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BusinessNZ
The voice of business

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Chair
Commerce Select Committee
Parliament Buildings
WELLINGTON

Dear Chair

Re: Companies and Limited Partnerships Amendment Bill

Background

Prior to the introduction of the Bill, BusinessNZ wrote to the Minister of Commerce in 2010 expressing our concerns regarding possible changes to the company registration process mainly in response to revelations about a handful of companies engaged in illegal activities. We considered no sudden and adverse measures should be taken in regard to company registration processes, particularly requiring extra company verification measures to address money laundering and terrorist financing. Our overriding concern was that if the burdensome measures previously suggested, such as limiting directors to only be New Zealand residents, were introduced, this would simply cut New Zealand off from the pool of international talent, and limit the opportunities for our companies to grow.

In addition, any proposals to change processes or regulation needed to examine the totality of the problem. Traditionally, instances of such activity within New Zealand have been rare - so much so that we are currently at the top of Transparency International's least corrupt table. We would be very concerned if there was any attempt to boost registration processes due to a few isolated incidents. Having said that, in 2012 there have been reports of at least three incidents that may call into question New Zealand's reputation as a trusted and solid place to do business. Therefore, an examination of this issue is probably timely.

Changes already outlined

Before we discuss some particulars of the Bill, we note that changes have already taken place to strengthen the standing of New Zealand's business integrity in the international market. The Anti-Money Laundering and Countering Financing of Terrorism Act was passed in 2009, and supporting Codes of Practice and regulations are now being put in place with an expected formal beginning of 30 June 2013. These measures assist in bringing New Zealand closer to international standards.

The particulars of the Bill

First, BusinessNZ wishes to point out that given the informal discussions circulating in 2010 around possible changes to companies registration, it is good to see that some of the more onerous and arduous recommendations have not proceeded, either because they would reduce competition, or would be largely ineffective. Also,

the fact that this issue was first raised in 2010, but with the first reading of the Bill in July 2012, indicates that Government has not been in a hurry to make changes.

Having said that, we believe the draft legislation has some deficiencies that need to be addressed to ensure harm to business is minimised.

Criminalisation of breaches of certain directors' duties
The Bill outlines an additional change to the Companies Act 1993, namely clause 4 inserts a new 138A section after section 138. Subsections (1) and (2) state that:

(1) Every director of a company who does not act, or omits to do an in breach of the duty in section 131 (duty of directors to act in good faith and in best interests of company) commits an offence if he or she knows that the act or omission is **seriously** detrimental to the interests of the company.

(2) Every director of a company who does an act, or omits to do an act, in breach of the duty in section 135 (reckless trading) commits an offence if he or she knows that the act or omission will result in **serious** loss to the company's creditors. (Emphasis added).

While we have issues with both clauses, we are especially concerned about subsection (1). Given the proposed penalties for committing such offences are up to five years in jail or up to $200,000 in fines, BusinessNZ is concerned that the proposed legislation is applying a faulty test that will judge commercial risk taking in hindsight. In comparison, the Australian regime only criminalises breaches if the director is found reckless or intentionally dishonest, and does not relate the dishonesty to the seriousness of the detriment of interests or losses caused by the offending. Given the Trans-Tasman link whereby various businesses for instance have a head office in Australia, the alignment between the two countries with respect to director liabilities is something that needs to be considered.

The differing angle taken with New Zealand's proposed legislation could cause significant adverse effects on the day-to-day risk-taking that is part of running a business. The very nature of business means that because actions are taken to make a profit, the flip side is that there is also the potential to make a loss. It goes without saying that the larger the business, the larger that profit or loss could be. The current wording of the proposed section creates a significant danger of directors having their actions judged after the event, potentially with a chilling effect on the decision making process. The risk-return trade-off may find itself increasingly slanted towards not taking up opportunities that could present a healthy return for owners/shareholders.

Therefore, BusinessNZ recommends that Clause 4 is abandoned, or narrowed to only apply to intentional dishonesty, with particular focus on subsection (1).

New Zealand resident director or agent
The other aspect of the Bill on which BusinessNZ wishes to comment concerns the requirement for New Zealand registered companies to have a resident director or agent living in New Zealand. That person would be legally responsible for an entity's administrative affairs and would have responsibility, along with directors resident

offshore, if the entity failed to comply with its reporting and record-keeping obligations.

First, BusinessNZ agrees with comments made by the Government essentially stating that while some changes might be required, we should not lose sight of the fact that New Zealand has the advantage of being a country in which it is both relatively inexpensive and easy to set up a company. This has led to New Zealand leading international rankings in terms of the ease of doing business.

We also note that the Bill includes an exemption whereby companies with at least one director resident in an enforcement country are not required to appoint a New Zealand-resident director or a resident agent. We believe this to be a sensible stance given existing information-sharing arrangements and would see fewer companies caught up with the proposed legislation. We note that for some business structures that currently operate, particularly involving a Trans-Tasman element, often have a limited or lower levels staff presence in New Zealand. Therefore, the changes outlined above are a set in the right direction.

More importantly, we are pleased the more onerous options that would likely harm New Zealand's pool of talent have not been taken further. During the submission process, others may outline further restrictions they consider should be introduced, but, if so, BusinessNZ would advocate extreme caution. Taking into account the proposed changes, as well as recent changes to other legislation, we would want a time period for any changes to bed down before considering further changes.

Therefore, BusinessNZ recommends that any additional measures increasing requirements on New Zealand registered companies are not considered until the changes outlined in the Bill, if introduced, have been given the opportunity to take effect.

Regards,

Phil O'Reilly
Chief Executive
Business New Zealand