the NZBN Act requires the Registrar of NZBNs to “keep and operate” the NZBN register. Ceasing operation of the register will place the Registrar in breach of this provision. This means that the NZBN Act will need to be amended to remove this requirement.

There will be direct costs associated with ceasing the NZBN register

32. The Companies Office has been working to integrate the functionality of its registers. This means that the operation of many of its registers is now functionally connected to others. To cease operation of the NZBN register, other registers (including the companies register) would need to have NZBN functionality removed. Supporting technology infrastructure would also need to be updated.
33. We have been advised that this will involve a four to six month IT project. There is currently no funding budgeted for such a project, so Crown funding may be required.
34. Other government agencies that have built the NZBN into their systems and programmes may also need to make changes to remove the NZBN from their systems. There may also be costs for the private sector to the extent that business

would need to amend their systems to adjust for the fact that NZBN data would no longer be available.

35. Officials have not been able to quantify these costs at this time, but we anticipate they would be substantial.

There is a risk of damage to the Government's reputation both internationally and domestically

36. Given the extent, and the public nature, of the commitments made about the initiatives dependent on the NZBN, failure of the NZBN register could seriously damage the Government's reputation. This reputational damage would be felt internationally, across government and with the private sector. This could harm support for, and confidence in, future Government initiatives.

Regularising the current approach

37. We consider that urgent legislative change is required to resolve this issue.
38. We propose, in the near term:
 - 38.1. amending the Companies Act to enable revenue collected under that Act to be used to fund functions under the NZBN Act; and
 - 38.2. retrospectively validating the historic approach to funding the NZBN Registrar functions from Companies Act revenue.
39. These changes will not have any impact on the level of the fees charged to companies. The costs of the NZBN register are already spread over a number of fees charged by the Companies Office.

Enabling entities to be charged for their NZBN

40. In the longer term, if any fees or levies are to be charged for NZBN registry services and related functions, we consider that it would be preferable for them to be charged directly under the NZBN Act. We propose enabling this now by inserting a levy and fee making power within the NZBN Act. This would enable regulations to be made in the future allowing the Registrar to charge NZBN entities for the provision of NZBN registry services and related functions.

Beginning to explicitly charge for NZBN registry services would represent a policy change and may be controversial

41. It should be noted that explicitly charging entities for NZBN registry services and related functions would represent a policy shift from funding the NZBN from the fees already charged to entities.
42. This may be controversial. All incorporated entities (companies, limited partnerships etc.) were allocated NZBNs automatically by the Registrar of NZBNs. Some of these businesses may object to the proposal of a future charge for the allocation of a number they did not ask for.

43. Similarly, unincorporated businesses which actively applied for an NZBN did so when there was no fee for NZBN registry services or any related functions. The NZBN has been advertised as being 'free' for these and, by inference, other businesses. The cost for providing an NZBN to unincorporated businesses is currently being met through Crown funding (\$0.428 million).
44. However:
- 44.1. Most NZBN entities are already being charged for NZBN registry services. The vast majority of entities which have been issued with an NZBN are companies. These entities are in fact paying for NZBN registry services through their Companies Act fees (at a cost of approximately \$2.60 per year) – but they are unlikely to realise it.
- 44.2. Inserting a fee and levy provision into the NZBN Act at this time is a future-proofing measure. Whether any direct charges are implemented, on who, and at what level, will be the subject of public consultation by the Companies Office at the time of their next fees review, due to take place 2019/20.
- 44.3. This approach will be more transparent and principled in the long run, and will better meet best charging practices.

A similar issue could arise under the Insolvency Practitioners Bill if we do not resolve it now

45. The Insolvency Practitioners Bill was introduced in April 2010, was reported back by the Commerce Committee in May 2011, and had its second reading in November 2013.
46. In November of 2016 Cabinet reconsidered the policy behind the Bill. Cabinet made decisions which resulted in the development of SOP No 45 [EGI-16-MIN-0304 and CAB-16-MIN-0606 refer].
47. SOP No 45 substantially alters the policy of the Insolvency Practitioners Bill and replaces the registration system for insolvency practitioners with a co-regulatory model. Under that co-regulatory approach the Registrar of Companies will perform an independent oversight function.
48. SOP No 45 has been reported back by the Economic Development Science and Innovation Committee and the Insolvency Practitioners Bill, as amended by SOP No 45, is awaiting its next Parliamentary stages.
49. At the time policy decisions were sought from Cabinet on the development of SOP No 45 it was noted that "the Minister of Commerce and Consumer Affairs intends to make a Budget bid in 2017 to seek an appropriation for independent oversight, to be funded through the annual return fee for companies".
50. This effectively sought to replicate the funding model for the NZBN register.
51. As discussed above, the use of fee revenue collected under the Companies Act for that purpose would not be clearly within the scope of the fee setting powers in the Companies Act.

Funding of independent oversight for Insolvency Practitioners Bill

52. One of the consequences of these decisions is that the Companies Office will need to be funded to perform this independent oversight function.
53. The Cabinet decisions presuppose that the cost of independent oversight would be spread across all companies.
54. Officials have previously estimated that the annual cost of this function is around \$750,000-\$1,000,000. This estimate was based on the Financial Markets Authority's experience under the Auditor Regulation Act 2011, in which auditors are regulated under a similar regulatory model.
55. We consider that the funding of the independent oversight function should be addressed before the Insolvency Practitioners Bill is passed. In our view, the funding of the regulator is too fundamental an aspect of the regime to leave unresolved before the insolvency practitioners regime comes into force.
56. We propose to address this by inserting a levy making power within the Insolvency Practitioners Bill to enable the Registrar of Companies to explicitly charge companies (and other businesses able to be liquidated) for the provision of independent oversight of insolvency practitioners. This is in keeping with the intent of the existing Cabinet decisions.
57. We consider that requiring companies to pay some or all of the costs of independent oversight remains justified on the basis that:
 - 57.1. all businesses benefit from improving and maintaining the integrity of the insolvency regime
 - 57.2. most businesses are creditors of other businesses and so would benefit from improved practices in the way businesses were liquidated and the way creditors are paid.
58. Taking this approach will ensure that the substantive Cabinet decisions obtained in 2016, that companies should pay for the independent oversight of insolvency practitioners, is given effect.

Consultation

59. Officials have consulted with the Treasury, the Ministry of Justice and Parliamentary Counsel Office.
60. The Department of Prime Minister and Cabinet (PAG) has been informed.
61. The proposals contained in this paper have not been publicly consulted on, due to the sensitive nature of the issues they seek to address.

Financial Implications

62. We are seeking an increase of \$2.933 million to the Vote Business and Innovation Minister of Commerce and Consumer Affairs: Registration and Provision of Statutory Information appropriation in 2019/20. This would be funded from third party fees.

63. As decisions are being sought to enable the use of fee revenue to fund the NZBN, in order to be transparent about how the NZBN register will be funded in reliance on this change we are seeking this increase now instead of through the October Baseline Update.
64. This increase will be used to fund the NZBN information and education programme costs of \$1.993 million from 2019/20 and outyears.
65. An additional \$0.940 million is also required to fund increased registry services costs. This increase in costs is attributable to:
- 65.1. increased depreciation and capital charge arising from ongoing investment in the NZBN eco-system¹, for example to allow for NZBN sub-numbering which provides businesses with the ability to have sub numbers for branches that connect back to the parent NZBN and will better enable the NZBN to be used as an enabler for initiatives like e-invoicing;
 - 65.2. increasing usage of the NZBN register which has
 - 65.2.1. driven up corresponding technology costs; and
 - 65.2.2. created a need for additional resource to support users of the NZBN register.
66. If the ability to fund the NZBN register through fees collected under the Companies Act is not able to be addressed before 30 June 2019, we will seek to appropriate additional Crown funding, from between budget contingency, in 2019/20 for NZBN registry services

Legislative Implications

Funding of the NZBN Register

67. The proposals in this paper include a two-stage approach to addressing the funding of the NZBN register:
- 67.1. **Regularising the current approach** - Amend the Companies Act to provide a legal mechanism to use the fees currently collected under the Companies Act to meet the costs of the NZBN register and validate historic practices.
 - 67.2. **Enabling entities to be charged for their NZBN** - Amend the NZBN Act to insert a regulation-making power that could enable all or some entities which have been allocated an NZBN to be charged for NZBN registry purposes and related functions.
68. As discussed above, a solution to funding the NZBN register is needed before 30 June 2019. Failure to address the funding of the NZBN register by this date will have serious operational, cost and reputational implications.

¹ The NZBN eco system is the collection of technologies that make up the NZBN register for example the APIs that connect the NZBN register with authoritative sources of data or provide core business data for stakeholders wishing to search the NZBN register. It is also the repository for unincorporated entities such as sole traders, partnerships or trading trusts.

69. We therefore propose that a Bill regularising the current approach to funding of the NZBN register be introduced, and passed, on Budget night with a Priority 2. Both the Minister of Finance and the Leader of the House support this approach, subject to final decisions about Budget night legislation being made.
70. We do not consider that there are any policy risks in addressing the funding of the NZBN register under urgency and without select committee scrutiny. In the near term, the solutions in this paper normalise the approach to funding the NZBN register from the fees charged to entities, and in the long term provide a transparent way to set charges for NZBN registry services and related functions. Cabinet has already decided that the costs of the NZBN register should be met from fees charged to entities [CAB Min (15) 10/5 refers]. The solutions to the funding of the NZBN register in this paper make the changes necessary to give effect to that decision. We note that there are political risks, discussed above at paragraphs 41 to 44, associated with addressing this issue under urgency.
71. We also consider that there are no service delivery and communications risks unique to addressing the funding of the NZBN register through Budget night legislation. There are however a number of relatively minor risks
- 71.1. Resolving the funding of the NZBN register will draw the attention of the Regulations Review Committee to the way money has been collected and used over the last two and a half years. However, provided that the collection and use, for NZBN registry purposes, of fees prescribed and collected under the Companies Act is able to be regularised going forward, we consider that this can be managed. Addressing these matters under urgency will ensure that by the time any potential complaint is considered, the relevant regulations and practices will have been validated.
- 71.2. The Office of the Auditor General may seek to scrutinise the Ministry of Business, Innovation and Employment's (MBIE's) use of fee revenue once this matter comes to light.
72. It is possible to insert provisions enabling entities to be charged for their NZBN in the NZBN Act through subsequent legislation. However dealing with this now, while potentially controversial:
- 72.1. is low risk as we consider that any potential controversy can be managed through appropriate messaging;
- 72.2. makes more efficient use of House time; and
- 72.3. provides certainty to stakeholders.
73. We also note that this change will not, itself, impose fees on entities which have been allocated an NZBN.
74. For these reasons we propose that provisions enabling entities to be charged for their NZBN are inserted in the NZBN Act at the same time as the current approach to funding of the NZBN register is regularised.

Insolvency Practitioners Bill

75. We propose inserting a levy-making power into the Insolvency Practitioners Bill by SOP. This will enable the Registrar of Companies to explicitly charge companies for the provision of independent oversight of insolvency practitioners.
76. A SOP is already being prepared for this Bill to address minor technical and drafting issues and to clarify aspects of the transitional provisions (which do not require Cabinet decisions). We propose that the funding of the Registrar of Companies is included in this legislative vehicle.

Impact Analysis

77. With regard to the solutions for the funding of the NZBN register, 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.
78. MBIE's Regulatory Impact Analysis Review Panel has reviewed the attached Impact Summary prepared by MBIE on the funding of the Companies Registrar to perform its oversight functions under the Insolvency Practitioners Bill. The Panel considers that the information and analysis summarised in the Impact Summary meets the criteria necessary for Ministers to make informed decisions on the proposals in this paper.

Human Rights

79. 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.

Publicity and proactive release

80. We will proactively release this paper after the issues with the funding of the NZBN register are addressed. This is contrary to the Government's policy on proactively releasing Cabinet papers, however we consider that this is justified because of the content and timing of the proposed changes.

Recommendations

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

1. **note** that legal advice from the Ministry of Business Innovation and Employment (MBIE) indicates that the use of fees collected to maintain registers under the Companies Act 1993 (Companies Act) to fund the activities of the New Zealand Business Number (NZBN) registrar is outside the scope of the fee-setting powers in the Companies Act;
2. **agree** to retrospectively validate the collection and use, for NZBN registry purposes, of fees prescribed and collected under the Companies Act;
3. **agree** to amend the Companies Act to provide that fees collected under that Act may be used to fund NZBN registry services and related functions, include information and education activity;
4. **agree** to amend the NZBN Act to insert a regulation making power to enable all or some entities which have been allocated a New Zealand Business Number to be charged fees and levies for NZBN registry services and related functions.
5. **agree** to funding of the NZBN information and education work programme from third party revenue to ensure the continued uptake and effective use of the register from 2019/20;
6. **approve** the following changes to appropriations to give effect to the policy decision in recommendation 5 above, with a no impact on the operating balance and net core Crown debt:

Vote Business, Science and Innovation Minister of Commerce and Consumer Affairs	\$m – increase/(decrease)				
	2018/19	2019/20	2020/21	2021/22	2023/23 & Outyears
Departmental Output Expense: Registration and Access to Statutory Information (funded by revenue other)	-	2.933	2.933	2.933	2.933

7. **agree** to insert a provision within the Insolvency Practitioners Bill to enable the Registrar of Companies to charge a levy to companies (and other entities that can be liquidated) for the provision of independent oversight of the Insolvency Practitioners regime;
8. **invite** the Minister for Small Business and the Minister of Commerce and Consumer Affairs to issue drafting Instructions to the Parliamentary Counsel Office to give effect to recommendations 2, 3, 4, and 7;
9. **agree** that a Bill giving effect to the short term solution is introduced on Budget night with a Priority 2; and

10. **authorise** the Minister for Small Business and the Minister of Commerce and Consumer Affairs to jointly make decisions on any minor or technical matters that may arise during the drafting process.

Authorised for lodgement

Hon Stuart Nash

Minister for Small Business

Authorised for lodgement

Hon Kris Faafoi

Minister of Commerce and Consumer
Affairs

PROACTIVELY RELEASED