

Submission

to the

Commerce Select Committee

on the

New Zealand Business Number Bill

18 June 2015

Submission by the New Zealand Bankers' Association to the Commerce Select Committee on the New Zealand Business Number Bill

About NZBA

1. NZBA works on behalf of the New Zealand banking industry in conjunction with its member banks. NZBA develops and promotes policy outcomes which contribute to a strong and stable banking system that benefits New Zealanders and the New Zealand economy.
2. The following fifteen registered banks in New Zealand are members of NZBA:
 - ANZ Bank New Zealand Limited
 - ASB Bank Limited
 - Bank of China (NZ) Limited
 - Bank of New Zealand
 - Bank of Tokyo-Mitsubishi, UFJ
 - Citibank, N.A.
 - The Co-operative Bank Limited
 - Heartland Bank Limited
 - The Hongkong and Shanghai Banking Corporation Limited
 - JPMorgan Chase Bank, N.A.
 - Kiwibank Limited
 - Rabobank New Zealand Limited
 - SBS Bank
 - TSB Bank Limited
 - Westpac New Zealand Limited.

Background

3. NZBA is grateful for the opportunity to submit on the New Zealand Business Number Bill, bill number 15-1 (the Bill).
4. NZBA would appreciate the opportunity to make an oral submission to the Committee on this Bill.
5. If the Committee or officials have any questions about this submission, or would like to discuss any aspect of the submission further, please contact:

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General

NZBA fully supports the New Zealand Business Number (NZBN) initiative which will significantly help businesses to liaise with Government.

However we also believe that NZBN has the potential to be very useful in helping businesses to deal with other businesses and could help the private sector to realise certain efficiencies without requiring any significant changes to the framework currently proposed for NZBN.

Nature of the problem

There is a significant existing problem in business to business interactions as there is no way to determine the existence, nature or composition of trusts and partnerships in New Zealand. The problem creates considerable uncertainties and inefficiencies, particularly as far as partnerships are concerned.

NZBA submits that the NZBN initiative could address these uncertainties and inefficiencies with minor alterations.

Difficulties of dealing with partnerships

Partnership Act 1908 defines partnership as “...the relation which subsists between persons carrying on a business in common with a view to profit”. So a partnership may exist whether or not there is a partnership agreement/deed in place. Moreover, two or more people may find that they are actually operating as a partnership because a court may find that a partnership exists even though they themselves never intended to be in a partnership in a legal sense.

This brings significant uncertainty into business dealings with partnership, and for banks particularly when a bank is taking security over partnership assets. Under the Personal Property Securities Act 1999 (the “Act”), if a security is being taken over partnership assets, the registration of that security interest on the Personal Property Securities Register (“PPSR”) must be made under the “Partnership” category (the Act deems partnerships to be entities). In many cases it may prove difficult to determine with certainty whether a group of people are “a partnership” or “joint traders”.

This issue was considered by the High Court in relation to an NZBA member in *Rabobank New Zealand Limited v Stockco Limited* HC NAP CIV 2009-441-207 [25 February 2011]. In that case, Rabobank as lender believed that it was dealing with a partnership and it registered its PPSR registration against the partnership name that was given to it by the customer as required by the Act. The customer in that case had a partnership deed between the ‘partners’, but the court decided that there was no partnership in place and therefore Rabobank lost priority to another financier who made a registration against the individuals directly.

The result of this decision is to create significant inefficiencies in that banks (or any other secured creditor dealing with a partnership) must make registrations against the partnership, as well as individual partners, as well as numerous variations of the partnership name. A hypothetical but realistic example of a registration where instead of having one name registered, there are registrations against five names when dealing with Brian and Maree Gallagher is as follows:

1. B M & M E Gallagher Partnership
2. M & B Gallagher
3. Maree & Brian Gallagher Partnership
4. BM & ME Gallagher
5. Maree Elizabeth Gallagher and Brian Mark Gallagher

Having made all these registrations, lenders are still not guaranteed that any of the registrations are correct because these two individuals may decide tomorrow that they want to trade as “Maree The Beautiful & Brian The Cool Partnership” and give another bank security over the same assets as they gave to the first lender, and there will be no way for the first lender to find out about this. And of course the other bank/financier when it searches the register is likely to miss the fact that there is already security over the collateral owned by Maree and Brian because the names are different.

Solution for partnerships

This problem would be ameliorated if each entity that is “in trade” must (or at least can) be allocated a NZBN so other entities can determine with certainty who they are dealing with (i.e. same way the Companies Register operates at the moment). Each person should be able to search a public register and determine who it is dealing with. In the case of partnership the register should have the NZBN of the partnership, partnership name and names of at least a two of partners. This would mean that if Brian and Maree go to a bank and want to give security over the personal property of their partnership, the lender can look up the register and see that Maree and Brian are partners in a partnership called B M & M E Gallagher Partnership with NZBN 123456. This could be achieved through a specific a registration field on the PPSR as is currently the case for company number. The lender can then make one registration against that number and be confident that the registration is fully effective and gives clear public notice that it has a security interest in personal property of this partnership, and other credit providers will always be able to easily check who has a security interest in the partnership property. This will allow lenders to stop making multiple precautionary registrations against one entity, and will also allow other credit providers to do one search instead of five searches. The result will be lower transaction costs for all parties, increased certainty and less litigation.

NZBA submits that it would be appropriate to allocate a business number to an entity if that “entity” is GST registered. If an “entity” is GST registered, it means it is in trade and other entities dealing with it should be able to check who exactly they are dealing with. This

definition will not capture some partnerships that are not required to be registered for GST, but it is our understanding that there are not many partnerships like this and if these partnerships were given an opportunity to register then they may decide to apply for a NZBN as well due to the benefits in business to business interactions.

Difficulties of dealing with trusts

The issues with trusts are similar, but not as extreme as with partnerships. This is because for a trust to exist there needs to be a trust deed which means that if someone wants to deal with a trust they can always ask for a copy of the trust deed to determine the nature and constitution of the trust.

The trust's name, the identity of the trustees and the terms of the trust may however change during the course of trust's existence. Since this information is not recorded anywhere centrally, it is not possible to determine with certainty what the name of the trust is and who the trustees are. This results in significant inefficiencies while the name, composition and nature of the trust are being verified by counterparties wanting to deal with the trust. If trusts that are in trade (GST registered) were required to be allocated a NZBN, and required to keep the name and composition of trustees up to date on a register (publically available or available on demand) it would make dealing with trusts much easier.

Privacy vs. certainty

NZBA understands that a potential concern with making NZBN information on partnerships and trusts available on a publicly accessible register might be the impact on the privacy of the individuals involved. We understand that, as noted above, there is a natural tension between privacy and certainty for those dealing with non-incorporated entities. However, we submit that where an entity is in trade, the balance shifts towards certainty of business interaction for all parties dealing with that entity. Equivalent information is available for company directors and shareholders via the Companies Office website, and we consider partners of a commercially trading partnership to be in principle operating on the same basis as company directors as regards privacy.

Further, once a PPSR registration is made, the types of information that would be available on the NZBN register would already be publicly searchable (albeit, at a fee of \$3 per search) through the PPSR registration. In addition, certainty of parties will avoid former or retired partners or trustees having their information incorrectly recorded on the PPSR.

Other benefits

As well as the benefits to lenders and other business interactions noted above, there are key advantages to increased certainty of parties in a business context. From a banking perspective, one such benefit would be that certainty of parties will lead to simplifications as to who banks should be conducting the necessary due diligence requirements under the Anti-Money Laundering and Countering Financing of Terrorism Act 2009 for trust and partnership accounts.

Conclusion

The introduction of NZBN is an excellent initiative, and it seems to be a good opportunity to resolve a significant problem facing the private section in business to business dealings as outlined above. We invite the Government to consider the above submission seriously.