



Submission to the

Law and Order Committee

on the

COURTS AND CRIMINAL MATTERS BILL

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SUBMISSION BY THE NEW ZEALAND BANKERS' ASSOCIATION TO THE LAW AND ORDER COMMITTEE ON THE COURTS AND CRIMINAL MATTERS BILL

1. Thank you for the opportunity to make a written submission to the Law and Order Committee on the Courts and Criminal Matters Bill (the Bill).
2. This submission is the collective view of the New Zealand Bankers' Association (the NZBA) being the following nine member banks:
 - ANZ New Zealand Limited
 - ASB Bank Limited
 - Bank of New Zealand
 - Citibank, N.A.
 - The Hongkong and Shanghai Banking Corporation Limited
 - Kiwibank Limited
 - TSB Bank Limited
 - Rabobank New Zealand Limited
 - Westpac New Zealand Limited.
3. The NZBA supports this omnibus Bill to amend a number of statutes to enhance the courts' powers and processes for the collection of fines and other monetary penalties, and civil debt.
4. The submission focuses on matters of concern for the NZBA's member banks in Part 3 of the Bill, which contains proposed amendments to the Summary Proceedings Act 1957 (the SPA) :
 - 4.1 Priority of fines over secured loans
 - 4.2 Definition of 'property'

4.3 Deduction notices

4.4 Transitional arrangements.

PRIORITY OF FINES OVER SECURED LOANS

5. The NZBA submits that an amendment to the Bill is required so that the timeframes establishing priority of fines over secured loans are practicable. This would avoid disadvantaging consumers by ensuring that a fine status query does not need to be made more than once before a credit facility can be approved by banks.
6. The proposed new section 100J(3) of the SPA deals with the priority of fines over secured loans. It provides:

The secured party may, within three working days after being notified under subsection (2)(b), present to the Registrar a fine status response about the defendant that was given, under section 92E, not later than the agreement date and not earlier than two working days before that date.

The effect of this subsection is to establish that an amount owed for overdue fines recorded more than two working days before the signing of a security agreement would take priority over that security agreement.

7. The proposed new section 100J(3) will adversely impact on current bank lending practices and will inevitably lead to increased cost and inconvenience for borrowers. While it is standard banking practice for the liabilities of borrowers to be checked prior to the approval of a credit facility, credit is routinely approved well ahead of completing security agreements. The time between the approval of credit and the execution of security agreement can, at times, take as long as 30 working days. Accordingly, under the new section 100J(3), banks will generally be required to obtain a second fine status response before the execution of a security agreement.

8. This situation could simply be avoided by amending the Bill to provide for a 30 working day period between obtaining a fine status response and presenting it to the Registrar in order to establish priority, instead of the two working day window under section 100J(3) as currently drafted.
9. The NZBA also notes that the proposed new section 100J(3) of the SPA places an obligation on a secured creditor to produce a 'fine status response' (credit report) on the defendant to the Registrar within three working days. Member banks are concerned that this is a very short timeframe for production. The NZBA accordingly recommends that a 10 working day period would be a more reasonable timeframe for the secured party to notify the Registrar.

Recommendation

10. The NZBA submits that the proposed new section 100J(3) of the SPA be amended as follows:

The secured party may, within 10 working days after being notified under subsection (2)(b), present to the Registrar a fine status response about the defendant that was given, under section 92E, not later than the agreement date and not earlier than 30 working days before that date.

DEFINITION OF PROPERTY

11. The NZBA considers an amendment to the Bill is required to avoid ambiguity about the scope of provisions relating to the seizure of 'property'. This would benefit consumers by reducing the scope for any confusion about the ambit of the definition of 'property' in the SPA.

12. The NZBA understands that the provision is not intended to cover real property (e.g. land and buildings). However, there is no specific clause excluding real property from the ambit of the proposed legislation.
13. The NZBA is also concerned that the definition of property may enable warrants to seize 'property' to be issued against funds held in a bank account. Such funds are not considered by banks to be the 'property' of the defaulter, as the relationship is characterised as debtor-creditor (i.e. the funds are obligations owed by banks rather than 'property'). Accordingly, banks do not register security interests against funds in a bank account, but use rights of set-off to determine the net position of a customer.
14. For the avoidance of doubt, and to reflect the correct categorisation of funds in bank accounts, the NZBA recommends that such funds be excluded from the definition of 'property' in the SPA.

Recommendation

15. The NZBA submits that the proposed new section 79 of the SPA section 79 be amended by replacing the existing definition of 'property' and substituting the following:

***“property”** includes money and negotiable instruments, but excludes real property and funds in a bank account*

DEDUCTION NOTICES

16. The NZBA submits that an amendment to the Bill should be made to correct an adjustment relating to the collection of fines through instalment deduction notices made to the SPA in 2006 which has not achieved its desired outcome.
17. The amendment to the SPA which came into force on 9 April 2006 added a new section 87B(2A), which provides:

The deduction notice issued by the Registrar must specify that if on any occasion the amount of a deduction required to be made is greater than the amount that is payable or becomes payable to the defendant, the amount to be deducted on that occasion is the amount that is payable or becomes payable to the defendant.

18. The policy objective of section 87B(2A) is to allow for recovery of lower amounts from a defaulter's account, where there are insufficient funds to meet the total amount required by a deduction notice. There is no record of any Ministry of Justice consultation with the NZBA on the practical implementation of this policy. However when the Ministry wrote to the NZBA on 23 June 2010 to note the enactment of the Bill and the new section 87B(2A), it mistakenly noted that the adjustment "implements a change previously recommended by the Association". Subsequently, the Ministry acknowledged the problems raised by the NZBA about the application of the adjustment to instalment deductions.
19. There are no practical difficulties involved with applying section 87B(2A) to lump sum deduction notices. However, this is not the case for instalment deduction notices. Most existing bank payment systems facilitate instalment payment deductions through existing payment systems. These systems are unable to accommodate section 87B(2A) without costly and inefficient manual intervention. Such intervention is of particular concern due to the large numbers of instalment deduction notices which are processed by banks.
20. Furthermore and more generally, the NZBA considers that the use of instalment deduction notices issued under section 87B of the SPA has not worked in practice to improve the collection of outstanding fines. The NZBA's member banks have reported that there is a higher incidence of success in collecting fines where deductions are customer initiated.
21. Both the problems identified with the use of instalment deduction notices should be addressed in the Bill.

Recommendation

22. The NZBA submits that the Bill be amended to limit the application of section 87B to lump sum deduction notices, and add a new subsection to require that instalment deduction notices be defaulter-initiated (i.e. requested by the customer). The NZBA submits that this would be likely to improve collection rates and reduce the potential for cost and inefficiency associated with processing instalment deduction notices.

23. Alternatively the Bill could limit the application of section 87B(2A) to lump sum deductions. (This is not the NZBA's preferred option, as it would not address the second problem identified in paragraph 20.)